OFFICE OF THE CHANCELLOR OF JUSTICE

ANNUAL REPORT 2007
of the Chancellor of Justice

Overview of supervision by the Chancellor of Justice of the constitutionality and legality of legislation

Overview of compliance by supervised agencies with fundamental rights and freedoms

Overview of performance of other functions entrusted by law to the Chancellor of Justice

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OFFICE OF THE CHANCELLOR OF JUSTICE
KOHTU 8 STREET
15193 TALLINN
Phone: +372 693 8404
Fax: +372 693 8401

T r a n s l a t i o n
Margus Puusepp

D e s i g n
AS Vaba Maa

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Dear Reader,

I am happy that you opened this Report. Please continue, because it is worthwhile reading, comprising the core activities of the Chancellor of Justice in the last year.

The Chancellor of Justice Report 2007 includes the annual activities of the Chancellor's Office – of course, with an inevitably subjective accent from its compiler. The institution of Chancellor of Justice and its legal framework are consistent and remain the same as during the term of office of the previous Chancellor. However, in this Report the role of the current Chancellor of Justice, Indrek Teder, who assumed office on 10 March 2008, is limited to that of a compiler. Nevertheless, he will use the opportunity to reveal his personal convictions and emphasis on issues. Even though formally restricted to covering the activities of one calendar year, the starting point of the Report is the principle of continuity of the Chancellor of Justice as an institution. Therefore, the 2007 Report is somewhat wider, additionally including both some timeless principles as well as some issues from the time of compiling the Report in 2008.

The Chancellor of Justice, as guardian of the Constitution and a balancing power of democracy and Estonian statehood, only intervenes when something contravenes the Constitution or if restriction of fundamental rights and freedoms does not conform to the Constitution. The Chancellor of Justice does not aim to create or amplify contradictions but, rather, to be a constructive intermediary in resolving problems. At the same time, the Chancellor may not suppress problems or remain silent about them.

Most small nations of the world do not have their own state. And even if they do, it is not necessarily a democracy or governed by rule of law. Estonia is both a democracy and governed by rule of law. However, this does not mean that Estonia's independent statehood could automatically survive without constructive criticism and intervention. Democracy and openness expose larger or smaller problems existing in society. Such openness also creates a precondition for resolving problems. In reality, the daily life of a country consists of constantly resolving problems.

A small country must be especially precise and careful in resolving its problems and facing up to its tasks. While superpowers can sometimes afford to err, to make mistakes, smaller countries do not enjoy such a luxury. In order to avoid false steps and wrong paths turning into major problems, the Constitution establishes the institution of Chancellor of Justice, whose task it is to intervene and prevent destructive tendencies.

A wider and more timeless objective of the Chancellor of Justice is to ensure preservation of the Constitution and Estonia's statehood. To ensure that Estonia is not an episodic country that comes and goes depending on the world's violent convulsions. To ensure that the Estonian state and the Estonian Constitution continue to exist in line with our common will even after the passing of the next ninety years.

Undoubtedly, resolute and principled intervention by the Chancellor of Justice is not always to everyone's liking. But suiting everyone is not what the Chancellor should be trying to achieve. The Chancellor of Justice is not a trader who needs to advertise his goods. The Chancellor of Justice does not produce goods, sell rights, or bargain with the law. The Chancellor also has no need to canvass for votes, and is thus free to proceed from the Constitution and the law.

In 2007, Estonia continued to face the issue of national security even more conspicuously than before. The Chancellor of Justice intervened with constructive criticism in drafting several laws concerning the issue, for example, in the proceedings of the Draft Maintenance of Law and Order Act in the Riigikogu and in preparing the Draft Organisation of the Defence Forces Act.

Protection of fundamental rights and freedoms is always a critical issue. Many individuals whose fundamental rights and freedoms have been unjustifiably restricted have contacted the Chancellor of Justice. The Chancellor has made numerous inspection visits to institutions where individuals are or may be detained involuntarily. Although the living conditions of detainees have generally improved over the years, too many cases still give cause for concern.

Democracy is popular in words, but in reality it has proved to be something elitist which does not always reach all the people. Even in our vicinity, states and superpowers exist with a dire shortage of democracy, that luxurious way of life – if indeed luxury is the right term for protection of fundamental rights and freedoms, the opportunity to freely express opinions, protection of property, protection of life, or protection against torture, all of which are enshrined in the Estonian Constitution. We must continue to strive so that this luxury becomes a matter of course, available for everyone.

Another important function of the Chancellor of Justice is to ensure that the principle of democracy enshrined in the Constitution does not become merely a game of glass beads among lawyers, but that it clearly exists for all of us. The Chancellor of Justice needs to keep repeating certain simple truths and insisting on compliance with them – democracy is a commodity that always needs to be protected; there is always too little of it.

I wish you successful reading, and legal clarity!

Yours,
Indrek Teder

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PART 1.

THE CHANCELLOR OF JUSTICE AND THE RIIGIKOGU

I INTRODUCTION

Cooperation between the Chancellor of Justice and the Riigikogu comes in different forms: the Chancellor exercises supervision over the constitutionality of laws passed by the Riigikogu. Members of the Riigikogu may submit interpellations and written questions to the Chancellor. It has become an established practice that bodies of the Riigikogu, especially standing committees, ask the opinion of the Chancellor of Justice about draft legislation in the parliament.

In 2007, the Chancellor of Justice made no proposals to the Riigikogu (he made two proposals in 2005 and one in 2006), but delivered one report (cf. seven reports in 2005 and two in 2006). This Annual Report contains the text of the report as delivered to the Riigikogu and an overview of its proceedings in the parliament. The problem raised in the report was not resolved because neither the Government nor the Riigikogu initiated a Draft Act on the issue of purchase price and support to renewable energy that the report dealt with.

A proposal by the Chancellor of Justice in 2006 to bring the Political Parties Act into conformity with the Constitution resulted in a case in the Supreme Court in 2007, although the Riigikogu had initially agreed with the Chancellor's opinion. On 16 February 2007, the Chancellor of Justice brought the case to the Supreme Court. The Constitutional Review Chamber of the Supreme Court examined the Chancellor's application at a hearing on 08 May 2007 and decided to refer the matter to the Supreme Court *en banc*. On 13 September 2007, the parliamentary group of the People's Union of Estonia (*Eestimaa Rahvaliit*) initiated a Draft Act for Amendment of the Political Parties Act (111 SE) which also dealt with the issue of establishing a committee to exercise supervision over the financing of political parties. The first reading of the Draft Act took place on 04 December 2007 and it was sent for second reading. The Supreme Court *en banc* held a hearing on 20 November 2007. The Chancellor of Justice called for the part of the Political Parties Act that failed to establish effective control over financing of political parties to be declared unconstitutional. He also asked the Supreme Court to suspend the entry into force of its judgment in order to allow time for the Riigikogu to bring the Act into conformity with the Constitution and to establish at least the minimum required control over financing. During the debate in the parliament, the chairman of the constitutional committee and the Minister of Justice denied the existence of unconstitutionality in the system of control over financing of political parties. Nevertheless, the chairman of the constitutional committee saw a possibility of improving the system with the help of Draft Act No. 111 SE. The Minister expressed the opinion that intervention by the Chancellor of Justice in the legislative process constituted an infringement of the principle of separation of powers under the Constitution.

During the reporting period, the Chancellor of Justice replied to two interpellations (cf. two and six interpellations respectively in 2005 and 2006) and seven written questions (cf. seven and three written questions respectively in 2005 and 2006). The following issues were raised in the interpellations: the right of a Minister to withdraw a Draft Act from the Riigikogu without approval of the Government; and the extent of supervisory competence of a county governor (in connection with the issue of a building permit for Sakala Centre). Written inquiries dealt with the following issues: the extent of restrictions on access to information under the Public Information Act; health of a detainee; supervisory competence of county governors (two written inquiries); whether advertisements by legal persons published in promotional materials of political parties may be considered as donations; and whether members of local councils are entitled to belong to at least one committee within a council (two written inquiries).

The latter case – the right of members of local councils to belong to at least one committee within a local council, and potential legal remedies in case of failure to apply this right – is explored in more detail in this Annual Report. The specific case involves wider general implications, in the shape of the possibilities available to the state for taking measures in the case of action or inaction by a local government body in the context of wide-ranging local government autonomy.

Standing committees of the Riigikogu contacted the Chancellor of Justice in six cases during the reporting period requesting an opinion on draft legislation. Requests for an opinion were received twice from the constitutional committee and four times from the legal affairs committee. The more important of these included opinions concerning the Draft Maintenance of Law and Order Act (49 SE), amendments to the Security Authorities Act and the Surveillance Act submitted by the Minister of Internal Affairs (some amendments were subsequently introduced by the Money Laundering and Terrorist Financing Prevention Act, some are still being processed by the Riigikogu), and the Draft Equal Treatment Act (67 SE). The Chancellor of Justice submitted an own-initiative opinion on the Draft Members of the Riigikogu Status Act (54 SE).

Traditionally, annual reports of the Chancellor of Justice contain an in-depth analysis of a legal problem as an article under the relevant chapter. The problems described in more detail in annual reports have been either under increased attention during the reporting period or have been included as onward-looking reflections on issues important for the development of legal thinking. This Annual Report explores one issue – the possibility of control over the legality of surveillance activities.

PART 2.

THE CHANCELLOR OF JUSTICE AND EXECUTIVE POWER

I INTRODUCTION

Part 2 of the Chancellor of Justice Report 2007 deals with the issue of protecting fundamental rights and freedoms of individuals. First and foremost, it involves an opinion of the Chancellor of Justice as to whether state and local government agencies and bodies, legal persons in public law, or natural or legal persons in private law performing public functions, comply with the principle of guaranteeing fundamental rights and freedoms and the principle of good administration. In performing these tasks, the Chancellor of Justice functions as an ombudsman, i.e. as an institution protecting fundamental rights of individuals.

The function of ombudsman was not part of the work of the Chancellor of Justice when the institution of Chancellor was first re-established. This competence was added to the Chancellor's functions in the Chancellor of Justice Act adopted on 25 January 1999 and entering into effect on 01 June 1999. The competence has gradually expanded in terms of the range of supervised agencies as well as diversification of supervisory functions. For example, by an amendment entering into effect on 01 January 2004 the legislator extended the initial supervisory competence of the Chancellor in respect of state agencies to cover also local authorities, legal persons in public law, and private persons performing public functions. Since 18 February 2007, the Chancellor of Justice also functions as the national preventive mechanism established under Art 3 of the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel or Degrading Treatment or Punishment.

Today, the Chancellor of Justice may supervise the activities of state agencies (e.g. boards, inspectorates), local government agencies and bodies (e.g. city authorities, municipal schools), legal persons in public law (e.g. the Bar Association), as well as private persons performing public functions (e.g. bailiffs, non-profit associations operating on the basis of an administrative agreement). arbiter

The ombudsman is a general and independent body of petition. Individuals may contact the ombudsman if they believe that an agency or a person performing public functions has acted unlawfully. In addition to verifying compliance with legal norms, since 01 January 2004 the Chancellor of Justice may also verify whether supervised agencies and bodies comply with the principle of good administration. The fundamental right to good administration emanates from § 14 of the Constitution and means the duty of a public authority to act in a human-friendly manner. When communicating with individuals, public authorities must demonstrate consideration and treat them as subjects rather than objects, and contribute in every possible way to protection of individual rights and freedoms. Compliance with the principle of good administration is something more than merely an issue of legality: it provides a wider picture of the quality of public power.

The quality of protection of fundamental rights and freedoms has developed over the years. The Chancellor of Justice has given increasing attention to improving the methodology of conducting inspection visits and dealing with petitions submitted to him. The functions of the Chancellor as ombudsman have also developed.

The Estonian model of the institution of Chancellor of Justice is unique. In addition to the functions of the ombudsman, the Chancellor also performs the function of supervision over the constitutionality of legislation. This combined functionality allows a more complex approach to petitions by individuals. It is often found during proceedings that an activity of a state agency which a petitioner considered to be a case of maladministration actually arose from the requirements of an unconstitutional law or regulation. In cases of this kind, the Chancellor of Justice can find a solution to the problem by contacting the body that passed the relevant legal act and proposing that the act be brought into conformity with the Constitution.

Ombudsman proceedings may begin either with a petition submitted by an individual or upon the Chancellor's own initiative. When contacted by an individual, the Chancellor of Justice decides whether to accept the petition for proceedings. A petition is rejected if the matter it raises falls outside the competence of the Chancellor of Justice, or if a court judgment has entered into effect in the matter, or if court proceedings or compulsory administrative challenge proceedings are pending in the matter. The Chancellor of Justice is not competent to amend or review decisions passed by judicial bodies. The Chancellor may consider rejecting a petition if it is manifestly unfounded or if it is not clear from the petition what constituted a violation of the petitioner's rights. A petition may also be rejected if it is submitted more than one year after the individual became or should have become aware of a violation of their rights. This requirement arises from the premise that when a long time has passed after a violation it is either extremely complicated, or even impossible, to ascertain what had actually happened and to reach the right decision.

The Chancellor of Justice may also reject an application if other more effective legal remedies are available to the petitioner. As a rule, individuals should try to resolve their problem by using the most effective legal remedies: for example, by filing an administrative challenge to a relevant body or filing a complaint with a court. Unlike court decisions, the opinions of the Chancellor of Justice are only advisory in nature.

If the Chancellor of Justice rejects a petition, he informs the petitioner about it in writing, where necessary explaining to the individual any further possibilities for protection of their rights.

An important part of the activities of the Chancellor of Justice in relation to protecting fundamental rights is based on the Chancellor's own initiative, i.e. either drawing up analyses of certain issues or conducting inspection visits. Topics of own-initiative proceedings and agencies to be inspected are selected on the basis of advance information. As a rule, choices are based on a previously drawn-up work plan but, if necessary, information published in the media may also be used (e.g. information concerning certain activities by public authorities that may endanger fundamental rights, or the sudden emergence of acute topical issues in society).

Proceedings conducted by the Chancellor of Justice are characterised by freedom of choice of form, and the principle of expediency. This means that the Chancellor decides in each particular case which of the available procedural measures would be the quickest and most effective, but at the same time the least burdensome for participants in the proceedings. Clearly, the principle of freedom of choice of form is not applied in cases where the law prescribes the form of proceedings. The investigative principle also characterises proceedings conducted by the Chancellor of Justice. This means that the Chancellor will not proceed merely from information and materials submitted by participants in proceedings but where necessary also ascertains other facts and circumstances relevant in the matter, and collects evidence on his own initiative.

During proceedings the Chancellor of Justice may freely access all relevant materials and places, may request written information from participants, obtain written statements and explanations, if necessary involving experts in the proceedings. The Chancellor may conduct inspection visits (either with or without advance notification) to agencies under supervision whose activities involve a higher risk of restricting fundamental individual rights (e.g. prisons, police detention centres, care homes, or schools for children with special needs).

The law establishes certain procedural guarantees in cases where agencies under supervision hamper the activities of the Chancellor of Justice by hiding information, providing incorrect or insufficient information, or denying free access. The Chancellor may request launching of disciplinary proceedings in respect of individuals hampering his activities; alternatively, he may inform the public about such situations.

Following ombudsman proceedings, the Chancellor of Justice expresses an opinion, assessing whether a person performing public functions had complied with the law and whether communication with that person took place in accordance with the principles of good administration. In his opinion, the Chancellor may express criticism or standpoints, or make specific recommendations for eliminating a violation. The measures laid down by law are not coercive in character. The Chancellor's opinion is advisory. Compliance with the opinion is ensured through the high level of legal professionalism contained in it and through the widely recognised authority of the institution of the Chancellor of Justice.

To ensure enforcement of opinions of the Chancellor of Justice, the Chancellor of Justice Act enables the Chancellor to submit follow-up inquiries to supervised institutions in order to check how his opinions have been complied with. In cases of non-compliance with his opinion, the Chancellor may submit a report accordingly to the agency that performs regular supervision over the institution, to the Government, or to the Riigikogu. At the Chancellor's discretion, information about a case may also be disclosed to the public. Disclosure of information can also be used as a measure against those who hamper proceedings or who unjustifiably refuse to comply with the Chancellor's opinion. An opinion of the Chancellor of Justice is final and cannot be appealed in court.

In 2007, the Chancellor of Justice conducted proceedings in 252 cases involving the ombudsman function: cases initiated on the basis of petitions and own-initiative cases, including inspection visits. This Annual Report contains a selection of cases important from the point of view of the general public and deserving of special attention.

In selecting the cases for this Annual Report, preference was given to those where the Chancellor of Justice found significant violations in the activities of supervised agencies or where for some other reason the case involves wider-ranging implications for the public. Rules for presenting selection of important cases have been developed over the years. Cases are presented according to a uniform structure containing the following parts: (1) introductory sentence; (2) facts; (3) main legal issue; (4) legal justification, and (5) the result. The description of inspection visits differs from this structure and is presented as follows: (1) brief description of facts; (2) suspicion of violation; (3) brief description of the violation found, and legal assessment; (4) the result.

Summaries of the cases in Part 2 of this Annual Report are divided according to the areas of government of the ministries that a particular case concerns. Proceedings involving local authorities are covered if the problem related to performance of state functions or to an issue within an area of government of a ministry. Where that is so, the case is included under the section describing the area of government of the relevant ministry. If a case involved an issue of local authorities deciding local matters and the problem did not concern an area of government of a ministry, the case is presented under the section dealing with the competencies of the Minister for Regional Affairs.

The part of the Report on ministries also includes a general description of the area of government of a ministry in addition to a description of cases and inspection visits. A general description of an area of government forms an introduction to each section. The description defines the area of government of a ministry, a summary of the

main proceedings in respect of the particular area of government during the reporting year, and a brief description of the opinions of the Chancellor of Justice and his proposals for improving the work of the relevant agencies. The general descriptions also mention how a ministry and its subordinate agencies complied with earlier opinions of the Chancellor of Justice.

Description of cases as grouped by areas of government of ministries has also been used in several earlier annual reports of the Chancellor of Justice. An advantage of this structure is that problems relating to one specific area of government are described in a separate section so that readers, who may be either members of the Riigikogu or ministers with political responsibility for the activities within their area of government, can easily grasp what problems were detected in one particular sector of government in the previous year.

Verifying the legality of activities of supervised agencies takes up a significant part of the resources of the Chancellor of Justice and his Office. Of all 474 cases accepted for proceedings in 2007, the 252 ombudsman cases made up slightly more than one half. The absolute number of ombudsman cases in 2007 was roughly the same as in 2006. However, the proportion of ombudsman cases among all proceedings conducted by the Chancellor of Justice was larger in 2007 (46.8% in 2006). In 2007, 201 cases were initiated based on petitions by individuals and 51 cases upon the Chancellor's own initiative. The number of own-initiative proceedings has risen significantly.

The majority of the Chancellor's ombudsman activities comprise supervision over ministries and agencies whose activities are fairly directly related to fundamental individual rights and where the likelihood of restriction of fundamental rights is higher. Therefore, this Annual Report devotes more attention to describing the activities of these ministries. Primarily, these are the Ministry of Social Affairs, the Ministry of Justice, and the Ministry of Internal Affairs. The area of government of the Ministry of Social Affairs includes a number of health care and welfare institutions. The area of government of the Ministry of Justice and the Ministry of Internal Affairs includes a number of custodial institutions. Hence, the activities of these three ministries receive the widest coverage in this Annual Report within their respective areas of government: the Ministry of Social Affairs – 12 proceedings of cases and 7 inspection visits; the Ministry of Justice – 21 proceedings and 3 inspection visits; and the Ministry of Internal Affairs – 15 proceedings and 4 inspection visits.

1. The Chancellor of Justice as the national preventive mechanism

On 18 February 2007, an amendment to the Chancellor of Justice Act entered into effect, giving the Chancellor the function of the national preventive mechanism established under Art 3 of the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Estonia acceded to the UN Convention against Torture (UNCAT 10 December 1984) on 26 September 1991; the Convention came into effect in respect of Estonia on 20 November 1991. The Convention is one of the most important UN instruments for protecting human rights, aiming to prevent torture and other forms of degrading treatment or punishment throughout the world.

Estonia signed the Optional Protocol to the UN Convention against Torture (OPCAT 18 December 2002) on 21 September 2004; the Protocol came into effect in respect of Estonia on 27 November 2006.

Under Art 4(1) of the Protocol, places of detention are understood as any place where "persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence". Under Art 4(2), "for the purposes of the Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority". Thus, objects of inspection visits conducted by the national preventive mechanism include, in addition to state custodial institutions, all other institutions where liberty of individuals is restricted on the instruction, or with the support or consent, of a public authority. The state's preventive activity extends to all institutions where liberty of individuals is restricted.

The task of the Chancellor of Justice as the national preventive mechanism is to combat torture or other inhuman or degrading treatment or punishment in custodial institutions. Under Art 19 of the Protocol, the national preventive mechanism must be guaranteed the right to visit places of detention and verify the treatment of individuals staying there. The preventive mechanism must also be able to make recommendations to the relevant authorities concerning conditions of detention and treatment of detainees, and to make proposals and observations concerning relevant existing or draft legislation.

Under Art 23 of the Protocol, States Parties undertake to publish and disseminate the annual reports of the national preventive mechanisms. As the Chancellor of Justice and his advisers have regularly visited places of detention and made relevant recommendations to the executive authorities in previous years, the operation as the national preventive mechanism is closely related to supervision of compliance with fundamental individual rights. Therefore, the activities of the Chancellor of Justice as ombudsman and as the national preventive mechanism are described together.

2007 was the first year when the number of inspection visits for the Chancellor of Justice, as the national preventive mechanism, increased almost four-fold compared to the previous year. The methodology of inspecting custodial institutions was refined and brought into line with international requirements appropriate for national preventive mechanisms. Experts are involved in inspection visits more often than before, and prevention of torture, inhuman and degrading treatment in custodial institutions is improving with the help of the relevant international organisations. In order to inform custodial institutions about the new functions of the Chancellor of Justice, the Chancellor sent them all a letter explaining his rights and the legal norms serving as a basis for national preventive activities.

In 2007, the Chancellor of Justice with his advisors carried out extensive inspection visits to two special schools, four psychiatric medical institutions, three prisons, an aliens' expulsion centre, and several police detention centres.

This Report describes the activities of the Chancellor of Justice as the national preventive mechanism primarily in the sections concerning the areas of government of those ministries which include custodial institutions within the meaning of Art 4(2) of the Protocol. The section on the area of government of the Ministry of Justice provides an overview of activities by the Chancellor of Justice against torture and inhuman or degrading treatment in respect of individuals in prison. The section on the area of government of the Ministry of Internal Affairs overviews the results of supervision in respect of treatment of individuals in police detention centres and aliens' detention facilities. The section on the area of government of the Ministry of Social Affairs includes an overview of supervision in respect of treatment of individuals in the relevant medical institutions (mostly psychiatric hospitals and care homes), while the section on the Ministry of Education and Research describes treatment of individuals in special schools.

2. Participation of the Chancellor of Justice in sessions of the Government

Section 2(1) of the Chancellor of Justice Act repeats § 141(2) of the Constitution, giving the Chancellor of Justice the right to attend sessions of the Riigikogu and the Government with the right to speak. This means the Chancellor is entitled to speak on topics discussed at meetings of the Riigikogu and the Government, subject to the relevant procedure.

The right of the Chancellor of Justice to speak at sessions of the Government aims to ensure constitutionality and legality at a relatively early stage, i.e. in the form of *ex-ante* control. As a result of such *ex-ante* control of legislation, the Chancellor is able to assess draft legislation even at the stage of Government debates. In his opinion, the Chancellor focuses on draft provisions which are manifestly unconstitutional. As the time for legal analysis is limited due to the structure of *ex-ante* control, an opinion expressed at a session of the Government should be treated as a preliminary opinion, which does not prevent the Chancellor from changing his position later when dealing with a specific legal problem.

In 2007, the Chancellor of Justice reviewed 116 items on the agenda of the Government and made observations about them in 24 cases. In general, it may be said that the majority of the observations made by the Chancellor were taken into account or the draft act was revised in view of those proposals and remarks. During the reporting year, cases also occurred where, based on an opinion of the Chancellor, the Government decided to postpone adoption or approval of a draft legal act and to introduce significant changes to it.

For example, in 2006 the Chancellor of Justice submitted comments on the Draft Maintenance of Law and Order Act to the Minister of Justice. In the version of the Draft Act presented at the session of the Government in May 2007, several of the Chancellor's observations had been taken into account.[1]

With regard to the Draft Juvenile Sanctions Act, the Chancellor of Justice found that the Draft Act expanded the basis for placing special school pupils in an isolation room. In addition to the previous bases of risk of self-injury or risk of use of violence against others, the Draft Act included two new bases of risks: failure to comply with the internal rules of the school, and significantly hampering performance of the school's educational functions. The explanatory memorandum to the Draft Act only mentioned that oral admonishments were sometimes insufficient and a need existed to isolate a child in order to ensure the functioning of educational activities at the school. The Chancellor of Justice was of the opinion that despite the word "significantly" in the Draft Act, which somewhat limited the discretion to place pupils in an isolation room, failure to comply with the internal rules of the school and significantly hampering performance of the school's educational functions were concepts subject to wide-ranging interpretation. The basis for restricting the liberty of minors needed to be regulated by law but the law should be better justified. In its session of 05 July 2007, the Government decided not to approve the amendment and the drafter of the Act was asked to revise the Draft Act in light of the Chancellor's observations.

Elsewhere, the Government immediately agreed with some remarks and proposals made by the Chancellor of Justice

1 Nevertheless, the Government did not take into account all the observations concerning the Draft Act. At the session of the Government on 10 May 2007, the Chancellor of Justice expressed disagreement with Chapter 6 of the Draft Act, called "Delegating the state's law enforcement functions on the basis of administrative agreements". Regardless, the Government decided to initiate the Draft Act and send it to the Riigikogu for deliberation.

and made relevant changes. For example, the Government agreed to omit provisions from the Draft Environmental Liability Act that would have allowed the Act to operate retroactively. The Chancellor of Justice referred to the fact that the Draft Act introduced fundamental changes to the legal order, adding that individuals could not be presumed to be able to take into account the relevant provisions even before their enactment. Equally, retroactive operation of the Act could not be justified by the statement that the rules introduced would in any case constitute widely accepted and recognised behaviour in society which a reasonable person would normally comply with. A situation where it is not possible to ensure conformity of a requirement of an EU Directive with a national legal act is unfortunate but the state's omission or unconstitutional action may not cause people to suffer. The Directive on environmental liability and the Draft Environmental Liability Act enable the state itself to compensate environmental damage. Therefore, the Chancellor of Justice proposed that the state should compensate environmental damage caused in the period from 30 April 2007 until entry into force of the Act. Avoiding retroactivity of the relevant provisions was also one of the principles enshrined in the Directive on environmental liability. The Government decided at its meeting to omit from the Act the provision challenged by the Chancellor of Justice.

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 planning state education, research, youth, and language policy and, in this connection, organising 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 preparing draft legislation in the relevant areas. The Language Inspectorate belongs to the area of government of the Ministry of Education and Research. State agencies administered by the Ministry of Education and Research include the National Examination and Qualification Centre, the Estonian Educational and Research Network (EENet), and the Estonian Youth Work Centre (EYWC). In addition, the following are governed by the Ministry of Education and Research: the Tiger Leap Foundation, the Estonian Science Foundation, the Archimedes Foundation, the Estonian Information Technology Foundation, the Foundation for Lifelong Learning Development INNOVE, the Estonian Sports Training and Information Centre, the Estonian Science Centre AHHAA, and the Estonian Qualification Authority.

Failure to comply with compulsory school attendance arose again as an issue in the field of education during the reporting year. This has become an increasingly serious problem in Estonia. The situation has gradually deteriorated over the past ten years.[2] The state lacks consistent data about the exact number of problem pupils who fail to attend school.[3] Therefore, it is difficult to analyse what measures would be best suited for reducing the number of children who fail to attend school. Another problem is related to the lack of flexible legislative measures for timely and preventive intervention in the case of failure to attend school. Existing sanctions only provide two alternatives to deal with pupils who fail to attend school: referring a child to a special school, or placing them in an after-school assisted study group.

Under § 37(1) of the Constitution, everyone has the right to education; education is compulsory for school-age children to the extent specified by law. Under Art 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, no-one may be denied the right to education.

Under § 8(1) of the Education Act, education is compulsory for school-age children to the extent established by legislation. Under § 8(2), pupils must attend school until they have acquired basic education or attained 17 years of age. Under § 8(5), the procedure for performance of compulsory school attendance and for keeping records of school-age children is regulated by secondary legislation.

Under Art 3(1) of the Convention on the Rights of the Child, the best interests of the child must be the primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies. Under Art 4 of the Convention, States Parties must undertake all appropriate legislative, administrative, and other measures for implementing the rights recognised in the Convention. Under Art 28(1), States Parties recognise the right of the child to development and must, therefore, take measures to ensure regular compliance with compulsory school attendance and to reduce dropping out from school.

The Chancellor of Justice carried out own-initiative inspection visits to special schools at Puiatu and Tapa in 2007. Inspection revealed that both schools lacked properly approved development plans. Both schools had submitted their development plan for examination to the Ministry of Education and Research but the Ministry had not yet approved the plans. Inspection also revealed that the Puiatu Special School building was in need of major repairs, while Tapa Special School lacked a sports hall and rooms used for manual skills training classes were in need of renovation. This means that the development of both schools had practically stopped.

Representatives of both Tapa and Puiatu special schools pointed out that children released from custodial institutions were studying and living together with children who had never been to a custodial institution. Therefore, ensuring discipline among pupils and motivating them was difficult and the schools were unable to achieve their educational objectives.

Speedy and comprehensive reform of future development guidelines for special schools and the legal framework regulating their activities needs to be carried out. In connection with the increasing number of children failing to comply with compulsory school attendance, consideration should be given to supplementing the existing Juvenile Sanctions Act with new measures and arranging for special schools to operate so as to contribute to children's educational progress in those schools and to help to avoid further violations.

Based on his inspection visits to special schools in previous years[4], the Chancellor of Justice made repeated proposals

2 A. Tiko, I.-E. Rannala. "Koolikohustuse mittetäitmine – probleem ja väljakutse" [Failure to comply with compulsory school attendance], Eesti Koostöö Koja konverentsi "Haridus õiguse ja kohustusena" materjalid, 26.–27.10.2007.

3 National Audit Office report of 27.August.2007 "Koolikohustuse täitmine ja selle tagamise tulemuslikkus" [Compliance with compulsory school attendance and the effectiveness of its enforcement], available online at: http://www.riigikontroll.ee.

4 Chancellor of Justice proceedings No. 7-5/192; 7-5/196, 7-5/168 in 2003 and No. 7-9/061391 in 2006.

to the Ministry of Education and Research to revise the legal regulation of operation of special schools and to ensure that schools have approved development plans. As a result of the Chancellor's proposals, the Ministry of Education and Research formed a working party to draw up the relevant concepts and has made different reform plans for special schools. However, no practical steps have been taken to improve the situation.

Instead of comprehensive reform of special schools, the Ministry of Education and Research only drew up a Draft Juvenile Sanctions (Amendment) Act. However, the Chancellor of Justice cannot support all the measures introduced in the Draft Act. For example, the Ministry planned to amend the Juvenile Sanctions Act so as to allow use of an isolation room to punish pupils who violate internal school rules.[5] Such an amendment would have been contrary to the Constitution and would have significantly infringed the rights of pupils in special schools. Special schools cannot be equated to juvenile custodial institutions. They are educational institutions intended for pupils needing special educational measures. Due to opposition from the Chancellor of Justice and the Minister of Justice, the right to use isolation rooms for punishment purposes was omitted from the Draft Act Juvenile Sanctions (Amendment) Act.

Amending the Juvenile Sanctions Act is no substitute for reform of the whole system of special schools. Estonia needs flexible and effective measures to influence and assist children who fail to attend school or who commit offences. Therefore, the legal framework for operating special schools requires immediate comprehensive and modern reform. Special schools must become effective and functional.

Proceedings initiated by the Chancellor in the field of education during the reporting period most frequently related to the problem of lack of legal clarity and performance of functions delegated by law to local authorities or state executive agencies. Therefore, many proceedings involved a review of the legality and constitutionality of legislation. Unfortunately, a number of cases also arose where different institutions dealing with children, including schools, had violated children's rights. During the reporting year, the question arose for the first time whether general education schools were processing the personal data of pupils and parents in accordance with the requirements of the Personal Data Protection Act. The Chancellor of Justice conducted proceedings in respect of 65 cases in the field of education during the reporting year. The results of the proceedings suggest that institutions dealing with children do not always observe children's fundamental rights. Violation of fundamental rights may occur due to insufficient awareness of children's rights or in general of fundamental individual rights established in the Constitution. Therefore, the Chancellor of Justice is of the opinion that guaranteeing the rights of children in Estonian society requires continuous attention.

The Chancellor of Justice considered it necessary to analyse the activities of educational institutions operating in six Estonian prisons. In general, it is possible to acquire basic, secondary, and vocational education in prisons. However, only a fraction of prisoners are involved in study. The small participation rate is probably attributable to the fact that most prisoners are not at the age of compulsory school attendance and it is more profitable for them to work rather than study in prison. Above all, prisoners are not highly motivated to acquire education. Another important problem is related to poor study conditions in prisons. The starting point in shaping future developments should be to improve cooperation between prisons and the general education system.

2. Refusal of children's camps to accept children from children's homes

Case No. 7-7/070108

(1) Two children's and youth camps operating under a licence from the Ministry of Education and Research refused to accept children from children's homes in their summer camps.

(2) The Chancellor of Justice was contacted by the chairman of the Estonian Association of Child and Youth Welfare Institutions who believed that the organisers of two summer camps had unequally treated children from a children's home by refusing to accept them in the camp. Several articles also appeared in the press in which the organisers of the relevant camps had justified their refusal to accept children from children's homes.

Based on information received, the Chancellor of Justice himself initiated proceedings and requested information from the relevant children's camps and from the Minister of Education and Research. The Chancellor found that the internet websites of the relevant camps lacked information about the registration codes and actual location of the legal persons organising the camps. Moreover, no information was given about operating licences or the qualifications of the camp leaders and teachers. One camp webpage lacked information about camp internal rules and the duration of sessions.

In his request to the Minister of Education and Research, the Chancellor of Justice asked whether information published in the press about the camps' refusal to accept children from children's homes was true and, if it was true, what the justifications were for refusal. He also asked for clarification of the basis for selection of children for the camps and guarantees for equal treatment of children.

5 Draft Act for amending the Juvenile Sanctions Act, available online at http://eoigus.just.ee/?act=6&subact=1&OTSIDOC_W=165512; version No. 1.

In his reply, the Minister of Education and Research explained that under the Youth Work Act children's and youth camps must have an operating licence issued by the Ministry of Education and Research. Within the process of issuing a licence, the Ministry verifies the existence of qualified staff in the camp, camp conditions and the environment, and security. The Minister of Education and Research had established qualification requirements for youth and project camp leaders and teachers, as well as a procedure for exercising state supervision and issuing instructions for compliance in case of shortcomings. The Minister also noted that he considered the protection of children's rights very important.

The children's camps explained in their reply that the reason for refusing to accept children from a children's home was not connected with specific children. Both camps found that more problems are likely to arise with children from children's homes as compared to children from ordinary families. Children from children's homes may have less preliminary information about camp activities, while the camps lack the necessary skills and capacities to deal with these children. One camp complained that the head of the children's home, when contacting the camp, had not been aware when the summer sessions there were taking place at all.

(3) In order to resolve the case, it was necessary to answer the question whether the camps' refusal to accept children from children's home had been lawful.

(4) Refusal to accept children from a children's home in camps contravenes the Child Protection Act and the UN Convention on the Rights of the Child. Under Art 2 of the Convention, the child must be ensured all rights without discrimination based on social origin or birth status. Under Art 3 of the Convention, the best interests of the child must be the primary consideration in all matters concerning children.

Under § 3 of the Child Protection Act, child protection is based on the principle that the best interests of the child must be the primary consideration at all times and in all cases. Children are entitled to assistance, care, and development regardless of whether they live in a family or are under curatorship. In implementing this norm, the bases for prohibition of discrimination set out in the first sentence of § 12(1) of the Constitution must also be taken into account.

Under Regulation No. 51 of the Minister of Education and Research of 13 September 2004, "Qualification requirements for youth and project camp leaders and teachers", both the leader of a camp and its teachers must be sufficiently qualified to deal with conflict situations and work with children with special needs. The camp leader must have sufficient pedagogical education. Familiarity with relevant legislation is also one of the preconditions included in the qualifications of a camp leader.

Accordingly, the camps could not rely on lack of sufficient professional qualifications to justify refusal to accept the children, because children's camps are not allowed to operate without the existence of properly qualified staff.

Under § 9 of the Youth Work Act, youth camps must have an operating licence issued by the Ministry of Education and Research under § 10 of the Act. Under § 13, the Ministry may revoke the licence if the activities of a camp do not comply with the requirements regulated by law.

The Chancellor of Justice concluded that in selecting children for the camp, criteria that prevented acceptance of children from children's homes did not conform to the requirements established by legislation. The camps refused to accept children from children's homes not because the particular children had caused problems in the camps in previous years but because of an overall assessment that such children are generally problematic.

Under § 14(2) of the Youth Work Act, if the activities of a youth camp do not conform to the requirements regulated by law, an official of an administrative agency exercising state supervision has the right to issue instructions for compliance to eliminate deficiencies. Under § 14(1), state supervision over youth camps is exercised by the Ministry of Education and Research in accordance with the Minister's order No. 1007 of 05 December 2006 "Procedure for state supervision of youth camps".

Under § 4 of the Information Society Services Act, a service provider must make information directly and permanently accessible to recipients of the service concerning the name of the service provider, its registry code and the name of the corresponding register, the service provider's address and other contact details, as well as information on the fee charged for the service, including information on whether the fee includes taxes and delivery charges. A service provider engaged in a regulated professional activity must also disclose the name of any professional organisation or similar institution with which the service provider is registered (including information on the operating licence), and information on where the professional requirements applying to the activity can be accessed.

The camp webpages lacked information about the registration codes and actual location of the legal persons operating the camps. Due to lack of relevant information, for example, parents would not know whom to contact and how in case of complaints or claims. Moreover, no information was available about operating licences and qualifications of camp leaders and teachers. One camp webpage lacked information about its internal rules and periods of camp sessions.

(5) The Chancellor of Justice recommended that the Minister of Education and Research verify compliance of the relevant children's camps with legal requirements. The Chancellor also referred to § 13 of the Youth Work Act, which allows the Ministry to revoke a camp's operating licence if its activities do not conform to requirements regulated by law. A situation where camps arbitrarily discriminate against children from children's homes in their selection of children does not conform to requirements established by legislation.

Based on the recommendation of the Chancellor of Justice, the Ministry of Education and Research carried our supervision proceedings in both camps. No violations were found that would have required revoking a camp's operating licence or issuing an instruction for compliance. The Ministry made recommendations to the children's camps for revising and improving their webpages. The Ministry also noted that improving cooperation between camps and children's homes should be discussed in the camp leaders' advisory council in the future.

The Chancellor of Justice also submitted recommendations for eliminating violations at both camps. The Chancellor explained that in the present case the camps had arbitrarily treated children from children's homes unequally as compared to children from ordinary families. The Chancellor requested that the camps immediately stop discriminating against children from children's homes in their acceptance procedures and start applying equal conditions for all. He suggested ascertaining the wishes of the relevant children's home for sending its children to camp and providing complete information to the children's home about periods of camp sessions, programmes, and equipment that children bring to the camp.

The Chancellor also asked the camps to bring their internet webpages into conformity with legal requirements. To ensure better availability of information to parents and children, the Chancellor asked the camps to publish on their webpages the statutes, internal rules, and rules of behaviour applicable there.

Both camps informed the Chancellor of Justice that they had updated their webpages and brought them into line with legislation and had also informed the relevant children's home about the possibilities of sending children to the summer camp.

3. Situation at a school for children with special needs

Case No. 7-9/070155

(1) The Chancellor of Justice verified on his own initiative the rules and procedures posted on the webpage of a school for children with special needs.

(2) The webpage of a school for children with special needs in Jõgeva County contained information about its internal rules and regulations.

The school's webpage under the section "Studying at school" included a document called "Rules for pupils". According to the rules established on 17 January 2005, in order to make amends for wrongdoing pupils were required to sit under room arrest, to perform cleaning duties, or to be denied an extra helping of food. The punishment depended on the type of wrongdoing.

The school's webpage also contained two different documents both entitled "Internal rules". Under the section "Studying at school" appeared internal rules of the school approved by the school council on 11 September 2006 and later approved by the director. At the same time, the section "Information" on the webpage also contained a document called "Internal rules".

According to clause 6.1 of the internal rules published under the "Information" section, medicines are kept in the teachers' room in a locked cupboard. According to clause 6.2 of the same rules, medicines for treatment of chronic diseases are given to pupils by class teachers on the basis of a prescription issued by the school nurse. The prescription is posted on the door of the medicines cupboard. According to clause 9.1, medicines that pupils brought with them to school had to be given for safekeeping to the school nurse or the class teacher.

It could be seen from the webpage that the school also had boarding school facilities but no internal rules for these were available.

On the basis of this information, the Chancellor of Justice began own-initiative proceedings and requested information from the school, asking it to clarify the situation.
The school replied that room arrest was used for those pupils who needed isolation in order to calm down following an incident of aggressive and violent behaviour. In such a case, a pupil would stay in their room for up to one hour under the supervision of a teacher. Pupils have also been placed in their room for the purposes of arranging their personal belongings or writing a letter of explanation when absent without leave from the school grounds. According to the school, cleaning duty was used as a punishment for pupils who broke the rule on using separate indoor footwear

inside the school and in boarding facilities. Pupils were denied an extra helping of food if they missed classes without reason or if they had taken fruit, ice-cream, or yoghurt outside the school canteen.

The school explained that the existence of two different documents with internal rules on its webpage was due to an error. When the webpage was renewed, the document with the old, invalid rules had been accidentally left there.

The local hospital organised health services at the school. A school nurse visited the school for a few hours twice a week. No school doctor was available in a school for children with special needs.

As the boarding school facilities were in the same building as the school, it had not been considered necessary to establish separate internal rules for the facilities, because pupils with mental problems might find it difficult to comprehend the existence of several sets of internal rules.

(3) In order to resolve the case, it was necessary to answer the question whether the punishments applied at the school conformed to legislation. In addition, it was also necessary to analyse provision of health services at the school and the legality of the school's internal documents.

(4) Under § 20(1) of the Constitution, everyone has the right to liberty and security of the person. A person may be deprived of liberty only in cases and according to the procedure prescribed by law. If pupils are confined to their room, i.e. deprived of their liberty, even if only for an hour, a legal basis for it must exist.

No legal basis exists for isolating pupils for disciplinary reasons in schools for pupils with special needs. Therefore, such punishment is unlawful. The law only provides for a limited number of cases for isolating pupils from others, and isolation may not be used as punishment.

Under § 20(1) clause 4 of the Social Welfare Act, an individual staying in a social welfare institution may be isolated from other persons staying in the institution if the individual is dangerous to himself or herself or to others, but for not longer than twenty-four hours, and then only on the basis of a decision of the head of the institution or their deputy. The isolated person must be under constant supervision of employees of the institution. Similar isolation is mentioned in the Juvenile Sanctions Act. Under § 6^2(2) of the Act, a pupil may be placed in an isolation room only if an immediate danger exists of bodily harm to themselves or violence toward other persons and verbal appeasement has been insufficient.

The requirements for isolation rooms were established in the Minister of Social Affairs Regulation No. 33 of 08 February 2002 "Health and safety requirements for the isolation room and its furnishing". The regulation lays down the size of the room and a requirement that furniture in it must be fixed to the wall or floor and the window of the room must be of unbreakable glass. A toilet for an isolation room must be adjacent or located close nearby.

The proceedings concerned an ordinary general education school intended for children with special needs. The school was not a welfare institution within the meaning of the Social Welfare Act or a school for children requiring special treatment due to behavioural problems within the meaning of the Juvenile Sanctions Act. For these reasons, the school lacked a legal basis for isolating pupils in a room whether for disciplinary or other reasons.

Under § 11 of the Constitution, rights and freedoms may be restricted only in accordance with the Constitution. Restrictions must be necessary in a democratic society and may not distort the nature of the rights and freedoms restricted. Although it might be pedagogically more difficult to manage pupils with mental disabilities, this does not provide a basis or justification for applying punishments in respect of them that the law does not allow.

No legal basis existed either for punishing pupils by denying them food or involving them in cleaning duties.

The school's internal rules did not prohibit pupils from taking fruit, yoghurt, or other food to a classroom or any other room. Therefore, it was not clear why denying pupils extra food could be used as a punishment for doing so. No law prohibits pupils from carrying foodstuffs at school.

No law authorizes punishing pupils by denying them extra food, even if their required normal nutritional portion is not affected. Applying such an unlawful punishment to pupils with mental disability is particularly deplorable regardless of the reason why it was applied.

Under § 10(4) of Minister of Social Affairs Regulation No. 109 of 29 August 2003 "Health protection requirements for schools", pupils may not be required to clean toilets or wash floors, lamps, or windows. Although it is understandable that pupils need to be involved in certain cleaning jobs to teach them elementary principles of keeping order and cleanliness, such involvement may not be for disciplinary reasons and may not exceed legal limits.

Any disciplinary tasks in respect of minors may only be applied on the bases and according to the procedure laid down by the Juvenile Sanctions Act. Under § 5 of the Act, minors may be required to perform community service

only with their consent and while they are not engaged in work or studies. The list of work to be performed as community service is contained in Government Regulation No. 181 of 18 August 1998. The regulation does not mention extensive cleaning work as a disciplinary measure.

With regard to school health care, Minister of Education Regulation No. 48 of 15 September 1999 lays down requirements for the minimum composition of medical staff in special schools with boarding facilities for pupils with special needs and in sanatorium schools. A school with boarding facilities for pupils with special needs having 91 to 150 pupils (in this case the school had 123 pupils) should employ one full-time school nurse and a half-time doctor. Failure to comply with these requirements may result in restricting the right of pupils to adequate medical care. The aim of requirements for school health care is not only to intervene in acute problem cases but also to promote health and prevent disease. Inadequate medical care results in insufficient monitoring of pupils' health, which is particularly important in the case of children with special needs.

A provision in the internal rules of a school requiring pupils to hand over medicines brought to school to the school nurse or a class teacher cannot be considered appropriate. Class teachers do not have medical training, so that it is not justified to give them the right to decide whether and when to dispense medicines to pupils.

With regard to boarding school facilities, § 161(1) of the Basic and Upper Secondary Schools Act specifies that, if necessary, the owner of a school creates boarding facilities at the school. Boarding facilities are a structural unit of a school providing study and living conditions corresponding to the individual needs and interests of pupils, as well as corresponding conditions for their upbringing. The bases for organising the work of boarding school facilities are provided in the Minister of Education and Research Regulation No. 29 of 23 August 2005. According to the regulation, boarding facilities are considered a structural unit of a school regardless of whether they are located in the same building as the school. Under § 5 of the regulation, organising the life of pupils in boarding school facilities must be laid down in approved internal rules of these facilities. The internal rules of boarding school facilities regulate, inter alia, the daily routine of pupils and the services and assistance available to them. The internal rules must be published on the school's webpage and they must be explained to pupils and their legal representatives upon admission.

Due to the absence of internal rules for the boarding school facilities, pupils and their parents did not know what the daily routine of the facilities was, or what services and assistance were available. The internal rules of the school did not contain any such provisions either.

The claim made by the school in its response, stating that there was no need for separate internal rules for boarding school facilities in a school for pupils with mental disabilities due to their comprehension problems, is neither appropriate nor justified. Internal rules of boarding school facilities must in any case be introduced to parents who, as legal guardians of the children, can explain the rules to them. The existence of rules is necessary, so that pupils know what requirements they have to observe while staying in boarding school facilities.

The school had a proper webpage as required by the Public Information Act and the Basic and Upper Secondary Schools Act. However, the information published on the webpage was insufficient and partly misleading.

Although pupils with mental disabilities need special conditions for education and upbringing, and it is pedagogically more difficult to manage them as compared to ordinary pupils, laws must be complied with when applying disciplinary and pedagogical measures. It is especially important to guarantee the rights of pupils in case of isolation and punishment, because pupils with mental disabilities might not always understand that their rights have been violated and do not know how to protect themselves in case of such violations.

(5) The Chancellor of Justice proposed to the school that it should eliminate the deficiencies. He also sent a memorandum to Jõgeva County Governor.

The Chancellor of Justice asked the school immediately to stop applying "room confinement", denying pupils food, and involving them in cleaning duties as punishments, and to amend respectively the rules for pupils and internal rules of the school. The Chancellor also asked that deficiencies in school health care be eliminated and that internal rules for the boarding school facilities be drawn up and approved as required by law. The Chancellor asked the school to bring its webpage into line with legislation and to remove from it insufficient or incorrect information.

In his memorandum to the County Governor, the Chancellor described the problems he had found at the school and asked the Governor to ensure that the school stop punishing pupils by confinement to their room, denial of food, and involvement in cleaning duties and respectively amend its rules for pupils and the internal rules. In his memorandum, the Chancellor of Justice also asked the Governor to take action to eliminate deficiencies in school health care and ensure amendment of clause 9.1 in the internal rules which required pupils to hand over medicines brought to school to the school nurse or a class teacher.

In addition, the Chancellor of Justice asked the Governor to ensure that the school draw up and approve internal rules for the boarding school facilities in accordance with legislation. The Chancellor asked the Governor to assist the

school in revising its webpage, so that it conforms to legal requirements.

In his reply, the County Governor explained that the Chancellor's recommendations had been discussed at a meeting among the school's teachers and specialists of the Jõgeva County Authority. The school drafted new internal rules which do not include confinement to rooms, involvement in cleaning duties, or denial of food. The County Governor proposed to the school director to annul the rules established for pupils on 17 January 2005, which had not been approved by the school council and contradicted the internal rules of the school.

The County Governor added that the school would hire a full-time qualified physiotherapist with higher education, but admitted that possibilities were limited to ensure the hiring of a full-time school doctor and a psychiatrist, who would be especially useful for a school for children with special needs. Under current legislation, the Estonian Health Insurance Fund finances health care services on the basis of the Minister of Social Affairs Regulation No. 51 of 24 August 1995 "Organisation of school health care" only in basic schools and upper secondary schools, but not in schools for children with special needs. Due to insufficient regulation, financing of health services in schools for children with special needs is problematic.

As Jõgeva County Authority considered it important for the school to have a full-time nurse, they would help the school to conclude an agreement with Jõgeva Hospital for additional nursing services as of September 2007.

In addition, in cooperation with Jõgeva County Authority, draft internal rules for the boarding school facility were drawn up, along with a list of compulsory documents that need to be published on the school's webpage. Jõgeva County Authority proposed that the school should appoint a person responsible for publishing information on the webpage.

The school replied to the Chancellor of Justice that they had amended the internal school rules as proposed by the Chancellor. Under the new internal rules, pupils may be punished by written reprimand in the pupil's mark-book, a director's directive and accompanying explanatory letter from a pupil, referring a pupil for individual tuition or consultation, and inviting a pupil's parent to a meeting with the class teacher, subject teacher, educator, or social pedagogue. By agreement with a parent, a child may be referred to a psychologist or for counselling to give up smoking, alcohol, or drugs. As the most stringent measure under the new internal rules, the school may refer a pupil to Jõgeva County juvenile committee.

Under the new internal rules, medicines brought to school by pupils must be handed over to the nurse, who keeps the medicines in a locked cupboard in her office and dispenses medicines to children in line with a treatment scheme prescribed by a family doctor or medical specialist.

The school will employ a full-time school nurse and, as of 01 January 2007, the school also has a full-time physiotherapist. In addition, the school has drawn up internal rules for the boarding facilities.

4. Inspection visit to Tapa Special School

(1) Advisers to the Chancellor of Justice conducted an own-initiative inspection visit to Tapa Special School on 23 November 2007.

Tapa Special School is a state basic school in the area of government of the Ministry of Education and Research for children requiring special treatment due to behavioural problems. The language of instruction of the school is Russian. Pupils are sent to Tapa Special School in accordance with a court ruling under § 6(1) of the Juvenile Sanctions Act.

At the time of the inspection visit, 20 pupils were at the school. Three pupils on the school list were not present at the time of the visit. One of them had been arrested and two had left the school without permission and had been declared wanted by the police. The school's boarding facilities have a capacity of 101 children.

The Chancellor of Justice previously visited Tapa Special School on 23 April 2003. During that visit, 73 pupils were studying at the school. As a result of the 2003 inspection visit, the Chancellor proposed to the Ministry of Education and Research that it should exercise more effective supervision over the school and analyse shortcomings in legal regulation.

(2) During the inspection visit of 23 November 2007, the Chancellor of Justice verified whether the school's documents conformed to requirements (3.1), whether the school complied with health protection requirements (3.2), how the school ensured protection of the rights of children from substitute homes attending the special school (3.3), and how pupils were coping after leaving the special school.

(3.1) Inspection revealed that Tapa Special School lacked a properly approved development plan. The school's devel-

opment plan, discussed at meetings of the school council on 26 August 2005 and 28 September 2006, had been sent for review to the School Network Bureau.

Under § 3^1(1) of the Basic and Upper Secondary Schools Act, in order to ensure consistent development, the school must prepare a development plan in cooperation with the board of trustees (or the council in the case of a state school) and teachers' council. Under § 3^1(3) of the Act, the manager of a school establishes a procedure for approval of the development plan.

The Ministry of Education and Research had not established the procedure for approving the management plan. Therefore, the development plan of Tapa Special School had not been approved. In the draft development plan, Tapa Special School presented proposals concerning its future development, including, inter alia, a possibility to start using Estonian as the language of instruction in the future.

Failure to approve the development plan occurred because the Ministry of Education and Research has for a number of years been planning reform of special schools in Estonia, but has not drawn up legislation for carrying out the reform.

Following previous visits to special schools in Tapa, Puiatu, and Kaagvere, the Chancellor of Justice made repeated proposals to the Ministry of Education and Research to supplement legal regulation concerning special schools and to ensure approval of the schools' development plans. As far back as 2003, the Chancellor drew the attention of the Minister to the need to approve the development plan of Kaagvere special school, repeating the same request in his memorandum of 17 January 2007. In his reply to the memorandum, the Minister explained that he would approve new statutes for all special schools at the latest in March 2007. However, this did not happen.

A roundtable on the reform of special schools was held at Tapa Special School on 19 March 2003. A representative of the Ministry of Education and Research confirmed at the roundtable that a working group had been formed in the Ministry in 2006 for drawing up a plan on development needs of special schools. At the end of the same year, a document called "Conceptual bases" had been drawn up for reforming the activities of special schools. Despite this, no draft legislation for regulating the activities of special schools had been drawn up by the time of the Chancellor's latest inspection visit.

Under Art 3(1) of the Convention on the Rights of the Child, the best interests of the child must be the primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Under Art 4 of the Convention, States Parties must undertake all appropriate legislative, administrative, and other measures for implementing the rights recognised in the Convention. Under Art 28(1), States Parties recognise the right of the child to development and thus must take measures to ensure regular compliance with compulsory school attendance and to reduce dropping out from school. Under Art 40(4) of the Convention, education and vocational training, inter alia, must be made available to children who have committed an offence.

In a situation where the development of special schools has stopped due to the incapacity of state executive agencies to carry out school reforms, the rights of children attending those schools are not guaranteed. As no reform of special schools has been carried out, children who have been to custodial institutions study together with children from ordinary schools. This constitutes a significant violation of children's rights.

On that basis, in his letter the Chancellor of Justice asked the Minister of Education and Research to ensure that the necessary draft legislation for reform of special schools be immediately drawn up. Drawing up draft legislation for reforming the basic principles of operation of special schools is necessary to ensure consistent development of those schools. In the case of Tapa Special School, their development plan needs to be approved.

The Chancellor of Justice also asked the Ministry of Education and Research to take into account the special background of pupils when reforming schools, so as to separate in special schools pupils who have been to custodial institutions from pupils who come from mainstream schools.

(3.2) Inspection revealed that rooms at the school's workshop did not conform to the Minister of Social Affairs Regulation No. 109 of 29 August 2003 "Health protection requirements for schools". The school also lacked a sports hall. The director of the school explained that plans for renovating the rooms and building a sports hall had been suspended due to uncertainty in connection with the reforms of special schools.

A school must contribute to children's physical development. To do this, the curriculum of basic and upper secondary schools includes manual skills training and physical education as compulsory subjects. Classes must take place in rooms that conform to health protection requirements. Manual skills training and physical education classes in special schools are especially important considering the specific background of their pupils.

On that basis, in his memorandum to the Ministry of Education and Research the Chancellor of Justice asked the

Minister to ensure immediate renovation of the manual skills training rooms and building of a sports hall in Tapa Special School.

(3.3) Tapa Special School noted that not all substitute homes were interested in their own children who had been sent to special school. For example, cases have occurred where Kopli Centre and Mustamäe Centre of Tallinn Children's Home did not wish to accept a child during the school holidays or failed to provide a child with clothing and footwear.

Under § 9 of the Education Act, state and local authorities must ensure that orphans and children deprived of parental care are fully state-maintained and are given the opportunity to study and acquire an education. Under § 25(2) of the Social Welfare Act, the residence, care and upbringing of a child following separation from home and family is arranged by the rural municipality authority or city authority.

A substitute home is a form of social welfare institution under § 18 of the Social Welfare Act. Under § 15^2(2) of the Act, a substitute home service is provided to children until they reach the age of 18. Provision of a substitute home service is financed by the state, with payment to the substitute home made on the basis of a contract concluded with the county governor. Under § 15^6(1) of the Act, if the need arises to amend a public law contract for provision of a substitute home service the rural municipality authority or city authority of the child's residence is required to review the terms and conditions of the contract by involving the contracting parties and amending the contract on the basis of an agreement between the parties. Under § 15^6(2) of the Act, a public law contract for provision of a substitute home service may be terminated prematurely if extension of the contract conflicts with the interests of a child, or if the child dies, or if the operating licence of the substitute home service provider expires or is declared invalid.

On that basis, it is evident that temporarily referring a child without parental care to a special school does not constitute a basis for terminating a substitute home service. A child is entitled to full maintenance by the state even during a stay in a special school. A substitute home is not a child's temporary place of stay, but a child's residence and home. According to § 15^1 of the Social Welfare Act, the objective of the substitute home service is to meet a child's basic needs by ensuring family-like living conditions. A child must be provided with clothing and footwear and an opportunity to spend school holidays at their substitute home.

On that basis, the Chancellor of Justice pointed out in his memorandum to the Minister of Social Affairs that children attending a special school are still entitled to full maintenance by the state. The Chancellor also drew attention to shortcomings in the activities of children's homes in his letter to Tallinn Social and Health Care Board.

(3.4) Inspection revealed that Tapa Special School had extremely little information about how former pupils were coping after leaving the school. The school's social pedagogue had made enquiries with local authorities about the children's subsequent life but had received only a few answers. According to representatives of the school, local authorities did not pay sufficient attention to children returning from a special school. During a child's stay in a special school, contacts between the parents and caregivers of children often take place upon the school's initiative. According to representatives of the school, several families would have needed social counselling and assistance from their local authority after sending a child to the special school in order to ensure subsequent return of the child to the mainstream school. Cooperation between special schools and local authorities with regard to this issue has been insufficient.

Under § 6(1) of the Child Protection Act, arranging assistance and protection of children and exercising supervision over these is the duty of local authorities. Under § 24(1), the natural environment for development and growth of a child is the family. Under § 24(2), the recording and support of families in need of assistance is organised by social services departments.

In his memorandum to the Minister of Social Affairs, the Chancellor of Justice drew attention to poor cooperation with families of children attending special schools.

(4) Following the inspection visit, the Chancellor of Justice sent memorandums to the Minister of Education and Research and the Minister of Social Affairs inviting them to improve protection of fundamental children's rights. The Chancellor also pointed out shortcomings in the activities of children's homes in his letter to Tallinn Social and Health Care Board.

In its reply to the Chancellor of Justice, the Ministry of Education and Research explained that a working group on reform of special schools would make its proposals for modernising the activities and infrastructure of the schools in the first half of 2008 at the latest. After the decision is passed, draft legislation for regulating the activities of special schools would start and development plans of special schools would be approved. Reforms also include measures for separating minors coming from mainstream schools from minors released from prison. Reform includes activities to improve cooperation between special schools and local authorities.

On the other hand, the Ministry of Education and Research noted that no resources existed in the state budget to

build a sports hall and renovate workshops at Tapa Special School. The Ministry plans to apply for funding from EU structural funds or the State Real Estate Company. A decision on sources of financing will be made in 2008.

The Ministry of Social Affairs in its reply informed the Chancellor of Justice that the Ministry's welfare department had a tradition of organising information days for child protection officials from county authorities. The issues raised by the Chancellor in his memorandum would be included in the agenda of the information day in February 2008, when the attention of county and local authorities would be drawn to the need to improve the activities of guardianship authorities and to ensure full maintenance by the state of children referred to special schools from substitute homes.

Tallinn Social and Health Care Board explained in its reply that substitute homes in Tallinn had refused to accept children from special schools during school holidays because permission to go on holiday must be given by a juvenile committee. In reaching the relevant legal position, Tallinn Social and Health Care Board had relied on interpretations from the Ministry of Education and Research.

On that basis, the Chancellor of Justice sent a follow-up enquiry asking the Ministry of Education and Research to explain which legal acts provided a basis for their belief that the decision to allow a child referred to a special school to return for holidays had to be made by a juvenile committee. Under § 6^1(7) of the Juvenile Sanctions Act, pupils are allowed to leave the grounds of a special school in cases provided for in the statutes of the school.

In his reply, the Minister of Education and Research noted that, based on current legislation, the consent of a juvenile committee was not necessary for allowing a child in a special school to go on school holidays. Based on the reply of the Ministry, the Chancellor of Justice again contacted Tallinn Social and Health Care Board repeating the request to ensure that children referred to special schools from substitute homes in Tallinn be given an opportunity to spend their school holidays in their substitute home.

Tallinn Social and Health Care Board replied that it would inform Tallinn Children's Home of their obligation to accept children from special schools back in their substitute home for school holidays. It also advised Tallinn Children's Home to arrange their work so that at least a couple of weeks before the start of the school holidays they would themselves contact the school to agree about the possibilities and conditions of a child's return to their substitute home.

The Chancellor of Justice will perform a follow-up verification of compliance with his proposals in six months as of making the proposals.

5. Inspection visit to Puiatu Special School

(1) Advisers to the Chancellor of Justice conducted an own-initiative inspection visit to Puiatu Special School on 22 November 2007.

Puiatu Special School is a state basic school in the area of government of the Ministry of Education and Research for children requiring special treatment due to behavioural problems. The language of instruction of the school is Estonian. Pupils are sent to Puiatu Special School in accordance with a court ruling made upon an application by a juvenile committee under § 6(1) of the Juvenile Sanctions Act.

At the time of the inspection visit, 33 pupils were on the school list; of these, 22 were present and 11 absent. Of the 11 absent pupils, three were under arrest and eight had left the school without permission. In the school year 2006/2007, there were 62 pupils and in 2005/2006 68 pupils at Puiatu Special School.

The Chancellor of Justice had previously visited the school on 28 October 2003. At the time of the inspection, there was a waiting list to be enrolled at the school because the school did not have enough capacity to accept all pupils. In 2003, violence was a serious problem for the school. This had been caused by referral to the school of pupils with previous prison experience. The isolation room at the school was used for disciplinary purposes and the situation of the room did not conform to health protection requirements. Following the 2003 inspection visit, the Chancellor of Justice proposed to the Ministry of Education and Research that it should exercise more effective supervision over the school and analyse shortcomings in legal regulation.

(2) Advisers to the Chancellor of Justice inspected how the school's isolation room was used (3.1), what sanctions were used in respect of pupils (3.2), how communication of children with their close friends and relatives was organised (3.3), whether the school documentation complied with requirements (3.4), whether the school complied with health protection requirements (3.5), how the school ensured protection of the rights of children from substitute homes (3.6), and how pupils were coping after leaving the school (3.7).

(3.1) Puiatu Special School has three isolation rooms which, according to the school's representatives, were not used for disciplinary purposes. The registration journal of one isolation room showed that all pupils who had been placed

in the room stayed there for a maximum of 24 hours as permitted by law. Several pupils had been repeatedly placed in an isolation room.

According to the pupils, the isolation room was still being used for disciplinary purposes. As a rule, pupils who had left the school without permission and had been caught were placed in an isolation room for 24 hours.

Under § 6^2(1) of the Juvenile Sanctions Act, pupils in special schools may be placed in an isolation room only for purposes of pacification. Under § 6^2(2), pupils may be placed in an isolation room for pacification if an immediate danger exists of bodily harm to themselves or violence toward other persons, and verbal appeasement has been insufficient. Hence, an isolation room may not be used for disciplinary purposes.

Under § 6^2(7) of the Juvenile Sanctions Act, a pupil placed in an isolation room must be under the constant supervision of an employee of the school. The purpose of constant supervision is to guarantee the safety of the child and constant monitoring of the health of a child who is in an emotionally disturbed state. Inspection revealed that buckets had been placed in the isolation room because pupils could not always go to a toilet while staying in the room. Visits to the toilet were arranged at specific times and pupils were also taken out of the isolation room to have lunch. Constant supervision by an employee of the school was not guaranteed. Use of the room for disciplinary purposes was also implicit in the fact that pupils were taken out of the room for lunch, which is not always something connected with pacification.

Therefore, use of the isolation room at Puiatu did not comply with the law.

The Chancellor of Justice asked the director of the school to immediately stop using the isolation room for disciplinary purposes. Use of an isolation room is only permitted under conditions clearly provided by law, and in case of placement of pupils in an isolation room they must be under constant monitoring.

(3.2) Sanctions applied to pupils at Puiatu Special School were regulated in Chapter 7 of the school's internal rules approved by the director's directive. Among other possible sanctions, the internal rules also allowed for imposition of community service and compensation by a pupil or their parent of proprietary damage caused to the school or another pupil (or individual).

Estonian legislation does not allow imposition of community service on pupils of special schools for disciplinary purposes. Under § 3(1) of the Juvenile Sanctions Act, community service is listed as one of the possible sanctions in respect of minors but, under § 5, minors may be required to perform community service of ten to fifty hours only with their consent and while they are not engaged in work or study. Juvenile committees may impose community service as a sanction. Thus, the school was not allowed to impose community service on its pupils for disciplinary purposes.

Compensation of damage also cannot constitute a disciplinary measure because, under civil law, every individual causing damage is required to compensate such damage anyway. Under the Law of Obligations Act, parents and guardians are liable for damage caused by minors. Under current legislation, damage must be compensated regardless of the kinds of disciplinary measures that a special school applies.

In addition, pupils at the school noted that besides cleaning their own room they were also obliged to clean corridors, classrooms, and toilets. Under the Minister of Social Affairs Regulation No. 109 of 29 August 2003 "Health protection requirements for schools", pupils may not be required to clean toilets or wash floors, lights, or windows. Although § 1(2) of the regulation states that it applies to schools operating on the basis of an education licence, the Minister of Social Affairs has not issued a separate regulation to regulate the establishment of health protection requirements in special schools (which do not operate on the basis of an education licence). Therefore, on the basis of analogy, the same regulation must be applied to state schools. Additionally, no other legislation states that pupils in special schools may be treated differently from pupils in mainstream schools.

Pupils at Puiatu Special School explained that, as a punishment, pupils who had left the school without permission and who had been caught were not allowed outside into the fresh air for approximately one month after being caught. The internal rules of the school did not include such a sanction. The use of such a sanction does not conform to existing legislation and is contrary to children's rights, because such a punishment may harm their health.

On that basis, the Chancellor of Justice asked the director of Puiatu Special School not to impose community service, compensation of damage, or prohibit going into the fresh air for a certain period as sanctions. The Chancellor also recommended that the school should not use pupils to clean floors or toilets.

The Chancellor of Justice sent a memorandum to the Minister of Social Affairs, explaining the need to amend or supplement the Minister's regulation No. 109 of 29 August 2003 "Health protection requirements for schools". Under § 8(2) clause 6 of the Public Health Act, the Minister of Social Affairs is required to establish health protection legislation concerning schools.

(3.3) Inspection revealed that opportunities of pupils at Puiatu Special School to communicate with their close friends and relatives via telephone or the internet were limited.

Pupils were allowed to telephone their close friends and relatives only once a week. To make a call, pupils used personal phone cards and calls were made from the school's payphone after informing a class teacher and in the presence of a security guard. According to school representatives, the security guard did not listen in to the calls. Phone calls were limited to ensure the security of pupils, because pupils could use the telephone to ask someone to come and pick them up in order to leave the school without permission or to bring them cigarettes or other prohibited substances or items.

According to pupils, the time for outgoing phone calls was too short, as only one hour was allocated to a whole class or group. Parents were allowed to call their children twice a week at designated times.

Use of the internet was allowed for one hour at a time as an incentive measure. In order to get permission, a pupil had to collect the signatures of all the teachers each time they wanted to use the internet.

The Juvenile Sanctions Act does not enable special schools to limit pupils' communication either by telephone or by other means. Under § 6^1(4) of the Juvenile Sanctions Act, neither the director of a school for pupils with special needs nor a person authorised by the director has the right to examine the contents of a pupil's correspondence and messages forwarded by telephone or other public communication channels.

Communication with close family and friends may contribute to the development of a pupil and help to maintain and strengthen the relationship between a child and their parents. No legal basis exists for limiting telephone communication. Limitations at Puiatu Special School had been allegedly applied due to administrative difficulties: it would be difficult to escort each pupil individually to a telephone and a need existed to monitor the content of messages. However, no legal basis exists for monitoring the content of messages, so that a security guard may not stand present during phone conversations in order to guarantee the confidentiality of calls. Instead of listening in to conversations, registration of incoming calls might have been used for security purposes. Administrative difficulties in connection with phone calls by pupils could have been overcome by creating additional calling opportunities (e.g. by installing pay phones in group rooms).

On that basis, the Chancellor of Justice recommended the director of Puiatu Special School to reduce limits on pupils' communication with close friends and relatives and, if necessary, expand opportunities for communication by creating additional technical means.

(3.4) Inspection revealed that Puiatu Special School lacked a properly approved development plan. According to the school's explanations, a development plan had been submitted to the Ministry of Education and Research. The Ministry had not established a procedure for approving development plans and therefore the Puiatu school development plan had not been approved either.

In a situation where the development of special schools has stopped due to the incapacity of state executive agencies to carry out school reforms, the rights of children attending those schools are not guaranteed. As no reform of special schools has been carried out, children who have been to custodial institutions study together with children from mainstream schools. Due to the stalling of reforms of special schools, the building at Puiatu Special School also did not meet health protection requirements, as it was not possible to decide which needs formed the basis for renovating or reconstructing the building. This constituted a serious violation of children's rights.

On that basis, in his letter the Chancellor of Justice asked the Minister of Education and Research to ensure that the necessary draft legislation for reform of special schools be immediately drawn up. Drawing up draft legislation for reforming the basic principles of operation of special schools is necessary to ensure consistent development of those schools. Puiatu Special School needs an approved development plan.

The Chancellor of Justice also asked the Ministry of Education and Research to take into account the special background of pupils when reforming schools, so as to separate pupils who have been to custodial institutions from pupils who come from mainstream schools.

(3.5) Inspection revealed that the school was housed in a building completed in 1963 which was in need of major repairs. The schoolhouse was cold. Although it was not possible to determine the exact inside temperature during the inspection, both teachers and pupils complained of the low temperature.

The South Estonian Rescue Centre has inspected Puiatu Special School on several occasions and issued various instructions for compliance. On 18 October 2006, the rescue centre issued an instruction for compliance obliging the manager of the school to install an automatic fire alarm and security lights in the building. The required number of fire extinguishers also had to be installed. In connection with planned major repairs, the rescue centre postponed the deadline for compliance with its instructions until 01 September 2009.

On 01 August 2007, the registered immovable property of the school was transferred to the State Real Estate Company and carrying out of major repairs was planned. At the same time, the director of the school explained that plans had been stalled due to the inability of the Ministry of Education and Research to decide how special schools in Estonia should be reformed. Therefore, at the time of the inspection it was not yet known how large the school's study groups will be in the future and whether the same school may include departments for pupils requiring different regimes.

A situation where the school building is in a dangerous condition and prejudices the health of children contravenes children's rights. In case of a fire, the life and health of pupils may be endangered. Low temperature in the school building may cause pupils to fall ill. Under § 32(1) of the Basic and Upper Secondary Schools Act, schools must ensure the mental and physical security of pupils and the protection of pupils' health during their stay at school.

On that basis, in his memorandum to the Minister of Education and Research the Chancellor of Justice proposed that the carrying out of major repairs in Puiatu Special School be assured.

(3.6) During inspection, representatives of Puiatu Special School noted that substitute homes were not interested in how their children were coping. In some cases, they did not wish to accept a child back into the substitute home during school holidays or failed to provide a child with clothing and footwear.

According to § 15^1 of the Social Welfare Act, the objective of the substitute home service is to meet a child's basic needs by ensuring family-like living conditions. The child is still entitled to full maintenance by the state. The child must be provided with clothing and footwear and an opportunity to spend school holidays at their substitute home.

The Chancellor of Justice drew the attention of the Minister of Social Affairs to the fact that children in special schools are entitled to full maintenance by the state.

(3.7) Inspection revealed that Puiatu Special School had little information about how their pupils were coping after leaving the school. Not all parents were interested in their children during their stay in the special school. Many pupils left the school before completing year 9 because the period of their stay at the school had expired. According to representatives of the school, several families would have needed counselling and assistance from their local authority in order to ensure subsequent return of the child to a mainstream school. Cooperation between special schools and local authorities with regard to this issue has been insufficient.

Following the inspection visit, the Chancellor of Justice sent a memorandum to the Ministry of Social Affairs drawing attention to poor cooperation by local authorities with children and parents of children attending special schools.

(4) Following the inspection visit, the Chancellor of Justice sent proposals for improving the protection of fundamental rights of children to the director of Puiatu Special School and memorandums to the Minister of Education and Research and the Minister of Social Affairs.

In its reply to the Chancellor of Justice, the Ministry of Education and Research explained that the working group on the reform of special schools would make its proposals for modernising the activities and infrastructure of those schools in the first half of 2008 at the latest. After the decision is passed, draft legislation for regulating the activities of special schools will begin and development plans for special schools will be approved. Reforms also include measures for separating minors coming from mainstream schools from minors released from prison. The reform includes activities to improve cooperation between special schools and local authorities.

The Ministry of Education and Research explained that the registered immovable property of Puiatu Special School had been transferred to the State Real Estate Company. A plan for renovating the school should be drawn up in 2008. Recommendations made by the South-Estonian Rescue Centre will be taken into account and problems related to isolation rooms will be resolved in the plan. Renovation will start in 2009.

The Ministry of Education and Research also explained that the issues raised in the memorandum of the Chancellor of Justice had been discussed with the director of Puiatu Special School and the regional school administrator. The attention of the director of the school was drawn to incorrect interpretation of legislation and the school was obliged to eliminate the deficiencies.

In its reply, Puiatu Special School informed the Chancellor of Justice that in the future it would use the isolation room strictly in compliance with the law. After the Chancellor's visit the isolation room had only been used twice and clearly in respect of pupils whose placement in the isolation room was necessary to pacify them.
To improve pupils' communication possibilities, the school made available additional periods for both incoming and outgoing telephone calls. The school also asked the telephone company *Elion Ettevõtted AS* to install two additional payphones on the living and study floors of the school building.

In its reply to the Chancellor's proposals, Puiatu Special School noted that reinforced security measures were being

applied to pupils who had left the school without permission but their opportunity to go into the fresh air was no longer limited. Sanctions which the Chancellor of Justice believed to be unlawful had been removed from chapter 7 of the internal rules of the school. The school also promised that pupils would no longer be required to wash school floors, but they would still need to clean their own rooms daily, including wet cleaning.

The Chancellor of Justice will perform a follow-up verification of compliance with his proposals in six months as of making the proposals. In May 2008, the Chancellor of Justice conducted an unannounced inspection visit to Puiatu Special School.

III AREA OF GOVERNMENT OF THE MINISTRY OF JUSTICE

1. General outline

The area of government of the Ministry of Justice includes planning and implementing state criminal policy; coordinating legislative drafting; drawing up consolidated texts of legal acts; processing international requests for legal assistance; deciding on extradition of a foreign citizen or a stateless person to a foreign state; managing the professional activities of courts of first and second instance, the Prosecutor's Office, prisons, judicial registers and forensic examination, notaries, and of legal assistance; dealing with issues of civil enforcement, sworn translators, bankruptcy proceedings, and data protection; coordinating crime prevention; and preparing draft legislation.

The competence of the Ministry of Justice includes organising the work of notaries and legal services, sworn translators, bailiffs, and trustees in bankruptcy; coordinating crime prevention and harmonising Estonian legislation with European Union law; ensuring the legality of activities by the Bar Association; and organising representation of the state in judicial proceedings.

The area of government of the Ministry includes county courts, administrative courts, and courts of appeal, the Prosecutor's Office, prisons, the Registers and Information Systems Centre, the Estonian Forensic Science Institute, the Data Protection Inspectorate, and the Courts Accounting Centre.

In 2007, the Chancellor of Justice investigated 344 cases concerning the area of government of the Ministry of Justice (including 57 cases concerning the Ministry and 257 cases concerning prisons). Similarly to previous years, the majority of petitions and proceedings in this field in 2007 were concerned with the legality of conditions of detention and imprisonment.

During the reporting year, the Ministry of Justice mostly dealt with the development of internal security, penal law, prisons, and data protection.

1.1 Law and order

For years, the Chancellor of Justice has been paying increased attention to issues of law and order and activities of the state in shaping this field. Both in 2006 and 2007, the Chancellor monitored the progress of deliberations in connection with the Draft Maintenance of Law and Order Act prepared by the Ministry of Justice, and submitted his proposals concerning the possible solutions contained in the Draft Act. This kind of Act has a potential for severely restricting the fundamental rights of individuals. The Riigikogu accepted the Draft Act for deliberation on 16 May 2007. The Chancellor of Justice has repeatedly drawn attention in his earlier reports to a gap in the Estonian legal order and the need to adopt a Maintenance of Law and Order Act.[6]

The Draft Act would establish a basis for a uniform system for protecting public order and security. The Chancellor of Justice considers it particularly important that the Draft Act creates fundamental rules for implementing law enforcement measures for the purposes of avoiding threats. This would improve certainty for law enforcement organisations in their activities and ensure increased confidence of the people towards the state. Another major change brought about by the Draft Act is clearer definition of the functions of threat prevention and proceedings in respect of offences. This should contribute to a shift in focus of police work, i.e. to avoid threats and prevent offences, rather than react to consequences and punish violations. In addition, the Draft Act should also have a positive impact on the attitude of each member of society towards the common responsibility for public order. The Draft Act importantly includes definitions of key concepts and introduces reform of the procedure for organising public meetings.

In his opinion sent to the Riigikogu legal affairs committee, the Chancellor pointed out some of the shortcomings in the Draft Act. The Chancellor considered Chapter 6 of the Draft Act as most problematic, as it would enable delegation of functions of law enforcement to persons (in private law) on the basis of an administrative contract. The Chancellor dealt more specifically with the problems of such a solution in his report of 2006.[7] In order to allow deliberation on the Draft Act to continue as swiftly as possible, the Chancellor made a compromise proposal to prescribe, in the relevant specific Acts instead of the present Chapter 6, which functions of public administration may be delegated and on what conditions, what the measures for exercising those functions are, what kind of supervision applies, and how responsibility is ensured.

The Chancellor of Justice believes that the current version of the Draft Act requires examination of issues of processing personal data, regulating surveillance activities, and organising public meetings. In addition, the Chancellor noted in his opinion that it is difficult to analyse the impact of the Maintenance of Law and Order Act as a general Act and

6 Issues of law and order were explored, for example, at a scientific conference on police law and law enforcement organised by the Chancellor in 2004. See also coverage of the Draft Act in the Chancellor of Justice Annual Report 2006, p. 152-153.

7 See the Chancellor of Justice Annual Report 2006. Tallinn 2007, p. 75 ff.

assess its compatibility with other laws without the existence of a related implementing Act which the Ministry of Justice has only started to prepare. The Draft Implementing Act is included in the Ministry's working plan for 2008.

1.2 State legal aid

The Chancellor of Justice has constantly monitored access to the administration of justice and whether this depends on a person's knowledge of law or financial status. In 2007, the Ministry prepared a Draft State Legal Aid (Amendment) Act, which would also resolve several problems raised by the Chancellor, such as excessive bureaucracy in the process of granting legal aid, appeal against refusal to grant legal aid, and granting state legal aid within review proceedings. The aim is to improve access to state legal aid and raise public awareness about the possibilities of obtaining legal aid.

1.3 Judicial system

The general right of access to administration of justice also relates to changes in the court system and administration of the courts that the Ministry of Justice is preparing. With the aim of making the court system an integrated whole, the Minister of Justice prepared an overview of legal policy aspects of the development plan for administration of the courts. According to the plan, first and second instance courts would fall under the Supreme Court.

An important change in the court system was elimination of the Viru Court of Appeal and transfer of its jurisdiction to the Tartu Court of Appeal. While recognising the aim of the change is to eliminate differences in the caseload and cost of adjudicating cases in different courts of appeal and to create better opportunities for specialisation by courts of appeal, the Chancellor of Justice nevertheless pointed out the possible risks of closing down a court.[8] Primarily the risk exists of reduced access to justice.

During the reporting year the Chancellor of Justice investigated 132 cases concerning judicial procedural law or where the court was a respondent.

1.4 Corruption

In 2007, the anti-corruption strategy was reviewed in order to implement the idea of a fair state and ensure the independence and objectivity of public servants. Additional measures for preventing corruption were drawn up and more attention was given to combating corruption in the private sector and among local authorities, as well as in use of European Union financial resources. On 23 August 2007, the Government approved the idea of drawing up an anti-corruption strategy for 2008-2012.[9] The aim of the new anti-corruption strategy would be to prevent and reduce corruption in different fields and increase corruption- and ethics-awareness among various target groups.

During the reporting year, the Council of Europe Group of States against Corruption (GRECO) organised a third round of assessment of States Parties with the aim of analysing the system of control of financing political parties and implementing the Criminal Law Convention. During the November visit, representatives of GRECO also met with the Chancellor of Justice, who explained his views and activities in relation to improving control of financing political parties.

1.5 Public service

The year 2007 saw preparation of another new concept for developing the public service and the related debate. The aims, already set in 1999, have not changed: to reduce the number of public servants and expand the possibilities for working in the public service on the basis of an employment contract, while ensuring employee motivation and competence. The concept was discussed at a Cabinet meeting of the Government on 27 September 2007.

The Chancellor of Justice supports the Ministry of Justice viewpoint that the current system of public service needs changing, as it is essentially outdated and does not fulfil its aims. In his oral report on activities for 2006 delivered to the Riigikogu on 27 September 2007, the Chancellor of Justice said that the new public sector reform had become like "waiting for Godot". In 2007, the Ministry of Justice prepared a comparative analysis with other countries and made proposals for changing current legal regulation. Submission of the new Draft Public Service Act was planned for the first quarter of 2008 but has been delayed.

8 Point 5 on the agenda of the meeting of 25 May 2007 of the Advisory Council for the Administration of Courts, available online at http://www.kohus.ee/orb.aw/class=file/action=preview/id=31040/32%5B1%5D.+protokoll+25.05.2007.pdf (26 February 2008).

9 For more detail, see http:// www.korruptsioon.ee/33241 (18 March 2008).

1.6 Data protection

The main developments in the field of data protection during the reporting year related to adoption of the new Personal Data Protection Act, major amendment of the Public Information Act, and repeal of the Databases Act. All these changes took effect on 01 January 2008.

The aim of the new Personal Data Protection Act, adopted on 15 February 2007, was to eliminate shortcomings that had become apparent in implementing the previous Personal Data Protection Act (entered into force on 01 October 2003). The new Act changed the classification of personal data, abolishing the category of private personal data, and supplementing the list of sensitive personal data with biometric data. Protection of the private life of data subjects was significantly improved by an amendment extending protection of the law to personal data that have been previously lawfully disclosed. The requirements were also changed for processing personal data for research purposes or for compiling national statistics. An institution was established of an official responsible for sensitive personal data. Money penalties for violating requirements for processing personal data were increased ten-fold.

The aim of revising the Public Information Act was to increase public authority transparency and bring it into line with modern information technology developments. For example, under the new Act, document registers of agencies must also ensure access to the relevant document file as of 01 January 2009. To ensure protection of privacy, no documents containing personal data are published in a document register.

Another important change consisted of repeal of the Databases Act and addition of the relevant provisions in the Public Information Act. In reforming the legal regulation of databases, it was recognised that the development of information technology has taken its own course, innumerable databases have been established, and the state collects the same kinds of data in different databases. The previous concept of agency-centred databases is replaced by a service-based approach. All databases not maintained purely for the needs of a particular organisation must be interfaced through the data exchange layer *X-tee*.

The Chancellor of Justice has constantly monitored development of issues of personal data protection and accompanying implementing practice. The most problematic issue in protecting personal data in connection with databases lies in defining delegating norms for creation of databases – the law is often unclear about the purposes and extent of state collection of personal data.[10]

In evaluating data protection arrangements conducted in autumn 2006 in connection with Estonia's Schengen accession, one of the main problems highlighted by experts was the issue of independence of the Data Protection Inspectorate. In the opinion of the European Commission, it was questionable whether the Data Protection Inspectorate, as an agency within the area of government of the Ministry of Internal Affairs, would exercise sufficiently independent supervision over other agencies in the Ministry's area of responsibility, such as the Police Board, the Citizenship and Migration Board, and the Border Guard Administration in connection with processing personal data in the Schengen information system. The Commission noted that the Data Protection Inspectorate lacked competence to supervise the Schengen information system because, among other data, this also contains information classified as state secrets. The Data Protection Inspectorate cannot supervise the processing of personal data containing state secrets because the Personal Data Protection Act does not give the Inspectorate competence to supervise processing of such data.

In order to enhance its independence, the Data Protection Inspectorate was transferred from the jurisdiction of the Ministry of Internal Affairs to the area of government of the Ministry of Justice.

On 18 February 2007, amendments to the Personal Data Protection Act entered into effect, aiming to bring data protection requirements into line with the Schengen rules. The scope of the Personal Data Protection Act was expanded to cover processing of personal data containing state secrets, if such processing arises from the Convention signed on 19 July 1990 and implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders (the Schengen Convention).

1.7 Penal law

The Chancellor of Justice highlighted the Act regulating confiscation of the proceeds of crime prepared by the Ministry of Justice as an important activity in this field in 2006. On 01 February 2007, the package regulating this issue and amending the Penal Code, the Code of Criminal Procedure, and related Acts, was adopted.[11] The aim of the Act is to improve the fight against organised crime by confiscating criminal proceeds. In the case of more serious

10 See, processing of personal data in national databases. Chancellor of Justice Annual Report 2005. Tallinn 2006, p. 110.

11 The Act amending the Money Laundering and Terrorist Financing Prevention Act, the Bailiffs Act, the Penal Code, the Code of Criminal Procedure, the State Legal Aid Act, and the Code of Enforcement Procedure was passed on 13 December 2006 and entered into effect on 01 February 2007.

crimes listed in the law, the Penal Code allows confiscation of all the property of a convicted person if the punishment exceeds three years' imprisonment. The law also provides a basis for confiscating property which has been transferred as a gift, sold significantly under the market price, or otherwise transferred to third persons if such property had been obtained as proceeds of crime. Protection of the rights of third persons in criminal procedure was also specified; this is particularly important in cases of confiscation infringing upon the right of ownership.

On 18 February 2007, an Act concerning conciliation of victims and perpetrators of crime (conciliation procedure) entered into effect. This supplemented the Code of Criminal Procedure with a procedure for conciliation of victims and perpetrators.[12] If conciliation is successful, the court, and in certain cases also the Prosecutor's Office, may terminate criminal proceedings in respect of criminal offences in the second degree. The Act passed takes into consideration the opinion of the Chancellor of Justice submitted to the Riigikogu legal affairs committee, emphasising that the rights of victims should be taken into account as much as possible in conciliation proceedings.

An Act extensively amending the Penal Code and Acts containing defining elements of misdemeanours entered into effect on 15 March 2007. The main purpose of the Act in connection with economic crimes was to bring the special part of penal law concerning economic crimes and crimes related to office into line with the requirements of the Constitution (definability of a criminal offence, and legal clarity; criminal punishment as a measure of last resort; proportionality and equal treatment; relation of penal law norms to the purpose of an Act relating to the relevant field) and the Estonian business environment. For example, instead of generalised definitions of crimes related to office[13], several new specific definitions of crimes related to office were established. The Act also revised the system of tax offences in order to distinguish clearly between tax-related criminal offences and misdemeanours, and to use criminal procedural measures primarily for reacting to extensive and serious violations which cause damage to the state.

The same Act also resolved a problem already raised by the Chancellor of Justice in 2005 in connection with legal regulation of limitation periods. The wording of § 81(5) of the Penal Code before entry into effect of the amending Act could be interpreted as meaning that the period of limitation of a previously committed crime would be interrupted and would start running anew if a new crime is committed. The law did not contain a final date of expiry. A situation where, after commission of a new criminal offence the time spent on procedural actions due to the activities of a state authority might result in a new final date of expiry of the offence, may lead to unreasonably long proceedings. The Minister of Justice agreed with the opinion of the Chancellor of Justice that such regulation may infringe upon a person's right to hearing of a case within a reasonable time.

In connection with implementing the above Act, constitutional review proceedings were carried out.[14] The Act decriminalised petty theft and other offences against property in the case of items or proprietary rights of small value (under 1000 kroons) if committed repeatedly. A problem arose in connection with individuals convicted on the basis of the amended provision and serving a sentence in a custodial institution. The court that had initiated the proceedings was of the opinion that the law did not provide a basis or procedure for the courts to follow for applying a more lenient sentence retroactively under § 23(2) of the Constitution. The Supreme Court *en banc* concluded that a substantive law basis for applying a more lenient law in respect of a convicted person could be found in § 5(2) of the Penal Code.

An Act amending restrictions on work with children entered into effect on 20 July 2007.[15] The aim of the amendment was to ensure that individuals convicted of a criminal offence of a sexual nature against children, or a criminal offence relating to child prostitution or child pornography, would not be able to work in positions involving direct contact with children (e.g. school teachers, kindergarten teachers, hobby group leaders, teachers at children's camps, and child-minders). Restricting the right to work with children and an accompanying lifelong prohibition in respect of individuals convicted of the relevant offences is necessary to prevent new offences. Employers must verify the data in the penal register of individuals to be hired for positions involving direct contact with children. The law also enables legal representatives of a child to obtain information about another individual's punishments relating to sexual offences.

The law does not foresee creating a register of paedophiles, and access to personal information concerning punishments is only allowed in case of an obligation or justified interest arising from law. At the same time, in case of enquiries made by employers, information in the archive of the punishment register also acquires legal meaning. The authors of the Draft Act justified the need for restriction by the existence of serious public interest in protecting children. The public interest outweighs the rights of a convicted person to extinction of a punishment. For balancing interests, the law also stipulates that a reply from the punishment register is given in the "yes/no" form and no other punishments of an individual besides the sexual offences listed in the law are disclosed to the person making the enquiry.

12 The Act amending the Penal Code, the Code of Criminal Procedure, and the Victim Support Act, passed on 17 January 2007, entered into effect on 18 February 2007.

13 Misuse of official position (§ 289 Penal Code) and negligence related to office (§ 290 Penal Code).

14 The Supreme Court *en banc* judgment of 02 June 2008, No. 3-4-1-19-07.

15 The Act amending the Child Protection Act, the Basic and Upper Secondary Schools Act, the Social Welfare Act, the Punishment Register Act, the Private Schools Act, the Vocational Educational Institutions Act, the Pre-school Child Care Institutions Act, the Youth Work Act, the Penal Code, the Code of Misdemeanour Procedure, and the Hobby School Act – passed on 14 June 2007, entered into effect 20 July 2007.

In his opinion sent to the Minister of Justice, the Chancellor drew the attention of the drafters to the fact that it was not sufficiently clear how, and based on what evidence, a legal representative of a child may prove their justified interest for requesting another person's punishment information from the register. Granting such a right to parents or legal representatives may result in unjustified interference in another person's privacy (fundamental right under § 26 of the Constitution). The Chancellor also noted that the law would be less restrictive of a person's rights if parents were enabled in certain cases to request from another person submitting of a statement from the punishment register (as an exception to the general rule under § 18 of the Punishment Register Act which prohibits requiring individuals themselves to supply data contained on them in the punishment register). The Chancellor also referred to a possible contradiction with the Personal Data Protection Act which entered into force on 01 January 2008. Under § 14(2) of the Act, without the consent of a data subject, data may be transmitted to third persons either directly on the basis of the law, in specific cases for the protection of the life, health, or liberty of a data subject or third persons if it is impossible to obtain consent from the data subject themselves or if a third person requests data obtained or created on the basis of the law and where no restriction on access to the data has been imposed. Based on the preparatory materials of the Act, it is not possible to conclude whether such provisions of the Punishment Register Act constitute a permissible exception under § 10(1) of the Punishment Register Act.[16]

The Chancellor of Justice expressed doubt as to whether a lifelong prohibition on work with children imposed on persons having committed a certain sexual offence was proportional, and advised considering giving employers a right of discretion in hiring individuals whose punishment is extinguished and whose data in the punishment register have been archived.

On 04 December 2007, the Riigikogu accepted for deliberation the Draft Act for amending the Penal Code (the so-called cyber-crime Draft Act), aiming to bring the Penal Code into line with the requirements of international law,[17] specify the definitions of criminal offences against computer systems, and revise punishments for relevant crimes. With the Act passed on 21 February 2008,[18] the Penal Code was supplemented with provisions on the liability of legal persons and, based on the Convention on Cybercrime, preparation of computer crimes was made a criminal offence. The definition of a terrorist offence (§ 237 Penal Code) was also revised so as to cover commission of computer crimes with terrorist intent.

At the meeting of the Government, the Chancellor of Justice recognised that increasing the severity of punishments proposed in the Draft Act concerned not only computer crimes committed under aggravating circumstances (in the case of certain aggravated computer offences defined in the Act). The Chancellor noted that the amendments extend the range of criminal offences where evidence may be collected through surveillance measures. As the explanatory memorandum to the Draft Act did not explain what kind of surveillance measures were needed to collect evidence (whether all or only some surveillance measures), the Chancellor advised considering whether using the full range of surveillance measures to collect evidence should be possible only in case of certain computer offences defined in the Act. The Chancellor also pointed out that a sentence of up to three years for preparation of a computer crime was equal to the sentence for having committed a principal computer crime, and that such a solution might be disproportionate.

On 19 December 2007, the Government submitted to the Riigikogu a Draft Act for amending the Traffic Act, the Penal Code, and related Acts. According to the explanatory memorandum, the aim of the Draft Act is to respond to the traffic safety situation and establish clearer and more effective measures for detecting traffic offences and more effective punishment of violators. To achieve this, the Draft Act, inter alia, enables conduct of proceedings for traffic violations detected with the help of automatic traffic surveillance equipment and amends the basis of liability for driving under the influence (so that the degree of punishment depends on the degree of intoxication) and adjusts relevant punishments (for misdemeanours and criminal offences). In addition, the Draft Act seeks to make disqualification from driving, which so far is used only as a supplementary punishment in case of misdemeanours, into a principal punishment.

The Chancellor of Justice received requests for an opinion about the Draft Act both from the Ministry of Justice in the drafting phase of the Act and, subsequent to its approval by the Government, from the Riigikogu legal affairs committee. The Chancellor expressed the view that in terms of encroachment upon fundamental rights the most important issue in the Draft Act is the written warning procedure to be introduced in connection with the system of automatic traffic surveillance. The written warning procedure contained in the Draft Act primarily encroaches upon the fundamental right stipulated in § 22(2) of the Constitution, under which no-one may be required to prove their innocence in a criminal procedure, and the fundamental right to administration and procedure as stipulated under § 14 of the Constitution. Encroachment upon fundamental rights arises from the fact that the Draft Act creates a basis for imposing a cautionary fine on individuals who are not necessarily perpetrators of the relevant misdemeanour or guilty of committing a violation. The Chancellor of Justice noted that, under the Draft Act, the cautionary fine imposed on the owner or responsible user of a vehicle constitutes a substantive punishment. Nevertheless,

16 The provision says: "Processing of personal data is only permitted with the consent of the data subject, unless otherwise provided by law."

17 The explanatory memorandum to the Draft Act refers to the Council of Europe Convention on Cybercrime and EU Council framework decision 2005/222/JHA of 24 February 2005 on attacks against information systems.

18 The Act amending the Penal Code, passed on 21 February 2008, entered into effect 24 March 2008.

the Chancellor conceded that the Supreme Court had earlier expressed the view that presumption of a violation of parking regulations by the owner of a vehicle was permissible where the actual violator could not be ascertained, considering the relatively harmless nature of such violation, their large number, and simple factual circumstances, as well as in the interests of ensuring economic and effective proceedings.[19] Enhancing traffic safety through protecting people's life, health, and property is a legitimate and vital objective in respect of which the European Court of Human Rights has also considered reversal of the burden of proof permissible under certain conditions. In conclusion, the Chancellor of Justice expressed the view that the Draft Act needs to clearly define the legal nature of the cautionary fine together with legal arrangements for responding to traffic violations committed by vehicles owned by legal persons. Secondly, the Chancellor pointed out a contradiction with the principle of legal clarity in connection with one of the norms in the Draft Act, which determines the severity of encroachment upon the rights of the owner or responsible user of a vehicle, as well as the necessity for encroachment, i.e. whether enhanced traffic safety would be achieved through procedural economy, on the one hand, and application of the sanction, on the other. Thirdly, the Chancellor highlighted the problem that the Draft Act contains insufficient procedural guarantees for protecting the rights of the owner or responsible user of a vehicle, such as the possibility of recording the person who committed the violation, the procedure for appeal against a cautionary fine, and its consequences. The Chancellor advised seriously considering establishing a requirement to record the image of the vehicle driver in implementing the automatic speed surveillance system. This would enhance procedural efficiency by using traffic cameras and applying a sanction more closely linked to the principle of fault-based liability. At the same time, this would ensure minimal encroachment upon the rights of non-violating vehicle owners or responsible users.

The Draft Act also specifies the procedure for establishing the degree of intoxication. The Chancellor considered this positive, as it also creates a basis for establishing intoxication outside traffic surveillance, conforming to the principle of restriction of fundamental rights and freedoms under § 11 of the Constitution and the principle of legal clarity under § 13 of the Constitution. Based on the Chancellor's proposal, the Draft Act was supplemented by inserting a definition of establishing intoxication in the Police Act.

In the opinion submitted to the Riigikogu legal affairs committee, the Chancellor of Justice also analysed the provisions in the Draft Act on confiscation of property rights. Although the Chancellor did not consider confiscation of property in civilian use (including rights belonging to individuals) from perpetrators of an offence as an impossible solution from the point of view of fundamental rights, he nevertheless found that confiscation of property rights as foreseen in the Draft Act could result in an extremely serious intervention of public power in complicated and diverse contractual relations between private individuals. Therefore, the Chancellor advised considering omitting from the Draft Act the provisions on confiscation of property rights and revising them thoroughly.

The Chancellor drew the attention of the Minister of Justice to a problem in connection with disqualification from driving as a new principal punishment for the relevant misdemeanour concerning individuals under 18 years of age. Under § 44(5) of the Penal Code, a money penalty may not be imposed on an individual under 18 years of age if they have no independent income. No such restriction applies in the case of a fine under § 47. This leads to a situation where individuals under 18 years of age whose misdemeanour proceedings are not terminated for reasons of procedural expediency can often only be punished by detention. Disqualification from driving as a principal punishment presumes the existence of a driving licence and commission of a traffic violation. Imposing a fine in the absence of independent income often results in substitution of the fine by detention under § 72 of the Penal Code. If extending the range of punishments was considered necessary for effectively responding to traffic violations, the possibility of applying community service as an alternative punishment for misdemeanours should also be considered.

1.8 Equal treatment

On 30 May 2007, the Riigikogu started deliberating the Draft Equal Treatment Act prepared by the Ministry of Justice. As a general law, the Draft Act was intended to establish wide-ranging protection against discrimination and enable individuals to protect their rights. Since 2004, Estonia has a Gender Equality Commissioner operating independently of the executive power. The Equal Treatment Act intended to expand the competencies of the Commissioner to also include protection on the basis of other aspects of discrimination besides gender.

In connection with deliberation of the Draft Act, it should be noted that the European Commission has initiated infringement proceedings against Estonia for failure to transpose the relevant directive into Estonian law. On 28 June 2006, the European Commission sent an official letter to Estonia concerning transposition of Council Directive 2000/43/EC of 29 June 2000 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin). On 03 January 2007, the European Commission sent another official letter to Estonia concerning transposition of the Council Directive 2000/78/EC of 27 November 2000 (establishing a general framework for equal treatment in employment and occupation).

19 Supreme Court Constitutional Review Chamber judgment of 22 February 2001, No. 3-4-1-4-01, par. 13. See also R.Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse. [Constitutionalism and the protection of fundamental rights and freedoms]. Tallinn 2004, p. 368.

The Draft Gender Equality Act failed to attract the support of a sufficient number of members of the Riigikogu at a vote on 07 May 2008 and was dropped from the proceedings.

1.9 The European Court of Human Rights

On 18 January 2007, the European Court of Human Rights delivered judgment in the case of A. Shchiglitsov.[20] The applicant had complained that the length of judicial proceedings was contrary to the reasonable time requirement under Art 6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Court noted that the dispute was concerned with dividing the joint property of the parties (including an apartment), and therefore the applicant had a considerable interest in speedy resolution of the matter. The Court found that in the period 1997-2000 there had been significant periods of inaction by the authorities during domestic judicial proceedings. On the one hand, the case was complicated due to interpretation of domestic law, in particular concerning whether the joint property included the apartment or a share in a housing association. On the other hand, the factual circumstances of the case and the core issue of the dispute, i.e. division of joint property, were not particularly complicated. In the opinion of the Court, the degree of sophistication of the matter did not justify the length of the proceedings and the Court concluded that the applicant's case had not been resolved within a reasonable time. Consequently, Estonia had violated Art 6(1) of the Convention. The Court awarded 900 euros for non-proprietary damage to the applicant.

Violation of the reasonable time principle was also found in the Court of Human Rights judgment of 08 November 2007 concerning an application by the company *Saarekallas OÜ*.[21] The company had complained that the length of proceedings had been contrary to the reasonable time principle under Art 6(1). The Court considered 11 December 1998 as having been the starting point of the proceedings and found that the proceedings had lasted seven years and two months. The Court was of the opinion that the proceedings had not been conducted within a reasonable time. Therefore, Estonia was found guilty of violating Art 6(1) of the Convention. With regard to effective proceedings, the Court was of the opinion that the applicant had not been able to use remedies to speed up the civil procedure or ensure appropriate compensation for eliminating a violation that had already occurred. Therefore, Estonia had violated Art 13 of the Convention. The Court awarded 900 euros for non-proprietary damage to the applicant company.

Compliance with the principle of conducting judicial proceedings within a reasonable time and ensuring remedies for redressing it is a serious problem. During the reporting year, the Chancellor of Justice sent a memorandum to the Ministry of Justice, proposing to initiate a Draft Act to enable persons to receive compensation through domestic (judicial) proceedings if the reasonable time principle was not complied with in judicial proceedings.

On 12 April 2007, the European Court of Human Rights delivered judgment in the case of A. Pello.[22] Based on Art 6(1) and 6(3) point d[23], Pello had complained that he had not been ensured a fair trial and his right to defend himself had been violated. The main issue of the complaint was that the applicant had not been given an opportunity to examine his witnesses.

Since the domestic courts had not made all reasonable efforts to summon witnesses, the Court decided that the applicant's rights to defend himself had been violated. The Court did not award compensation, as the applicant had not requested compensation in a specific sum.

Based on this judgment, it should be considered in future legal practice that although, as a rule, witnesses are summoned at the discretion of the court, exceptional circumstances could occur where failure to summon witnesses may constitute a violation of the Convention.

1.10 Law of imprisonment

The area of government of the Ministry of Justice includes prisons, which are charged with the task of administering imprisonment and custody pending trial. Imprisonment is a custodial sentence imposed on an individual convicted of committing an offence. Remand prisoners are deprived of their liberty to secure conduct of criminal proceedings against them, although no conviction (finding of guilt) has yet entered into effect. At the end of 2007, Estonia had five prisons.24 As deprivation of liberty constitutes a particularly serious restriction of fundamental rights, the Chancellor of Justice pays special attention to prisons.

2007 was the first year for the Chancellor of Justice as the national preventive mechanism under Article 3 of the

20 European Court of Human Rights judgment of 18 January 2007 in case No. 35062/03 *Shchiglitsov v Estonia*.

21 European Court of Human Rights judgment of 08 November 2007 in case No. 11548/04 *Saarekallas OÜ v Estonia*.

22 European Court of Human Rights judgment of 12 April 2007 in case No. 11423/03, *Pello v Estonia*.

23 "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by ... a tribunal established by law. 3. Everyone charged with a criminal offence has the following minimum rights: ... d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

24 Murru Prison, Harku Prison, Tallinn Prison, Tartu Prison, and Viljandi Prison. In 2008, Viru Prison will be opened and Viljandi Prison will be closed down.

Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (§ 1(7) Chancellor of Justice Act)[25]. Under the Protocol, the Chancellor is required regularly to visit institutions housing persons whose liberty is restricted, in order to prevent torture and other inhuman or degrading treatment. During the reporting period, the Chancellor conducted own-initiative inspection visits to Harku Prison, Tallinn Prison, and Murru Prison.

The inspection visits revealed that prisons still had problems with implementing the Administrative Procedure Act. For example, administrative acts examined during the visit to Harku Prison contained formal errors. Thus, prisoners often do not understand the facts and considerations based on which administrative acts have been issued. The Chancellor recommended Harku Prison to observe the duty of providing written reasoning when issuing administrative acts, as required by the Administrative Procedure Act. The Chancellor also recommended Harku Prison to take measures to improve the situation of female prisoners as concerns facilities for washing and health examination.

In Murru Prison, besides general problems related to daily living needs, the Chancellor also found a cupboard-like metal construction for segregating prisoners. The Chancellor considered that use of such a device constituted inhuman and degrading treatment. Following the Chancellor's visit, the device was reconstructed so prisoners can no longer be placed in it.

The inspection visit to Tallinn Prison revealed that the ventilation system was not adequate to ensure acceptable conditions in cells in periods of hot weather.

Based on petitions from prisoners, the Chancellor found on several occasions the activities of prisons to be unlawful and contrary to principles of good administration. During the reporting period, the Chancellor conducted nine investigations resulting in a proposal to a prison or the Ministry of Justice concerning violations of the rights of prisoners. In addition, the Chancellor advised Tartu Administrative Court to change its practice in connection with the use of special means in respect of prisoners during court[26] hearings.

A significant problem found on several occasions as a result of investigations conducted by the Chancellor of Justice was related to the finding that prisons had requested monetary payment resembling a public fee from prisoners without the existence of a relevant legal basis. The Chancellor has also earlier made proposals to prisons and the Ministry of Justice concerning certain payments requested from prisoners.[27] In the opinion of the Chancellor, the Ministry of Justice needs to supervise prisons more effectively in respect of this issue. The Ministry also needs to analyse what benefits provided by prisons justify requesting (full or partial) compensation of the costs from prisoners. If necessary, the Ministry needs to draw up relevant draft legislation to create a sufficient legal basis for this. The Chancellor notes with satisfaction that on 04 December 2007 the Government submitted to the Riigikogu a Draft Act (169 SE) for amending the Probation Supervision Act, the Imprisonment Act, and the Courts Act, which also lays down certain public fees in prisons.[28] However, no satisfactory solution has yet been established for the mark-up on goods sold in prison shops.

During the reporting period, the Council of Europe Commissioner for Human Rights published a memorandum assessing Estonia's progress in implementing the Commissioner's recommendations made in 2004.[29] In his memorandum, he also criticised the discretion to place prisoners in a disciplinary cell for up to 45 days, which he considered excessive. He also advised adjusting the amounts deducted from money transferred to a prisoner's bank account (§ 44(2) Imprisonment Act). On 02 October 2007, the Commissioner for Human Rights briefly visited Estonia, when he also met with the Chancellor of Justice.

In the period 09-18 May 2007, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited custodial institutions in Estonia. Members of the delegation also met with the Chancellor of Justice. The report of the latest CPT visit to Estonia has not yet been published.[30]

25 The relevant amendments to the Chancellor of Justice Act entered into effect on 18 February 2007.

26 Part 3 II 4 (Rights of detainees in administrative court procedure).

27 See the Chancellor of Justice Annual Report 2003-2004. Tallinn 2004, pp. 140-146.

28 In the approval phase of the Draft Act, the Minister of Justice asked the Chancellor to provide his opinion on it. Among other things, the Chancellor pointed out provisions establishing a fee for use of electrical equipment and for long-term visits. The Ministry of Justice changed the relevant provisions in the draft version submitted to the *Riigikogu*.

29 The memorandum is based on facts ascertained by officials from the Bureau of the Commissioner for Human Rights during their visit to Estonia on 27-30 November 2006. Available online at http:/www.coe.int/.

30 Reports of earlier CPT visits to Estonia (in 1997, 1999, and 2003) are available online at http:/www.cpt.coe.int/.

2. Legal remedies for violating the reasonable time principle in judicial proceedings

Case No. 6-8/070751

(1) The Chancellor of Justice decided to carry out own-initiative proceedings to establish possibilities of using legal remedies for violating the reasonable time principle in judicial proceedings.

(2) The practice of the Chancellor of Justice shows that the right of individuals to judicial proceedings within a reasonable time is the most frequent problem on which individuals ask the Chancellor to initiate disciplinary proceedings (five out of twelve petitions concerning disciplinary proceedings in 2006). One petition resulted in initiating disciplinary proceedings and bringing disciplinary charges. On several occasions, it was necessary to propose to the chairman of a court to apologise to an individual for non-compliance with the reasonable time principle, because delay in judicial proceedings beyond a reasonable time was not the fault of a specific judge.

The State Liability Act stipulates the following:

"§ 15. Damage caused in the administration of justice
(1) Individuals may claim compensation for damage caused during judicial proceedings, including damage caused by a court decision, only if a judge who heard the matter committed a criminal offence during these proceedings.

[...]

(3^1) In addition to what was provided in subsection 1 of this section, during proceedings listed in subsections 1 and 2 of this section individuals may also request compensation of damage caused, inter alia, by a court decision if the European Court of Human Rights has satisfied their individual application due to a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or of its Protocols in the relevant proceedings, if the violation led to an incorrect judgment and the individuals lack other possibilities for restoring their rights.

(4) Sections 1 and 2 of this section do not preclude the liability of public authorities if a judge or an extrajudicial body adjudicating a dispute or misdemeanour matter has caused damage through actions not related to the administration of justice or settling of a dispute or misdemeanour matter."

The Compensation for Damage Caused by the State to a Person by Unjust Deprivation of Liberty Act stipulates the following:

"§ 1. Right to receive compensation
(1) Pursuant to the procedure provided for in this Act, the following persons are compensated for damage caused by unjust deprivation of liberty:
1) persons held in custody with the permission of a court and criminal proceedings in which matters were terminated at the stage of pre-trial investigation or at a preliminary hearing, or persons acquitted of an offence;
2) persons detained on suspicion of a criminal offence and released when the suspicion ceased to exist;
3) persons held in prison and whose conviction has been annulled and criminal proceedings in which matters were terminated, or persons acquitted of an offence;
4) persons whose period of imprisonment exceeded the term of the punishment imposed;
5) persons with regard to whom unfounded coercive psychiatric treatment has been ordered by a court in connection with commission of an unlawful act provided for in the Penal Code (RT I 2001, 61, 364; 2002, 44, 284) if a court ruling made with regard to such person has been annulled;
6) persons who served detention if the judgment ordering detention has been annulled;
7) persons unjustly deprived of liberty by a decision of an official authorised to deprive of liberty or without conducting disciplinary proceedings, misdemeanour proceedings or criminal proceedings if such proceedings were compulsory.

[...]"

(3) In the present case, it was essential to find an answer to the question whether Estonian legislation establishes sufficient legal remedies if the principle of reasonable length of judicial proceedings has been violated.

(4.1) Under § 13 of the Constitution, everyone has the right to protection by the state and the law. Under § 14, the guarantee of rights and freedoms is the duty of the legislative, executive, and judicial powers, and of local authorities. And under § 15(1), everyone whose rights and freedoms are violated has a right of recourse to the courts.

The right to an effective remedy for protection of one's rights, arising from §§ 13, 14, and 15 of the Constitution and Art 13 of the European Convention on Human Rights and Fundamental Freedoms, is a subjective fundamental right

intended to guarantee an effective and seamless protection of the rights of individuals.[31] A right without an accompanying effective mechanism for its judicial protection is a mere declaration lacking any substance and meaning.

The right to an effective remedy for defending oneself also includes the right to hearing of a matter within a reasonable time. The first sentence of Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms *expressis verbis* stipulates the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Supreme Court has also repeatedly referred to the need to adjudicate judicial disputes within a reasonable time.[32]

The phrase "reasonable time" is an undefined legal concept which, according to case-law, needs to be given substance on a case-by-case basis. The reasonableness of the length of court proceedings, according to the case-law of the European Court of Human Rights, depends primarily on the following circumstances: complexity of the case; importance of the benefits at stake; behaviour of the applicant and the authorities (in particular the courts).[33] The Supreme Court has also emphasised that "in order to measure whether the court proceedings took place within a reasonable time, it is necessary to assess the complexity of the dispute and the behaviour of the participants in the proceedings and the court."[34] On the one hand, judicial proceedings need to be sufficiently long, so as to allow for preparation of the case. Too much haste at the expense of quality of administration of justice is not justified. On the other hand, the proceedings should not be unjustifiably delayed. An optimal balance needs to be achieved.

The question whether, in the case of the reasonable time criterion of judicial proceedings, objective circumstances arising from the workload of the court which may cause delays should also be taken into account – e.g., existing resources, number of complaints, complexity of complaints – depends on the starting point of the analysis. In other words, while in disciplinary proceedings against judges, for example, it is an important argument in order to assess the fault of a particular judge for delay, the state in general must not use such arguments to justify its failures and shortcomings in building the judicial system, shaping relevant regulation, and providing financing.

On that basis, it may be concluded that if the reasonable time criterion of judicial proceedings was not observed, this amounts to a restriction of a person's right to effective remedy for one's protection under §§ 13, 14, and 15 of the Constitution and Art 13 of the ECHR.

(4.2) Correction of mistakes (both substantive and procedural) made in the administration of justice takes place within the court system. In other words, a person should use the right to appeal to a higher-instance court which will consider, within the framework laid down by law, the justifiability of that person's dissatisfaction and, if necessary, will make a new substantive decision amending the decision of the lower-instance court or will return the decision to the lower-instance court for reconsideration. If proceedings were not held within a reasonable time, usually this does not affect the substance, i.e. correctness, of the decision. Higher-instance courts have no basis or need to overturn a court judgment merely because of non-compliance with the reasonable time principle. Thus, under current law, appeal against a court judgment does not enable individuals to redress their right in this respect.

In case of delays occurring within particular judicial proceedings, only in certain cases can individuals appeal against a court order to raise the issue of excessive length of proceedings. For example, under § 352(5) of the Code of Civil Procedure, if a county court postpones the hearing of a matter for more than three months without consent of the parties, a party may appeal against the ruling if they find that the hearing of the matter is adjourned for an unreasonably long period. This provision also applies in administrative court procedure.[35] However, the provision is not applicable in cases where no hearings in the matter have yet been scheduled. The Code of Criminal Procedure, § 385 clause 14, also clearly excludes the possibility of filing an appeal against a ruling on the adjournment of a court hearing. Furthermore, proceedings in one court instance might not necessarily violate a person's right to hearing of a case within a reasonable time, as violation may eventually occur as a result of accumulative proceedings at all court instances. In such cases, redressing a violation by appealing against rulings is not possible at all.

Under § 91(1) of the Courts Act, disciplinary proceedings against a judge are commenced if elements of a disciplinary offence become evident. Under § 87(2), a disciplinary offence is a wrongful act by a judge consisting of failure to perform or inappropriate performance of official duties. An indecent act by a judge is also a disciplinary offence.

31 The importance of this principle is also pointed out, e.g., in the following judgments and ruling of the Supreme Court *en banc*: 22 December 2000, No. 3-3-1-38-00, points 15 and 19; 17 March 2003, No. 3-1-3-10-02, points 17 and 18; 06 January 2004, No. 3-3-2-1-04, points 26 and 27; 28 April 2004, No. 3-3-1-69-03, par. 24; also Supreme Court Constitutional Review Chamber judgment of 25 March 2004, No. 3-4-1-1-04, par. 18.

32 For example, Supreme Court Special Panel ruling 10 April 2002, No. 3-3-4-2-02, par. 10; Supreme Court *en banc* judgment 17 February 2004, No. 3-1-1-120-03, par. 18; Supreme Court Administrative Law Chamber judgment 29 September 2004, No. 3-3-1-42-04, par. 22; Supreme Court Administrative Law Chamber ruling 15 November 2004, No. 3-3-1-58-04, par. 21.

33 For example, the European Court of Human Rights judgment of 18 January 2007 in the case of *Shchiglitsov v Estonia*, par. 16: "The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute."

34 Supreme Court Administrative Law Chamber ruling 15 November 2004, No. 3-3-1-58-04, par. 16.

35 See, concerning § 177(4) of the earlier version of the Code of Civil Procedure the Supreme Court Administrative Law Chamber ruling of 06 February 2006, No. 3-3-1-4-06.

The Chief Justice of the Supreme Court, the Chancellor of Justice, the chairman of a court of appeal or of a court of first instance, and the Supreme Court *en banc* have the right to initiate disciplinary proceedings in respect of judges (§ 91(2)). The Disciplinary Chamber of the Supreme Court imposes disciplinary punishments on judges (§ 94(1)).

The Chancellor agrees with the opinion of the Supreme Court Administrative Law Chamber, according to which "everyone has the right to submit a request to a competent authority for initiating disciplinary proceedings against a judge under § 91(2) of the Courts Act, but no subjective right exists to demand that proceedings are actually initiated. The competent authority which receives the request decides on initiating proceedings based on its right of discretion. Disciplinary liability of judges does not enable individuals to influence directly the hearing of the matter or protect rights of parties to proceedings [...] during judicial proceedings."[36] In other words, even if a disciplinary punishment is imposed on a judge for violating the reasonable time principle of judicial proceedings, this does not constitute a legal remedy for the individual concerned nor does it result in redressing the violation (including compensation of damage).

As stated above, compliance with the reasonable time principle depends not only on the performance of duties by a judge but also on other circumstances (e.g. huge workload of a court). Therefore, delay in proceedings does not necessarily constitute a disciplinary offence by a judge.

Delay in proceedings may be redressed by reducing or annulling the court fees of parties to the proceedings,[37] reducing sanctions,[38] or creating an assumption of a positive decision in the applicant's favour.[39] Estonian legislation does not explicitly link such measures to violation of the reasonable time principle.

Having studied these remedies, the European Court of Human Rights has come to the view that they are not always sufficient so as effectively to redress a violation.[40]

Under § 25 of the Constitution, everyone has the right to compensation for moral and material damage caused by the unlawful action of any person. This also includes cases where damage to a person was caused by any authority exercising public power, i.e. executive, legislative, or judicial power.

Delay in court proceedings beyond a reasonable period may result in moral or material damage to persons. An open court case and uncertainty about the future arising from this inevitably causes tensions, mental suffering (nervousness, worry, stress), and other inconvenience for individuals (e.g. possible stigmatisation in criminal cases). Depending on the type of judicial proceedings, such an encroachment upon the rights of an individual may be especially serious (e.g. in criminal cases, family matters). A court judgment made significantly later than when the original dispute arose may cause material damage. For example, the judgment may have essentially lost its significance for the individual as its enforcement no longer allows redressing the damage caused by the dispute, or the individual might no longer need legal protection. This means that public power has not been able to comply with its constitutional duty to provide protection through judicial proceedings to individuals.

Thus, based on § 25 of the Constitution, individuals must have an opportunity to claim compensation for damage caused by failure to comply with the reasonable time principle in judicial proceedings.

In connection with the reasonable time principle, it is worthwhile bearing in mind the negative effect on the authority of the administration of justice and the judicial system, which failure by a court to comply with the rules would cause. Proper administration of justice is one of the most important elements in the principle of the rule of law, and delay in judicial proceedings may inevitably undermine a person's trust in the functioning of the state.

(4.3) The bases and procedure for protecting rights violated, and redressing damage caused, in implementing public power and performing other public functions is established by the State Liability Act. A special norm regulating compensation of damage caused by administration of justice is contained in § 15 of the Act. This provision enables compensation of damage caused by a court in the administration of justice in the following cases:

- a judge committed a criminal offence during the proceedings (subsection 1);
- the European Court of Human Rights has satisfied a person's application due to a violation of the European

36 Supreme Court Administrative Law Chamber ruling of 06 February 2006, No. 3-3-1-4-06, par. 15.

37 § 169 Code of Civil Procedure includes special provisions for covering procedural expenses arising from delay in proceedings, though not including delays attributable to the court.

38 Supreme Court Criminal Law Chamber ruling of 13 February 2003, No. 3-1-1-133-02, par. 8: "The Supreme Court Criminal Law Chamber does not agree with the cassator's claim that twice overturning a judgment of acquittal in respect of him by the court of appeal would be a factor which in itself should result in closing any further proceedings due to the passing of a reasonable time." 27 February 2004, No. 3-1-1-3-04, par. 22: "[…] passing of a reasonable time in criminal proceedings does not necessarily always mean that a person should be acquitted. Depending on the circumstances, a proportional result of passing of a reasonable time in criminal proceedings may also be, for example, closing of the criminal case on grounds of expediency or taking the relevant factor into account in sentencing." See also Supreme Court Criminal Law Chamber judgment of 20 October 2005, No. 3-1-1-95-05, par. 12.

39 Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings adopted by the Venice Commission at its 69the Plenary Session (Venice, 15-16 December 2006) (CDL-AD(2006)036rev), p. 76, 84 ff. Available online at http:// www.venice.coe.int/docs/2006/CDL-AD(2006)036rev-e.asp.

40 *Ibid*, p. 103 ff.

Convention for the Protection of Human Rights and Fundamental Freedoms or of its Protocols in the relevant proceedings, if the violation led to an incorrect judgment and the individual lacks other possibilities for restoring his or her rights (subsection 3^1).

In addition, under § 15(4) of the State Liability Act, the above does not mean that a body exercising public power is relieved of responsibility if a judge has caused damage through activities not related to administration of justice.

The State Liability Act does not directly enable claims for compensation of damage if a court has violated the reasonable time principle in dealing with a case. Delay in proceeding with a case is not subject to criminal punishment (subsection 1; see §§ 302 ff Penal Code) and normally does not lead to an incorrect judgement in a case (subsection 3^1).

If a case involves a detainee in criminal court proceedings, the individual may request compensation of damage caused by deprivation of liberty under the Compensation for Damage Caused by State to Persons by Unjust Deprivation of Liberty Act. Looking at the bases for compensation of damage contained in the Act (§ 1), it must be said that individuals may not claim compensation of damage merely on the ground that the length of the judicial proceedings was excessive.

On that basis, it should be concluded that Estonian legislation does not enable claims for compensation of (moral and proprietary) damage if the reasonable time principle was not observed in judicial proceedings. Besides possible imposition of a disciplinary punishment on a judge, delay in court proceedings might not result in any other outcome in favour of the victim.

(4.4) The Ministry of Justice has made various efforts to reduce the length of court proceedings (e.g. by merging geographical jurisdictions of courts, increasing the number of support staff, or raising the qualifications of court staff). The situation has somewhat improved but problems continue to exist (for more detail, see the statistics[41])

The case-law of the European Court of Human Rights also confirms existence of the problem of length of judicial proceedings in Estonia, e.g. in the case of 02 December 2003 *Treial v Estonia* and the case of 18 January 2007 *Shchiglitsov v Estonia*, where the court found a violation of the reasonable time principle.[42]

Conducting judicial proceedings within a reasonable time is also an issue under the special attention of the Council of Europe and the European Court of Human Rights.[43] In order to reduce the number of applications to the Court of Human Rights relating to violations of the reasonable time principle, they emphasise the need for general measures, including domestic reform of court systems.[44] Alongside measures for speeding up judicial proceedings, the latter also includes enabling compensation at state level in cases of violation of the reasonable time principle in judicial proceedings, thus eliminating the need to turn to the Court of Human Rights for compensation. A report drawn up by the Group of Wise Persons[45] also shows that, for example, in 2005 the reasonable time principle in judicial proceedings concerned approximately 25% of the judgments of the European Court of Human Rights. In order to alleviate the workload of the Court of Human Rights, the report emphasises the need for effective domestic remedies (which would also need to be known to individuals) for the state to redress the relevant violations.

The Venice Commission has carried out a study on the effectiveness of national remedies in respect of excessive length of judicial proceedings.[46] The study analyses the experience and the consequences in the Court of Human Rights as well as in Council of Europe member states. For example, Italy, which is a problem country in respect of this issue,[47] has prepared a separate Act to enable the award of compensation (24 March 2003, Act No. 89, the so-called Pinto

41 Available online at http:// www.kohus.ee/10925.

42 See the European Court of Human Rights judgment in the case of 02 December 2003 No. 48129/99 *Treial v Estonia*, 18 January 2007 No. 35062/03 *Shchiglitsov v Estonia.*

43 For the activities of the Council of Europe, see the European Commission for the Efficiency of Justice (CEPEJ) framework programme "A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe" (CEPEJ (2004) 19 REV2, Strasbourg 13 September 2005), which, inter alia, summarises the Council of Europe recommendations on this issue. The Estonian version is available online at http:// www.nc.ee/vfs/531/cepej_rev_2004.pdf (01 April 2007). See also: Length of court proceedings in the member States of the Council of Europe based on the case-law of the European Court of Human Rights, CEPEJ(2006)15; Reducing judicial times in the countries of Northern Europe, CEPEJ(2006)14.
Available online at http:// www.coe.int/t/dg1/legalcooperation/cepej/textes/adoptedTexts_en.asp (02 May 2007).

44 E.g., one of the items on the agenda of the Committee of Ministers meeting on 13-14 February 2007 on the topic of monitoring compliance with judgments of the Court of Human Rights was also the problem of excessive length of judicial proceedings, and/or setting up an effective domestic remedy in this respect, in 21 countries (cases against Bulgaria, Croatia, Czech Republic, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Liechtenstein, Lithuania, "the former Yugoslav Republic of Macedonia", Poland, Romania, San Marino, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom)).
Available online at http:// www.coe.int/t/e/human_rights/execution/01_Introduction/1PR987e.asp#TopOfPage (31 March 2007).

45 Available online at http:// www.coe.int/t/dc/press/NoteRedac2007/20070125_report_wisepersons_en.asp (31March 2007).

46 Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings, adopted by the Venice Commission at its 69the Plenary Session (Venice, 15-16 December 2006); CDL-AD(2006)036rev.
Available online at http:// www.venice.coe.int/docs/2006/CDL-AD(2006)036rev-e.asp (02 May 2007).

47 See, e.g., the Committee of Ministers interim resolution of 14 February 2007 ResDH(2007)2 on the excessive length of judicial proceedings in Italy; available online at http:// wcd.coe.int/ViewDoc.jsp?Ref=ResDH(2007)2&Sector=secCM&Language=lanEnglish (01 April 2007).

Act).[48] Poland[49] has also established a relevant legal regulation (the Act of 17 June 2004).

Additionally, it should be noted that compensation is clearly only an after-the-event response to a violation of the reasonable time principle. The state should take pre-emptive action to avoid occurrence of such unfortunate cases and establish the right of appeal in this respect in order to speed up the proceedings.[50] Preventive measures have so far apparently not been sufficient, if individuals have suffered moral or proprietary damage through delay in court judicial proceedings.

(5) In order to ensure everyone's right under § 25 of the Constitution to compensation for moral and proprietary damage caused by the unlawful action of any person, the Chancellor of Justice proposed to the Minister of Justice to initiate a Draft Act to enable individuals to receive compensation through domestic (judicial) proceedings if the reasonable time principle of court proceedings was violated in resolving their case. The Chancellor stressed that this would help to guarantee the right to effective remedy emanating from §§ 13, 14, and 15 of the Constitution and § 13 of the ECHR, and resolve the problem already at state level, thus avoiding the need to turn to the European Court of Human Rights for compensation.

In his reply of 19 June 2006, the Minister of Justice noted that the Chancellor's proposal was worth considering and the issue definitely needed to be dealt with in the future.

By 27 November 2007, the Chancellor of Justice had not received further feedback from the Minister on the issue, and therefore the Chancellor contacted the Minister once again. He asked the Minister to explain what action had been taken to enable compensation for violations of the reasonable time principle in judicial proceedings. The Chancellor wanted to know whether the Ministry had included preparing a solution to this problem in its work plan for 2008.

The Chancellor drew the attention of the Minister to the Court of Human Rights recent judgment in the case of *Saarekallas OÜ v Estonia*, where the Court once again found a violation of the reasonable time principle in judicial proceedings and awarded compensation to the applicant.

In his reply, the Minister of Justice explained that no developments in respect of the issue had yet occurred but the Ministry intended to include the issue in its work plan for the second half of 2008.

3. Protection of rights of individuals in coercive psychiatric treatment proceedings

Case No. 6-1/071246

(1) On the basis of a petition from the Estonian Patient Advocacy Association, the Chancellor of Justice supervised the constitutionality of proceedings for applying coercive psychiatric treatment under the Code of Criminal Procedure to verify whether the rights of individuals were sufficiently protected.

(2) Chapter 16 of the Code of Criminal Procedure establishes the procedure for applying coercive psychiatric treatment.

The Chancellor of Justice was contacted by the Estonian Patient Advocacy Association, which drew the Chancellor's attention to a possible violation of rights of offenders in coercive psychiatric treatment proceedings and to shortcomings in the relevant provisions of the Code of Criminal Procedure. The petitioner explained that cases had occurred in practice where an offender had been committed for coercive psychiatric treatment on the basis of a court ruling, without having been able to meet the judge who conducted the criminal trial or the state-assigned defence lawyer. According to the petitioner, situations had also occurred where a person had not been aware of criminal proceedings launched against them and of coercive psychiatric treatment imposed on them by a court ruling. According to the petitioner, the reason for violations of rights was insufficient regulation in the Code of Criminal Procedure. As a comparison, the petitioner pointed out provisions regulating the procedure for committal for coercive psychiatric treatment under the Code of Civil Procedure. In the petitioner's opinion, the more precise requirements regulating placement in closed institutions under civil court procedure should also extend to imposing coercive psychiatric treatment under criminal procedure.

The Chancellor of Justice first acquainted himself with the court rulings for applying coercive psychiatric treatment available through the official section of the courts information system. Analysis of the rulings revealed that,

48 The relevant Italian legislation and practice has also been dealt with in more detail in European Court of Human Rights judgments, see, e.g., judgment of 29 March 2006 in the case of *Cocchiarella v Italy*.

49 See, e.g., the Court of Human Rights judgments of 01 March 2005 in the cases *Michalak v Poland* and *Charzynski v Poland*.

50 The UN Human Rights Committee has noted that within the meaning of Art 14 of the International Covenant on Political and Civil Rights the possibility of redress post factum is not sufficient. The Committee has stressed "To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both at first instance and on appeal." (UN Human Rights Committee explanations (General Comment No. 13) on Art 14, § 10.
Available online at http:// sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/Treaty?OpenView&Start=1&Count=30&Expand=6#6 (01 May 2007).)

normally, a person subject to proceedings is represented by a state-appointed defence counsel. Based on 43 rulings that the Chancellor reviewed, it was not possible to answer the question whether defence counsel had personally met their clients, whether persons subject to coercive psychiatric treatment had been heard during the pre-trial procedure, whether they had been informed about requests filed with the court for applying coercive psychiatric treatment, and whether a copy of rulings had been delivered to persons subjected to coercive treatment.

Subsequently, the Chancellor contacted the Minister of Justice and the Estonian Bar Association for information. The Chancellor asked the Minister for his view about the practicality of different provisions on coercive psychiatric treatment and placement in closed institutions under the Code of Civil Procedure and the Code of Criminal Procedure. The Chancellor asked the Bar Association whether they had received any complaints concerning violation of the right of defence by lawyers assigned as defence counsel in proceedings for applying coercive psychiatric treatment. The Chancellor also requested information on the time of assigning defence counsel in proceedings for coercive psychiatric treatment and whether the recommendations for representing people with disabilities in court, approved by the Board of the Bar Association, also extended to criminal proceedings for applying coercive psychiatric treatment.

The Minister of Justice agreed with the problems pointed out by the Chancellor, but admitted that harmonisation of the relevant parts of the Codes of Civil and Criminal Procedure would require more in-depth comparative analysis. The Minister also emphasised that in case of emergence of the need for coercive psychiatric treatment, defence counsel should be guaranteed immediately to the individual concerned. In addition, the Minister expressed the view that individuals must be guaranteed the right to be heard in pre-trial procedure, while creation of this possibility or waiver of it in exceptional cases must be properly documented.

The chairman of the Board of the Estonian Bar Association confirmed that the recommendations given by the Board to lawyers in respect of representing disabled persons in court also extended to coercive psychiatric treatment proceedings. According to the chairman, the Board of the Bar Association had not received any complaints or other information that defence counsel had not met or sufficiently communicated with their clients in proceedings for coercive psychiatric treatment. The chairman also explained that in practice in proceedings for applying coercive psychiatric treatment, the individual concerned is assigned a defence counsel as of the moment of handing over the criminal file, i.e. immediately before the start of the court proceedings.

(3) To resolve the petition, the Chancellor had to answer the question whether Chapter 16 of the Code of Criminal Procedure (applying coercive psychiatric treatment) guarantees sufficient protection of the rights of individuals subject to proceedings.

(4) Under § 45(2) clause 2 of the Code of Criminal Procedure (if an individual is unable to defend themselves or if defence is complicated due to their disability), participation of counsel is mandatory throughout criminal proceedings. Thus, participation of counsel becomes mandatory at the latest as of the moment of ordering forensic psychiatric assessment. Under § 43(2) clause 2 of the Code, counsel is appointed by the body conducting the proceedings if a suspect or the accused has not requested counsel; but participation of counsel is mandatory under § 45 of the Code. Thus, the Code of Criminal Procedure guarantees the right of defence of individuals subject to proceedings. At the same time, the right of defence must also be ensured in practice. Under § 30(1) of the Code of Criminal Procedure, a Prosecutor's Office is responsible for directing pre-trial proceedings and ensuring their legality and efficiency.

For ensuring effective defence, it is also important to observe the duty of defence counsel under § 44(1) clause 2 of the Bar Association Act to notify a client of activities relating to the supply of legal services. The Code of Ethics of the Estonian Bar Association also repeatedly emphasises the need of communicating with a client. If counsel fails to communicate with their client, this may result in inability to use the right of appeal. As no statement of charges is drawn up within proceedings for applying coercive psychiatric treatment, the Code of Criminal Procedure does not require the court to verify prior to a court hearing whether the individual concerned had been informed of a request for applying coercive psychiatric treatment. The relevant procedural documents are only delivered to counsel (§ 397(2) and § 398(4) Code of Criminal Procedure). The Board of the Estonian Bar Association by its decision of 10 January 2007 has required lawyers to inform their client about the decision that was made if the client did not attend the hearing. Counsel is also required to assess the need for the client to be present at a hearing and, if necessary, ask the court to summon the client.

Unlike the Code of Civil Procedure, the Code of Criminal Procedure does not regulate introducing a ruling for imposing coercive psychiatric treatment, or its delivery, to an individual subjected to treatment (§ 541(1) Code of Civil Procedure), informing their legal representative about the decision (§ 541(1) Code of Civil Procedure with reference to § 536(2)), or challenging a ruling for applying coercive psychiatric treatment through review procedure (§ 701(2) clause 2 Code of Civil Procedure) if an individual subjected to treatment had not been summoned to court or informed of criminal proceedings. Under § 391 and § 402(1) of the Code of Criminal Procedure, where a ruling for applying coercive psychiatric treatment is contested, a final decision has been made in a court of appeal. Under § 696(3) of the Code of Civil Procedure, in proceedings by way of petition it is possible to file an appeal in the last instance with the Supreme Court against a county court ruling terminating the proceedings (including a decision on placement in a closed institution).

A precondition for applying coercive psychiatric treatment is a finding by a court that an individual has committed an unlawful act, so that in essence the decision is similar to a conviction. In a situation where different procedural Acts establish a different restriction of liberty for the duration of the decision-making procedure, differences in regulatory provisions must be necessary and justified.

In the Chancellor's opinion, there is reason to believe that in practice the rights of defence of persons subject to proceedings are not always sufficiently guaranteed during pre-trial procedure, regardless of the fact that the Code of Criminal Procedure establishes mandatory participation of defence counsel in proceedings for applying coercive psychiatric treatment.

(5) The Chancellor proposed to the Minister of Justice that he should find a solution, in cooperation with the Prosecutor's Office, to guarantee the right of defence in pre-trial procedure of individuals subject to proceedings for coercive psychiatric treatment.

Based on the need to ensure rights and guarantees for individuals in proceedings for coercive psychiatric treatment at least to the same level as ensured by the Code of Civil Procedure, the Chancellor proposed to the Minister of Justice to carry out a comparative analysis of procedural laws and to unify the relevant legal provisions to a justified extent at the latest in 2009. The Chancellor also recommended the Minister to support organising in-service training for prosecutors, judges, and lawyers on issues concerning proceedings for coercive psychiatric treatment.

The Minister of Justice agreed with all the Chancellor's proposals.

4. The right to be heard in coercive psychiatric treatment proceedings

Case No. 6-1/071246

(1) On the basis of a petition from the Estonian Patient Advocacy Association, the Chancellor of Justice supervised the constitutionality of proceedings for applying coercive psychiatric treatment under the Code of Criminal Procedure.

(2) Section 400(4) of the Code of Criminal Procedure is worded as follows:

"§ 400. Court hearing
[...]
(4) If the mental state of the individual allows it, the court may summon to a court hearing the individual with regard to whom applying coercive psychiatric treatment is requested."

The Estonian Patient Advocacy Association contacted the Chancellor of Justice with a request to verify the constitutionality of the Code of Criminal Procedure to the extent concerning judicial hearing of an individual subject to coercive psychiatric treatment proceedings. The petitioner drew the Chancellor's attention to the fact that in practice the right of individuals to be heard was not always guaranteed in deciding on applying coercive psychiatric treatment under criminal procedure. According to the petitioner, failure to hear individuals subject to proceedings was caused by the wording of the Code of Criminal Procedure, which enables the court to make a decision on applying coercive psychiatric treatment without having to hear the individual. In addition, the petitioner noted that committal of an individual to coercive psychiatric treatment on the basis of a court ruling under criminal procedure is comparable to placement in a closed institution under the Code of Civil Procedure, so that the Code of Criminal Procedure should follow the provisions on the right to be heard and explaining the course of proceedings to the individual as stipulated under the Code of Civil Procedure. The petitioner also referred to § 536(1) of the Code of Civil Procedure, which allows the court to hear the individual in his or her usual environment, i.e. outside the courtroom.

The Chancellor sent a request for information to the Minister of Justice, asking for the Minister's view on potential conflict of § 400(4) of the Code of Criminal Procedure with everyone's right to be tried in their presence under § 24(2) of the Constitution. The Chancellor also asked the Minister's opinion on whether a person's incapacity to provide statements that are useable as evidence precludes the need for the individual to be heard in proceedings for applying coercive psychiatric treatment. Additionally, the Chancellor asked the Minister to justify differences in the relevant provisions of the Codes of Criminal and Civil Procedure, including the right of individuals to be heard in their usual environment during coercive psychiatric treatment proceedings. As participation of defence counsel is mandatory in such proceedings, the Chancellor also asked the Estonian Bar Association to respond to the same questions. The Chancellor asked for additional explanations from The Estonian Society of Psychiatrists.

The Minister of Justice found that the Code of Criminal Procedure did not contravene the Constitution, as it could be interpreted in a way compatible with the Constitution. According to the Ministry of Justice, the right of individuals to be tried in their presence may be derogated from only in exceptional circumstances. The Minister of Justice expressed readiness to specify the wording of § 400(4) of the Code of Criminal Procedure in the interests of legal

clarity, and to inform courts about issues relevant to guaranteeing the right of judicial hearing.

The Estonian Bar Association also considered it necessary to specify the wording of § 400(4) of the Code of Criminal Procedure. The Estonian Society of Psychiatrists found that guaranteeing the right of judicial hearing in proceedings for applying coercive psychiatric treatment is an important principle and in criminal procedure it should also be possible to arrange hearing of an individual in their usual environment if necessary.

According to the Estonian Society of Psychiatrists, it was not possible to assess precisely in how many cases it had happened that the mental state of an individual had changed in the period from pre-trial proceedings until judicial proceedings. The Society also lacked an overview of how often during judicial proceedings courts asked for a new expert opinion on the capacity of an individual subject to proceedings to attend a court hearing.

(3) In order to resolve the problem raised in the petition, it was necessary to find an answer to the question whether the right of courts under the Code of Criminal Procedure to involve an individual subject to proceedings in a judicial hearing for deciding coercive psychiatric treatment guarantees everyone's right to be tried in their presence as stipulated under § 24(2) of the Constitution.

(4) The right to be tried in one's presence is part of the right to a fair trial. This right is stipulated under § 24(2) of the Constitution and Art 6 of the ECHR.

Proceedings for applying coercive psychiatric treatment are a special type of criminal proceedings (§§ 393–403 Code of Criminal Procedure). Under § 400(4) of the Code of Criminal Procedure, the court may summon to a court hearing the individual in respect of whom applying coercive psychiatric treatment is requested if the mental state of the individual allows it. Under § 536 of the Code of Civil Procedure, an individual must always be heard by the court, except if, in the opinion of an expert, this could result in harmful consequences to the health of the individual, or if the court is convinced, based on a direct impression, that the individual is clearly unable to express their will (§ 636(1) and § 524(5) Code of Civil Procedure). Under § 536(1) second sentence of the Code of Civil Procedure, if necessary the court must hear the individual in his or her usual environment.

From the wording of § 400(4) of the Code of Criminal Procedure, it arises that hearing an individual in judicial proceedings for applying coercive psychiatric treatment is not compulsory but depends on the court's discretion. On the other hand, the relevant provision can be interpreted so that, in deciding the issue of the right to be heard, the court must also take into account the individual's subjective right and the need to defend it. Interpretation conforming to the Constitution is also supported by the fact that under § 394 clause 3 of the Code of Criminal Procedure an individual's mental state during criminal proceedings is included among the facts related to the subject of proof.

In conclusion, the Chancellor of Justice found that § 400(4) of the Code of Criminal Procedure in itself did not contravene the Constitution, as it was possible to apply the provision by interpreting it in compliance with § 24(2) of the Constitution.

(5) However, considering the prohibition of arbitrary exercise of state authority under § 13(2) of the Constitution and the principle of legal clarity emanating from it, the Chancellor proposed to the Minister of Justice to specify the wording of § 400(4) of the Code of Criminal Procedure.

The Minister of Justice agreed with the Chancellor's proposal and promised to revise the wording of § 400(4) of the Code in 2008 in order to ensure interpretation of the provision which better conforms to the Constitution.

5. Electricity bill of prisoners

Case No. 7-1/060511

(1) Based on a petition from a prisoner, the Chancellor of Justice verified the procedure for payment of electricity consumed in connection with use of personal electrical equipment by prisoners detained in Tartu Prison.

(2) The Minister of Justice issued a directive on 07 August 2000 No. 362 "Procedure and norms for covering costs related to personal belongings of sentenced and remand prisoners and persons subject to expulsion". Inter alia, the directive stated: "2. Prisoners are required to compensate all expenses related to use of personal electrical equipment in accordance with the following norms: power of equipment 10-50 W – price 5 kroons per month; power of equipment 51-... W – 25 kroons per month.

[...]

6. A prisoner's temporary absence from their department (short-term departure, serving a disciplinary punishment in a punishment cell, being in the medical facility, etc) does not relieve them from the obligation of monthly payment

for costs of using their electrical equipment. No costs are recorded if a prisoner has handed in their equipment for storage to the prison storeroom."

A prisoner from Tartu Prison contacted the Chancellor of Justice with a complaint that Tartu Prison had recorded costs for use of electrical equipment even when he had been in the police detention centre.

The Chancellor sent a request for information to the Minister of Justice and Tartu Prison.

The Ministry of Justice replied that under the Imprisonment Act prisoners bear the costs of using electrical equipment allowed them by the prison director. Under the Minister of Justice regulation No. 72 of 30 November 2000 "Internal prison rules", the procedure and norms for covering costs are established by a directive of the Minister of Justice. Temporary absence means any absence from the prison department which is temporary in character, i.e. cases when a prisoner returns to the department after a certain time. Thus, temporary absence has no restrictions relating to time or substance, as in this context it is not important exactly where the prisoner is and for what purpose. According to the Minister of Justice, the prison does not impose any limits on handing in electrical equipment to the storeroom for storage – whenever temporarily absent, a prisoner may always store their equipment in the storeroom. According to the Minister, some prisons have a practice where all items (including electrical equipment) are placed in the prison storeroom during a prisoner's temporary absence. The Minister is of the opinion that often prisoners themselves are not interested in storing their electrical equipment during their absence, presuming that for some reason they might not get it back on return. Thus, prisoners themselves wish to pay for equipment left in their room even during temporary absence. A lump sum per month has been established for covering costs of using electrical equipment. This means that, regardless of the number of days when equipment was used, the same amount per month has to be paid. If a prisoner hands equipment into storage in the middle of the month, payment is taken for the days when the equipment was in the cell at their disposal. No fee for using electrical equipment has to be paid when equipment is kept in the storeroom, regardless of the reason why the equipment was stored.

According to the director of Tartu Prison, personal belongings of prisoners are stored in the prison storeroom based on an application from a prisoner. If a prisoner has not applied, they take all their personal items in the cell with them. The director provided an overview of periods of absence of the specific prisoner who had petitioned the Chancellor. According to the director, the petitioner always took his electrical equipment with him while absent from the prison.

(3) The main issue in this case was whether prisoners should pay the cost of using personal electrical equipment if they have taken all their equipment with them while absent from the prison.

(4) Under § 31(3) of the Imprisonment Act, prisoners bear the costs of using electrical equipment allowed them by the prison director. Based on the principle of the rule of law, the Supreme Court has derived a principle that norms establishing financial obligations may not be interpreted to the detriment of individuals (so as to increase the financial obligation).[51] Therefore, the wording of § 31(3) of the Imprisonment Act should be interpreted as meaning that prisoners bear the actual measurable costs (e.g. as measured by electricity meter) for using electrical equipment.

If a prison demands a fee from prisoners for use of electrical equipment based on abstract criteria which do not meet the actual costs, the fee may in essence become a public fee under § 113 of the Constitution.

Under § 113 of the Constitution, state taxes, duties, fees, fines, and compulsory insurance payments must be laid down by law. The Supreme Court has consistently stressed the principle that § 113 protects all public financial obligations, regardless of how they are called in legislation. The aim of § 113 of the Constitution is to reach a situation where all public financial obligations are established only by Acts adopted by the Riigikogu. Based on the reservation under § 113 of the Constitution, fees for performing public functions may only be taken when the fee has been established by an Act. Public financial obligations may not be imposed by legislation lower than parliamentary Act. Delegating the duty of establishing public financial obligations to the executive power is permissible only if it arises from the nature of the particular financial obligation and the legislator defines the scope of discretion, e.g. by establishing in its Act the minimum and maximum fee, the procedure for calculating the fee, etc.[52]

The wording of § 31(3) of the Imprisonment Act should be interpreted as meaning that prisoners bear the actual costs of using electrical equipment, i.e. costs which are measurable. Considering the living conditions and economic possibilities of custodial institutions, it might not be feasible to base calculations of electricity used by prisoners on determining actual consumed kilowatt-hours (e.g. by installing an electric meter for each cell). Instead, other criteria could be used to calculate electricity consumed. It is important that other means of calculating and recording should be reasonable and not lead to erroneous results. Such criteria must be both formally and substantively lawful. Formal lawfulness presumes existence of substantive bases in an Act and a delegating norm for the Minister of Justice to issue

51 Supreme Court Administrative Law Chamber judgment of 03 April 2000, No. 3-3-1-4-00, par. 1; Supreme Court Civil Law Chamber ruling of 10 April 2007, No. 3-2-1-37-07, par. 9.

52 For the first time in the Supreme Court *en banc* judgment of 22 December 2000, No. 3-4-1-10-00; latest in Supreme Court Constitutional Review Chamber judgment of 13 February 2007, No. 3-4-1-16-06.

regulations. Substantive lawfulness includes a wider range of conditions to which the procedure of calculating use of electricity by prisoners must conform (above all, the conditions must be reasonable and fair).

According to the first sentence of paragraph 6 of the Minister of Justice directive No. 363 of 07 August 2000, a prisoner's temporary absence from their department (short-term departure, serving a disciplinary punishment in a punishment cell, being in the medical facility, etc) does not relieve a prisoner from the obligation of monthly payment for the costs of using their electrical equipment. The second sentence adds that no costs are recorded if a prisoner has handed in their equipment to the prison storeroom for storage.

The reply to the Chancellor's request for information shows that the petitioner was in Tartu police detention centre for a certain period. It is also apparent that the petitioner was charged for use of electricity for that period, although he had taken all personal electrical equipment with him to the police detention centre.

Based on the Minister's directive, prisoners need not pay the cost of using electrical equipment for a period of their temporary absence if they store the equipment in the prison storeroom. The directive does not specify how to act in a situation where a prisoner takes all their personal electrical equipment with them for a period of absence. In other words, should the prisoner pay the costs of using electrical equipment even when it is obvious that they could not have been using it within a particular period? In § 64(5) of internal prison rules, the Minister of Justice established the right of prisoners to take their personal belongings with them during temporary absence from prison.

The Chancellor of Justice concluded that the aim of paragraph 6 of the directive must be to avoid a situation where a prisoner leaves the prison but the electrical equipment stays in the cell. This means, for example, that cell mates can use the equipment but the prison cannot demand payment for it because the prisoner to whom the equipment belongs is not in prison at the time. On that basis, a prisoner who is temporarily away from prison does not have to pay the fee for using electrical equipment if the equipment is not in the cell. For example, if a prisoner stored the equipment in the prison storeroom for a period of temporary absence. Hence, two conditions must be fulfilled. First, a prisoner must be temporarily absent from the prison and, second, their personal electrical equipment must be outside the cell, so that it cannot be used (and electricity consumed) by another prisoner.

In view of the aims of the directive, a prison may not record costs for using personal electrical equipment while a prisoner is actually away from the prison and has taken their equipment with them. Prisoners have been given the right to decide whether they take their personal belongings with them for a period of absence or leave them in storage at the prison. Taking personal electrical equipment with them might be necessary because it cannot be excluded that they want to use the equipment in another custodial institution where they are temporarily staying. In addition, at first sight no logical reason exists to prohibit prisoners from taking their equipment with them. Even when taking their belongings with them, the two criteria above have been fulfilled: they are temporarily absent from prison and their personal belongings are outside the cell. The prison should have no reason to deduct money from a prisoner's account for consuming electricity because it is obvious (and this can be ascertained without excessive effort) that in practice the prisoner has not consumed electricity (and their personal belongings were outside the prison). Otherwise, the principle of equal treatment under § 12 of the Constitution would be violated[53] due to different treatment, without reasonable cause, of prisoners who are temporarily absent from prison and who take their belongings with them as compared to those who store their equipment in the prison storeroom.

Accordingly, the Minister of Justice could not establish an obligation to bear the costs of using personal electrical equipment even when a prisoner is outside the prison and has taken their equipment with them.

(5) The Chancellor proposed to the Minister of Justice to draw up legislation for calculating costs related to use of personal belongings by prisoners and inserting the relevant delegating norm in the Imprisonment Act.

In his reply, the Minister of Justice explained that amendments to the Imprisonment Act were planned in 2007, inter alia adding to the Act a delegating norm based on which the Minister of Justice can adopt a regulation to establish a procedure for covering costs related to electrical equipment. The procedure should define how and to what extent consumption of electricity is charged. The Minister also agreed that the calculation should be cost-based and the rate of the fee should proceed from general reasonable and justified criteria.

On 20 March 2008, the Riigikogu passed an Act amending the Probation Supervision Act, the Imprisonment Act, and the Courts Act, by which it supplemented § 31(3) of the Imprisonment Act with a second sentence: "The period of calculating the costs of using electrical equipment is one month, and the costs are calculated on the basis of the power of the equipment."

53 Supreme Court Constitutional Review Chamber judgment of 03 April 2002 No. 3-4-1-2-02: "This principle expresses the idea of essential equality: those who are equal have to be treated equally, and those who are unequal must be treated unequally. But not every unequal treatment of equals amounts to violation of the right to equality. The prohibition on treating equal persons unequally has been violated if two persons, groups of persons, or situations are arbitrarily treated unequally. Unequal treatment can be regarded as arbitrary if no reasonable cause for it exists."

6. Calculating date of release from prison

Case No. 7-4/061713

(1) On the basis of a petition from a prisoner, the Chancellor of Justice verified the correctness of calculating the date of release from prison.

(2) The petitioner was sentenced to five months' imprisonment and was placed in Tartu Prison. The starting date of serving the sentence was set for 01 September 2006. The prison set the date of release for 01 February 2007.

The prisoner contacted the Chancellor with a complaint that the date of his release from imprisonment was determined wrongly and his first day in prison had not been included in the period of the sentence.

The Chancellor sent a request for information to the Ministry of Justice and Tartu Prison.

According to the information from the director of Tartu Prison, Tartu County Court had imposed an aggregate punishment on the petitioner, under which he was to serve five months' imprisonment. The court ruling set the starting date for serving the sentence as 01 September 2006. According to the director of Tartu Prison, the prison in its activities observed § 67(1) of the Penal Code (entered into force 01 September 2002), and in releasing prisoners § 75 of the Imprisonment Act. Section 67(1) of the Penal Code establishes units of measurement of duration of fixed-term sentences, according to which the court determines the length of the sentence within the sentencing framework. In calculating the term of sentence in days, the unit of measurement is one astronomical day. On that basis, Tartu Prison may not place persons punished by months and years in a more favourable position than those punished by days, because in the latter case their first day is not considered part of the punishment as the first day of imprisonment is considered to have been completed on the following day. The director of Tartu Prison confirmed that the prison was observing a long-time practice of prisons by calculating terms of imprisonment this way, i.e. if a court ruling sets the starting date of five months' imprisonment on 01 September 2006, then the end-date of imprisonment is 01 February 2007 (in calculating imprisonment, the months were added to the starting-date of imprisonment; thus, adding five months to the starting date of 01 September 2006, the end-date of imprisonment is 01 February 2007).

According to the Minister of Justice, prisons follow § 67(1) of the Penal Code in calculating terms of imprisonment, and § 75 of the Imprisonment Act in calculating the date of release. In calculating the term of imprisonment in days, the unit of measurement is one astronomical day, i.e. 24 hours. In view of this, in the opinion of the Minister of Justice prisons may not place individuals punished by months and years into a more favourable position than those punished by days, because in the latter case their first day is not considered part of the punishment. According to the Minister, calculating the term in accordance with the above-described method is also supported by § 135(1) of the General Principles of the Civil Code Act, under which a term begins to run on the day following the calendar day of occurrence of the event by which the beginning of the term is specified, unless otherwise provided by law or agreement. Under § 136(3) of the General Principles of the Civil Code Act, in specifying a term, the period from midnight to midnight is taken as a day. According to the opinion of the Minister of Justice, a person only needs to serve half of the last day of imprisonment and is released in the second half of the day.

(3) The main issue in the case was from which moment to calculate when the term of release of a prisoner starts to run.

(4) Under § 20 of the Constitution, everyone has the right to liberty and security of the person. No one may be deprived of their liberty except in cases and under a procedure provided by law to execute a conviction or detention ordered by a court.

This provision imposes a requirement of legality on restricting individuals' liberty and security of the person. The requirement of legality presumes existence of a relevant substantive law norm as well as existence of an evidentiary (factual) basis justifying conviction, and its implementation in compliance with requirements of due process. In other words, deprivation of liberty must conform to the requirements of §§21-23 of the Constitution and Art 6 of the ECHR. A legal norm enabling conviction and deprivation of liberty must be in force at the time of commission of an offence and it must establish the relevant type of punishment (i.e. deprivation of liberty). Any punishment that deprives individuals of liberty must be imposed on the basis of a parliamentary Act.[54]

In view of the above, a criminal court judgment that deprives an individual of their liberty must be passed in compliance with the norms established in the Penal Code and the procedure established in the Code of Criminal Procedure. In imposing a sentence, the court ascertains the length of imprisonment, often also mentioning in the judgment the starting date of serving the sentence (primarily in the case of an aggregate punishment or in the case of a suspect who had been held in detention on remand). A problem arises because under current practice the courts do not mention the end-date of the sentence in their judgment. This, however, does not mean that duration of sentence is not determined and the prison itself may determine it in substantive terms. Calculating the term of punishment is regulated by § 67 of the Penal Code, under which a term of imprisonment is calculated in years, months, and days.

54 J. Sootak, P. Pikamäe. Karistusseadustik. Kommenteritud väljaanne. [Penal Code. Commented edition] Tallinn 2004, § 20 comment 7.2.

According to the commented edition of the Penal Code, when calculating a term of punishment in days, the unit of measurement is one astronomical day (24 hours).[55]

Systematic reading and interpretation of the Penal Code shows that § 67 ("Calculation of terms of punishment") is located in Chapter 4 entitled "Imposition of punishment". Applying punishment in penal law means imposition of punishment by a court or by an extrajudicial body conducting the proceedings.[56] In penal law, the imposition of a punishment means the passing of a sentence by a court, or the ordering of a punishment by an extra-judicial investigative authority. Under the Penal Code, the imposition of a punishment should take place pursuant to a sentence passed by a court in relation to one or several offences, pursuant to an order issued by an extra-judicial authority, and in both cases pursuant to the corresponding calculation of the term of the sentence or punishment.[57] It may be concluded from the above that imposition of punishment only takes place through a court or an extra-judicial body. Section § 67 of the Penal Code establishes units of measurement for calculating duration of punishment (years, months, and days) within the sentencing framework. The sentencing framework arises first and foremost from the sanction in the special part of the Penal Code which establishes the type and term of punishment. Calculating the term of punishment is not an end in itself but determines the period of validity of a punishment. Only the courts are competent to do this and prisons do not have discretion in this respect.

Calculating a term of imprisonment is an issue of substantive penal law and constitutes part of the decisions made during judicial proceedings. A term of punishment can only be as long as determined by a court judgment. Executive authorities are not competent to change a term of punishment by either shortening or lengthening it, because in principle the end-date of a punishment arises from the court judgment. According to established judicial practice, the date of release is not written into a judgment and no legal norms directly apply in respect of calculating the date. To find a solution, it is necessary to interpret the Penal Code and constitutional norms in the context of the principles of substantive penal law.

It is possible to proceed from § 171(1) and (2) of the Code of Criminal Procedure. Although under § 171(1) of the Code of Criminal Procedure a term does not include the hour or day as of which the beginning of the term is calculated, yet subsection 2 says that if a person is detained as a suspect or arrested, the term is calculated as of the moment of their detention. By nature, § 171 of the Code of Criminal Procedure applies only to calculating procedural terms in criminal proceedings. The distinction provided in subsection 2 only applies to detention or remanding in custody as a suspect. Thus, the aim of this provision in itself is not directly related to calculating the end-date of punishment, but it can be used as a possible solution, taking into consideration the similar situation of remand and sentenced prisoners in respect of restriction of fundamental rights (and freedoms).

Although in general it is not considered correct to classify fundamental rights into more or less important rights, yet certain fundamental rights are considered to be weightier, including the right to liberty and security of the person (§ 20 Constitution).[58] Individuals may be deprived of liberty only in the cases and under the procedure established by law for the purposes explicitly mentioned in the Constitution. Deprivation of physical liberty of an individual constitutes a very severe encroachment upon a fundamental right.

Therefore, the legislator has prescribed in § 171(2) of the Code of Criminal Procedure that in case of a person's detention (or remanding in custody) as a suspect, the term is calculated as of the moment of detention. Thus, in the case of remand prisoners, the restriction of physical liberty is calculated from the moment when they were deprived of their liberty. The purpose of this regulation is to ensure maximum favourable conditions to individuals in case of serious encroachment upon fundamental rights, so that the encroachment does not become disproportionately heavy.

The Supreme Court has established that the more extensive the encroachment upon fundamental rights the more serious the reasons justifying it must be.[59] The Supreme Court has also expressed the view that an encroachment must be performed in a way that least damages the rights of an individual.[60] This must also be taken into account in detaining an individual – a person must not be deprived of liberty for longer than prescribed by court judgment and restriction of liberty should occur in a manner that causes minimal additional suffering for the individual concerned.[61]

The previous Code of Criminal Procedure did not contain an exception similar to § 171(2) of the current Code,

55 J. Sootak, P. Pikamäe. Karistusseadustik. Kommenteritud väljaanne. [Penal Code. Commented edition] Tallinn 2004, § 67 comment 2.

56 Supreme Court *en banc* judgment of 17 March 2003, No. 3-1-3-10-02, par. 25.

57 J. Sootak, P. Pikamäe. Karistusseadustik. Kommenteritud väljaanne. [Penal Code. Commented edition] Tallinn 2004, § 56 comment 2.

58 E.g. Supreme Court Administrative Law Chamber judgment of 09 June 2006, No. 3-3-1-20-06, par. 15: "[...] the individual's right that was restricted was one of the most important fundamental rights – liberty." In terms of extent of encroachment upon fundamental rights, based on the case-law of the European Court of Human Rights deprivation and restriction of liberty have been distinguished – see, e.g. Supreme Court Administrative Law Chamber judgment of 2 November 2005, No. 3-3-1-61-05, par. 33: "[...] in deciding whether it constitutes deprivation of liberty in the meaning of Art 5 of the Convention or restriction of liberty, all the factual circumstances of the case have to be taken into account, i.e. the type of the measure applied, its duration, consequences, and manner of application. Deprivation and restriction of liberty differ only in terms of extent of the encroachment [...]".

59 Supreme Court Constitutional Review Chamber judgment of 05 March 2001, No. 3-4-1-2-01.

60 Supreme Court Constitutional Review Chamber judgment of 17 March 1999, No. 3-4-1-1-99.

61 See R.Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse. [Constitutionalism and the protection of fundamental rights and freedoms] Tallinn 2004, pp. 137-138.

but the Supreme Court in an earlier case expressed the following view [in respect of the previous Code of Criminal Procedure in force at the time]: "§ 85 of the Code of Criminal Procedure establishes rules for calculating terms in performing procedural actions. In the case of these procedural actions, either performed by the body conducting the proceedings or parties to the proceedings, it is fully logical to proceed from the principle enshrined in § 85(1) of the Code of Criminal Procedure that in calculating terms a term does not include the hour or day from which the beginning of the term is calculated. Such regulation could be seen as a certain concession to both the body conducting the proceedings and the party to the proceedings, but actually such method of calculation is simply an agreement which is difficult to contest based on any external factors. However, the rules for calculating terms under § 85 of the Code of Criminal Procedure cannot be used for all terms applicable in criminal procedure, and in particular not for terms related to restriction of fundamental rights of individuals. For example, the provisions of § 21(2) of the Constitution and § 11(2) or §§ 73 and 74 of the Code of Criminal Procedure may not be interpreted in the context of § 85 of the Code of Criminal Procedure as meaning that the time of restriction or deprivation of liberty in criminal proceedings should be calculated from the hour or day following such restriction or deprivation. Running of terms related to restriction of fundamental rights should be counted as of the moment of the respective restriction of fundamental right or deprivation of liberty."[62]

Depending on the course of criminal proceedings, preventive custody may if necessary be applied in respect of suspects in order to guarantee proceedings. In a situation where preventive custody in respect of a sentenced person was applied during pre-trial investigation, time spent in custody pending trial is included in the term of punishment and is calculated from the moment the person is detained as a suspect. This means that in the case of sentenced persons who were remanded in custody during criminal proceedings the court judgment will count the term of imprisonment as of the moment the person was detained. In the case of sentenced persons who were not remanded in custody during criminal proceedings, the first day in prison is not included in calculating the term of imprisonment according to current practice (the term begins to run from the day following the person's arrival in prison). This is also proved by the present case: the petitioner was sentenced to five months' imprisonment and the starting date of serving the sentence was set for 01 September 2006, but the prison set the date of release for 01 February 2007, i.e. one day longer than five months. Thus, sentenced persons who have been remanded in custody during criminal proceedings are placed in a better situation than sentenced persons who were not in preventive custody.

In terms of encroachment upon fundamental rights, taking a suspect into custody and imposing imprisonment on a sentenced person are similar – in both cases, physical liberty of persons is restricted. This means that imprisonment as a punishment and taking into preventive custody as a measure for guaranteeing criminal proceedings are comparable in terms of encroachment upon fundamental rights. Proceeding from the principle of constitutionally conforming interpretation, in case of equal extent of restriction individuals must be treated equally. In case of having been remanded in custody, detention is counted from the moment when a person was in practice deprived of liberty. In case of imprisonment, however, according to current practice, running of detention is counted only from the day following deprivation of liberty. Equal conditions and equality of persons should be observed in restricting physical liberty for whatever purpose. In the present context, it is not important whether the purpose is guaranteeing criminal proceedings or the start of serving a sentence. When applying equal conditions, preference should be given to conditions which are more favourable to individuals.

The Supreme Court has expressed the following view in respect of including the time spent in preventive custody as part of the term of punishment in case of subsequent conviction: "On 17 July 2000, Lääne-Viru County Court in its judgment imposed one year of imprisonment on M. Lond as punishment. Since 23 March 2003 M. Lond was taken into custody and was not released before he started serving his sentence. Thus, one year of imprisonment would have been completed on 22 March 2001, as the day of taking into custody should also be counted. During pre-trial investigation M. Lond had additionally been in custody in the period 15-23 July 2000, i.e. nine days, which had to be deducted from the final sentence as time having already been served under § 45 of the Criminal Code. Thus, pursuant to the court judgment, M. Lond should have been released on 13 March 2001. In the above-mentioned criminal case, Tartu County Court made a judgment on 12 March 2001 and also set the date of serving the sentence on 12 March 2001. As 12 March had been included in the previous punishment according to the earlier court judgment, M. Lond had two days of imprisonment, i.e. 12 and 13 March, left to be served from the sentence imposed by Lääne-Viru County Court, and only those two days could be added to the punishment imposed by the latest judgment."[63]

The Chancellor of Justice expressed the opinion that the starting point of serving a sentence should be that specific moment when a sentenced person arrived at the custodial institution for the purpose of serving the sentence.

(5) The Chancellor recommended to the Minister of Justice to observe the principles of legality and good administration and to change the current practice for calculating the starting point of serving a sentence in the case of sentenced persons.

In his reply, the Minister of Justice noted agreement with the Chancellor's opinion and explained that from the legal policy point of view it was indeed justified to adopt an approach according to which a term of imprisonment should

62 Supreme Court Criminal Law Chamber ruling of 26 January 2000, No. 3-1-1-12-00, par. 2.

63 Supreme Court Criminal Law Chamber judgment of 18 October 2001, No. 3-1-1-102-01.

include the day from which the sentence begins to run. On that basis, the Minister noted, it is necessary to change the practice of the Ministry of Justice and introduce a legislative amendment. According to the Minister, plans exist to include a provision specifying calculation of terms of imprisonment in the next package of amendments to the Code of Criminal Procedure.

7. The procedure for payment for the room for long-term visits in Murru Prison

Case No. 7-4/061376

(1) On the basis of a petition from a prisoner, the Chancellor of Justice verified the procedure for payment for the room for long-term visits in Murru Prison.

(2) Payment for the room for long-term visits was regulated by a separate prison director's directive in Murru Prison. The directive established three different possibilities of payment: from the prisoner's personal prison account on the basis of the prisoner's application; by the visitor via a card payment terminal in the visiting room; and a cash transfer made in advance in Rummu post office.

A prisoner in Murru Prison contacted the Chancellor and complained about the procedure. The petitioner claimed that cash payment for use of the room for long-term visits could only be made through Rummu post office. The prison would not accept payment made through other post offices.

The Chancellor submitted a request for information to Murru Prison and the Ministry of Justice.

The director of Murru Prison justified his directive by the aim of reducing the volume of cash transactions in prison.

The Ministry of Justice explained that the director in his directive had approved Rummu post office as the only acceptable place for cash payments because the prison had communicated correct settlement account numbers to the post office to ensure that money transfers are made to the right account. The Ministry of Justice was of the opinion that payment for the room for long-term visits was the obligation of a prisoner or a visitor and the prison was not required to establish any additional requirements to secure receipt of payment to the right account. The prisoner and the visitor themselves must ensure that payments are made to the right account and if payment is not received the visit would not take place. Thus, the prison should also accept transfers made in any other manner. The Ministry of Justice promised to inform the director of Murru Prison of the need to amend his directive.

(3) The main issue in the case was whether the procedure established by the director of Murru Prison requiring that cash payments for the room for long-term visits could only be made via Rummu post office was lawful.

(4) In the opinion of the Chancellor of Justice, it is not justified to refuse payments made through other post offices. Thus, the Chancellor concluded that possibilities for payment for the visiting room must not be restricted in such a way and it is not lawful to establish that payments should be made only through one specific post office.

(5) The Chancellor closed the proceedings of the petition as the Ministry of Justice promised to inform the director of Murru Prison of the need to amend the payment procedure for the room for long-term visits.

On 29 January 2007, the director of Murru Prison passed directive No. 9 which allows payment for the room for long-term visits also through other post offices.

8. Placement of a prisoner in an isolated locked cell

Case No. 7-4/071288

(1) The Chancellor of Justice received a petition from a prisoner in Viljandi Prison who complained that he had been placed in a locked cell without justified reason.

(2) The petitioner was serving a sentence in Viljandi Prison. Based on directive No. 133 of 19 December 2006 of the director of Viljandi Prison, the petitioner had been placed in an isolated locked cell. The basis for the placement was the prisoner's application to the prison director in which he explained that his security was endangered if he stayed in the general accommodation block.

On 02 April 2007, the petitioner applied to the director of Viljandi Prison, asking to be transferred to Tartu Prison and justifying his request with poor health and risk to his security.

On 25 May 2007, the petitioner filed another application, explaining that his isolation was unnecessary and should

be stopped, and asked to be brought back to the accommodation block. He also asked to be transferred to Tartu Prison. In the same letter the petitioner admitted that he had earlier asked to be placed in an isolated cell.

The director of the prison neither allowed the prisoner back to the accommodation block nor transferred him to Tartu Prison.

The petitioner contacted the Chancellor of Justice and noted that despite his application to be sent back to the general accommodation block he had stayed in the isolated locked cell for almost five months. The petitioner also noted that the prison director's directive No. 133 of 19 December 2006 did not contain a reference to how it could be challenged.

To verify the claims made in the petition, the Chancellor submitted a request for information to the director of Viljandi Prison.

In his reply, the director of Viljandi Prison explained that a prisoner is placed in an isolated cell for reasons of his personal security and stays there until the need for isolation ceases to exist. In practice, prisoners have been kept in isolation for up to six months in Viljandi Prison. According to the director, Viljandi Prison is small and the number of isolated persons is minimal. Thus, security officers talk to an isolated prisoner at least once a week, or more often if necessary. Staff of the social department also deal with an isolated prisoner, who is also ensured daily medical examination. Thus, according to the director, the continued existence of the reasons for isolation of the petitioner was verified at least once a week. In addition, the director confirmed that with placement of the petitioner in an isolated cell his other rights were not restricted and no additional limitations were imposed. The director noted that the directive for the petitioner's isolated placement was explained to him against his signature, and the directive lacked a reference to challenge procedure because the directive had been issued on the basis of the prisoner's own request, and administrative procedural law (including the procedure for challenging administrative acts) had been previously explained to him.

According to the information available to the Chancellor of Justice, the petitioner was transferred to Tartu Prison in June 2006 to continue serving his sentence.

(3) In order to resolve the petition, it was necessary to verify whether Viljandi Prison had violated any legal requirements.

(4.1) The petitioner was placed in an isolated locked cell at his own request by directive No.133 of 19 December 2006 of the director of Viljandi Prison. Under § 51(1) of the Administrative Procedure Act, a prison director's directive is an administrative act.[64]

Under § 54 of the Administrative Procedure Act, an administrative act is lawful if issued by a competent administrative authority pursuant to legislation in force at the moment of issue, is in accordance with legislation in force, is proportional, does not abuse discretion, and complies with requirements for formal validity. Thus, two aspects can be distinguished in respect of lawfulness of an administrative act: formal lawfulness and substantive lawfulness.

In the framework of formal lawfulness, compliance with requirements of form, competence, and procedural rules is evaluated. In respect of the present directive, the Chancellor focused on the facts relating to formal lawfulness, because the directive lacked reference to the possibility of challenging it.

As a rule, administrative acts are issued in writing. Other forms are possible if an Act or regulation explicitly permits or if an urgent order needs to be given which cannot be postponed. The requirement of written form is necessary first and foremost to protect the rights of individuals and to avoid potential disputes. Individuals to whom an administrative act is addressed should be able to understand clearly their rights and duties in connection with the act. In case of disagreement with the substance of the administrative act, this provides a basis for filing an administrative challenge or having recourse to the court. However, the requirement of written form does not directly give rise to an obligation to draw up an administrative act as a certain type of document. What is important is that the administrative act contains all the requisite elements.[65]

The compulsory requisite elements of an administrative act include: conclusion, reasoning, reference for challenge, and other compulsory elements. In this case, the prison director's directive lacked reference for challenge.

Under § 57 of the Administrative Procedure Act, an administrative act must contain reference to the possibilities, place, terms, and procedure for challenging it. Absence of reference for challenge does not affect the validity of an administrative act or alter a term for challenging it, or bring about other legal consequences. Absence of reference for

64 Under § 51(1) of the Code of Administrative Procedure Act, an administrative act is an order, resolution, instruction for compliance, directive, or other legal act issued by an administrative authority upon performance of administrative functions in order to regulate individual cases in public law relationships and directed at creating, altering, or extinguishing the rights and obligation of persons.

65 A. Aedmaa *et al.* Haldusmenetluse käsiraamat. [Handbook on administrative procedure] Tartu 2004, pp. 294-295.

challenge may be considered to be a good reason for allowing the term for challenging to expire, if the term is allowed to expire due to absence of reference to challenge.

In accordance with the meaning of § 57, a reference for challenge definitely needs to be included in administrative acts imposing a burden. The reference should also be included in alleviating administrative acts if they involve restricting an individual's rights or if they partly grant an individual's request. The aim of a reference for challenge is to ensure that individuals whose rights an administrative act may concern have information about the possibilities for protecting their rights and know what, where, and by what deadline they need to do in order to invoke such a right. Individuals must also be able to challenge an administrative act which from the point of view of an administrative authority might seem as alleviating the individual's situation because the addressee might not agree with all the conditions established in the act.

Including a reference for challenge in a particular administrative act does not depend on how the prison fulfilled its duty of explaining. Under § 36(1) of the Administrative Procedure Act, an administrative authority (prison) in administrative proceedings (including in each specific case when applying additional security measures in respect of a prisoner is decided) must explain the following to a participant in proceedings (prisoner) at their request:
1) the rights and duties of the participant in proceedings in administrative procedure;
2) within what term the administrative proceedings are presumably conducted and what are the possibilities to expedite the administrative proceedings;
3) what applications, evidence, and other documents must be submitted in the administrative proceedings;
4) what procedural acts must be performed by participants in the proceedings.

In addition, upon admission to a prison, the prison must explain to prisoners their rights and duties. Prisoners are given written information on Acts regulating imprisonment, internal prison rules, and the procedure for filing complaints (§ 14(2) Imprisonment Act).

Performance of the duty to explain does not mean an administrative act may lack reference for challenge. Both the duty to explain and the duty to include a reference for challenge are compulsory and are not interchangeable. Complying with both duties is necessary in order to ensure the lawfulness of an administrative act and observance of the principle of good administration.

The Chancellor of Justice found that in accordance with § 57(1) of the Administrative Procedure Act and the principle of good administration, the administrative authority (prison) is required to include a reference for challenge in its administrative acts and at the same time comply with the duty to explain (§ 36 Administrative Procedure Act).

(4.2) According to the information received from Viljandi Prison, the petitioner had filed two applications after placement in an isolated cell.

In the application of 02 April 2007, the petitioner had asked to be transferred to Tartu Prison in connection with his poor health and security threats. In the application of 25 May 2007, he had expressed a wish to leave the isolated cell and return to the accommodation block or to be transferred to Tartu Prison.

In replying to the petitioner's application of 25 May 2007, the prison should have complied with the requirements under § 68(1), § 44(1) clause 1, and § 65(3) of the Administrative Procedure Act.

Under § 68(1) of the Administrative Procedure Act, an individual may apply for repeal of an administrative act only if they may apply for resumption of administrative proceedings pursuant to § 44 of this Act. Under § 44(1) clause 1, an administrative authority resumes administrative proceedings at the request of an individual if the circumstances or legislative or procedural provisions forming the basis for issue of the administrative act imposing permanent restrictions on the rights of the individual who submits the application cease to exist.

Under § 65(3) of the Administrative Procedure Act, if the basis for issue of an administrative act which permanently restricts rights no longer exists due to changes in legal or factual circumstances, the administrative act must be repealed at the request of an individual concerned as of the moment when changes in the circumstances took place.

An individual who has been placed in an isolated locked cell may at one point wish to return to the accommodation block of the prison. For example, when the prisoner finds that the reasons for their placement in isolation no longer exist and they are no longer endangered among other prisoners. If a prisoner applies to terminate security measures taken in respect of them, the prison must verify whether the grounds for the prisoner's isolation still exist. If they have ceased to exist, the prisoner must be transferred back to the accommodation block based on their request and § 65(3) of the Administrative Procedure Act (in combined effect with § 68(1) and § 44(1) clause 1 of the Act).

On the other hand, a situation may exist where an individual staying in an isolated locked cell believes that the reason for them to stay isolated no longer exists, but the prison believes that they should continue to stay in isolation. In this case, the prison must issue a new directive under which the individual is placed in an isolated locked cell under § 69

of the Imprisonment Act, and the prison must justify continued application of security measures in the changed situation (considering the absence of the prisoner's own wish to stay in an isolated cell).

It is also important that the prison should regularly verify continued existence of the factual circumstances necessitating the prisoner's stay in a locked cell. Under § 69(3) of the Imprisonment Act, application of additional security measures is terminated if circumstances for their application cease to exist. Thus, an administrative authority (in this case prison) must observe the investigative principle in ascertaining the facts. The latter is prescribed by § 6 of the Administrative Procedure Act as follows: during proceedings in a matter, an administrative authority is required to establish the facts relevant to the matter and, if necessary, collect evidence on its own initiative for such purpose. Hence, an administrative authority is required to actively investigate the matter and collect additional evidence.[66]

The petitioner's application to the director of Viljandi Prison shows that the individual repeatedly changed his wish to stay in an isolated locked cell. In his application of 25 May 2007, the petitioner found that his isolation was unnecessary and should be terminated. He also wished to be transferred to Tartu Prison. The Chancellor had no information concerning the reply to this application, as the director of the prison did not include it with the materials sent to the Chancellor. Thus, the Chancellor was unable to express a clear view whether the petitioner's application had been reviewed in accordance with the investigative principle and requirements of § 65(3) of the Administrative Procedure Act. However, less than a month after his request, the petitioner was transferred to Tartu Prison to serve the remainder of his sentence, i.e. in principle his request had been granted.

In his application of 02 April 2007, the petitioner had expressed a wish to be transferred to Tartu Prison. At the same time, he expressed concern in respect of a potential threat to his security in the accommodation block of the prison.

To verify the circumstances described in the applications, the prison should have observed the investigative principle. The prison director's reply to one of the petitioner's applications available to the Chancellor does not show that the prison acted pursuant to the requirements of § 65(3), § 68(1), and § 44(1) clause 1 of the Administrative Procedure Code by using the investigative principle in conducting administrative proceedings.

(5) The Chancellor of Justice concluded that Viljandi Prison had violated the principle of good administration by failing to apply the investigative principle and failing to include a reference for challenge in its administrative act. On that basis, the Chancellor proposed to Viljandi Prison as follows:

1. Place prisoners in isolated locked cells only if the circumstances described in § 69(1) of the Imprisonment Act exist, and include in the relevant directive a correct legal basis and all facts on which the decision is based.
2. If an individual who is staying in an isolated locked cell at their own request applies to return to the accommodation block, the application should be reviewed in accordance with the requirements of § 65(3), § 68(1), and § 44 of the Administrative Procedure Act. However, if the need to keep the prisoner isolated continues to exist, a new directive under § 69 of the Imprisonment Act needs to be issued.
3. Comply with the requirement of § 57(1) of the Administrative Procedure Code and include a reference for challenge in all administrative acts. Also include a reference for challenge in alleviating acts which nevertheless restrict an individual's rights, and in administrative acts which only partly grant an individual's request.

In his reply to the proposals, the director of Viljandi Prison explained that the Chancellor's recommendations had been forwarded to the prison security officer and duty officers in the imprisonment department, i.e. to persons whose duties include deciding the necessity of applying additional security measures as well as drawing up draft administrative acts and performing administrative actions.

The director of Viljandi Prison also explained that, in order to ensure compliance with the principles of the Administrative Procedure Act and the principle of good administration, an information day on issues of administrative procedure would be organised for officers of Viljandi Prison on 23 January 2008.

9. Character reference of a prisoner for the purposes of application for pardon

Case No. 7-4/070989

(1) The Chancellor of Justice was contacted by a prisoner complaining that his character reference given by Tartu Prison to the Office of the President of the Republic had not conformed to reality.

The petitioner, who was serving a sentence in Tartu Prison, applied for a pardon to the President of the Republic. On 07 May 2007, the director of Tartu Prison drew up a character reference in respect of the petitioner for the Office of the President. In the reference, the director noted that during the time spent in Tartu Prison the prisoner had behaved properly, no conflicts in communication had occurred with prison officers or other prisoners. The prisoner's contact

66 For the investigative principle, see e.g. Supreme Court Administrative Law Chamber judgment of 10 May 1999, No. 3-3-1-19-99.

with parents was said to be minimum, no visits had taken place in prison. The prisoner had a friendly and supportive relationship with his spouse. The spouse together with children had regularly been to the prison for long-term visits. According to the character reference, the main reason why the prisoner wished to be released before the end of his sentence was that his family had run into a difficult economic situation during his stay in prison.

The director of the prison added the following sentence to the character reference: "The prisoner is eligible for release on parole and the reasons given in his application for pardon can be partly resolved in the framework of the state social welfare system. According to the assessment of Tartu Prison, no circumstances relating to the prisoner's personality, life, or conviction and sentencing would justify supporting the application for pardon. Tartu Prison does not support the prisoner's application for pardon."

The President of the Republic did not grant the application for pardon.

The petitioner through his representative contacted the Chancellor of Justice. In the opinion of the petitioner, the President had denied his application because the character reference had contained a subjective assessment by the director concerning the need to grant his application for pardon.

The Chancellor of Justice submitted a request for information to the director of Tartu Prison and asked him to forward all the documents relating to processing the petitioner's application for pardon.

(3) The main issue concerning the petition was whether the materials submitted by Tartu Prison to the Office of the President objectively reflected the prisoner's behaviour during his imprisonment.

(4) Under § 78 clause 19 of the Constitution, the President of the Republic releases or grants commutation to convicts at their request by way of pardon.

A pardon is a one-off individual act of mercy granted by the state in exceptional circumstances. Traditionally, this is a privilege reserved to a sovereign (head of state). In the classical historical meaning, a pardon is granted to individuals who have committed a criminal offence and have been convicted by a court. A pardon relieves an offender either fully or partly of the consequences of committing a crime. At the same time, a pardon does not question the legality and justifiability of the court judgment and does not have an effect on other persons who have committed a similar act. Pardon, unlike amnesty, presumes submitting an individual request.[67]

Under § 14 of the Constitution, the guarantee of rights and freedoms is the duty of all state institutions. This principle also applies to pardon. A convict's subjective right to apply for a pardon emanates from § 78 clause 19 of the Constitution. It is important to keep in mind that prisoners have a subjective right to apply for pardon, but they do not have an objective right to be released from serving a sentence by way of pardon.

It arises from the principles of separation of powers, a democracy governed by the rule of law, and § 65 clause 16 of the Constitution that the branches of state authority and constitutional institutions must be autonomous in exercising the competence explicitly granted to them by the Constitution.[68] Therefore, neither the Chancellor of Justice nor anyone else may exercise supervision over the President's decision either to grant or not to grant pardons as this decision is within the President's exclusive competence. The President has an extensive right of discretion in this issue.

Despite the fact that a pardon is a one-off individual act of mercy by the President, a fair procedure must precede a decision concerning a pardon. On that basis, the Chancellor may verify that procedural rules for pardon were complied with and the procedure conformed to the principles of good administration.

The procedure for pardon is regulated in the rules of procedure of the committee for review of applications for pardon, approved by the President of the Republic Directive No. 13 of 31 January 2007.[69] Clause 5 of the rules of procedure of the committee for review of applications for pardon establishes that the following documents are enclosed with an application for pardon submitted to the committee: a certified copy of the court judgment (in case of aggregate punishment, copies of all the individual judgments) with a notice of entry into force of the judgment; information characterising the convict; documents proving the facts provided in the application for pardon or facts which have relevance in reviewing the application.

Under clause 7 of the rules of procedure, in shaping its position the committee takes into consideration the convict's earlier punishment record, the severity of the crime committed, the circumstances of its commission, the period of sentence already served, the health of the convict, and other factors, as well as whether the convict has understood their guilt and regrets the crime committed.

The Supreme Court has expressed the view that pardon, in terms of constitutional law, is on the one hand an ad-

67 Supreme Court Constitutional Review Chamber judgment of 14 April 1998, No. 3-4-1-3-98, par. 1.
68 *Ibid.* point IV.
69 Available online at http:// www.president.ee/et/ametitegevus/k2skkirjad.php?gid=88329.

ministrative decision and, on the other, a procedure involving multiple phases.[70] It includes drawing up and filing an application for pardon, forwarding it, preparing the review, decision on pardon, notifying and implementing the decision. The procedure involves different agencies and officials, including those in respect of whom the President lacks norm-making competence (e.g. the prison administration). This leads to the conclusion that although the President's procedure for pardon is not an administrative procedure in its classic sense, parallels may be drawn with the activities of executive power in administrative law relationships. Specific procedural rules and general principles of law are observed in administrative procedure. The rules and principles of fair procedure in administrative law relationships are reflected through principles of good administration. As a rule, such principles can also be applied in pardon proceedings. Thus, technically, the Chancellor may assess whether the proceedings of an application for pardon conformed to the principles of good administration and guarantee of fundamental rights.

The Supreme Court has found that as a rule the following principles are generally recognised as principles of administrative law in European legal space: legal certainty, legitimate expectation, proportionality, non-discrimination, the right to be heard in administrative procedure, the right to procedure within a reasonable time, productiveness, and efficiency.[71] Several principles of administrative law which form a core of good administration have found recognition as constitutional principles. Based on generally recognised principles in European legal space, the Supreme Court has concluded that in Estonia the right of individuals to good administration as a fundamental right emanates from § 14 of the Constitution.

Section 14 of the Constitution establishes that the guarantee of rights and freedoms is the duty of the legislative, executive, and judicial powers, and of local authorities. The purpose of this section is to establish a general fundamental right to organisation and procedure,[72] and the right to good administration definitely forms part of this. The right to organisation and procedure expresses the idea that proper, correct, and fair procedure (formal lawfulness) contributes to reaching a substantively correct result (substantive lawfulness).

One of the preconditions of fair proceedings is supplying adequate information to the President. All the documents, including a character reference of a convict, must fairly reflect the convict's behaviour in prison and their attitude to the purpose of imprisonment. Any claim made in a character reference must be justified based on specific facts. Providing a character reference also presumes a certain amount of subjective assessment, which, nevertheless, must be justified and based on objective facts. In some cases, it is not possible to provide documentary evidence of all the claims used in characterising a convict (e.g. their threat to the security of the prison or to other prisoners).

Having analysed the documents relating to the behaviour of the prisoner which the Chancellor received in response to the request for information and comparing them with the character reference provided by Tartu Prison, the Chancellor of Justice found that in principle the character reference accurately reflected the prisoner's behaviour. According to the Chancellor's assessment, the character reference provided by the director of Tartu Prison was quite favourable towards the prisoner, except the director's opinion concerning necessity to grant the application for pardon.

No legal act places an obligation on the prison director to assess whether a prisoner's application for pardon should be granted or not. If the President has asked for such an opinion or if providing it has become customary practice, it should also be established, for example, in the rules of procedure of the committee for review of applications for pardon. A director's opinion with regard to granting an application for pardon, which he is not explicitly required to give and which falls beyond the framework of an objective assessment of a prisoner's behaviour, may seem to a prisoner as the only reason why the President denied their application for pardon. This, in turn, may negatively affect the relationship between the prisoner and prison officers. The procedure must not only be fair but also seem to be fair.

In providing a character reference in pardon proceedings, the prison must only proceed from objective circumstances relating to the prisoner's behaviour which are necessary to provide the President with as much adequate information as possible and in order to understand to what extent the prisoner has understood the aims of the punishment or imprisonment (i.e. whether the prisoner's behaviour in prison indicates their potential for future re-socialisation). One factor endangering the above-described fair procedure might be an assessment given by the prison which does not meet objective circumstances or is not related to an application for pardon.

The character reference of the prisoner shows that the prison did not support granting a pardon to him, although his behaviour had been very proper during his imprisonment. As one of the reasons for not supporting the appeal for pardon,[73] the prison indicated the fact that the prisoner was entitled to release on parole in the future (on 02 April 2010, to electronic surveillance as of 04 April 2009). The Chancellor was of the opinion that the prison's reference to the individual's possible release on parole as a serious argument for not granting the application for pardon was misleading and in the specific case essentially inaccurate. All convicts are eligible for release on parole. This is an issue of judicial proceedings and, as a rule, for example in the case of long-term imprisonment, it should not be considered as

70 Supreme Court Constitutional Review Chamber judgment of 14 April 1998, NO. 3-4-1-3-98.

71 Supreme Court Constitutional Review Chamber judgment of 17 February 2003, No. 3-4-1-1-03.

72 E.g. Supreme Court *en banc* judgment of 28 October 2002, No. 3-4-1-5-02, par. 30; Supreme Court Constitutional Review Chamber judgment of 17 February 2003, No. 3-4-1-1-03, par. 12; 14 April 2003, No. 3-4-1-4-03, par. 16.

73 In the character reference for the prisoner on 07 May 2007, the director of Tartu Prison had noted that the individual would be eligible for release on parole, and the reasons cited in his application for pardon could be resolved through the social welfare system.

relevant in granting or denying an application for pardon. Eligibility for release on parole should not be a more serious argument in deciding pardon than the prisoner's excellent behaviour, the type of crime committed, relations with the outside world, the probability of re-socialisation, understanding the purpose of imprisonment, etc. The prison is required to provide the President with material characterising a prisoner. The fact of an individual's eligibility for parole should not be considered as information characterising a prisoner in the context of processing an application for pardon.

Neither the committee on review of applications for pardon nor the President are required to observe the assessment by the prison director, but they must develop their own opinion about the need for pardon. However, in line with the principle of good administration and the obligation of fair procedure, the Chancellor found that the prison could consider abandoning the practice of assessing applications for pardon filed by prisoners or to start proceeding from the above principles when providing its recommendation.

(5) The Chancellor made a proposal to Tartu Prison to cover only objective circumstances in character references of individuals and, if necessary, to include subjective assessments based on objective facts concerning an individual's behaviour in prison. The Chancellor also recommended Tartu Prison to abandon covering circumstances not related to this purpose in providing character references.

In his reply to the Chancellor's proposal, the director of Tartu Prison noted that based on the arguments in the Chancellor's proposal Tartu Prison will no longer provide an assessment of whether to grant or deny a prisoner's application for pardon.

The director of Tartu Prison noted that in providing character references in the future, Tartu Prison would proceed from the objective characteristics of a prisoner, such as previous criminal record, behaviour in prison (discipline and employment), existence of social network, and, if necessary, from a justified assessment concerning a prisoner's ability to lead a law-abiding life in case of release from imprisonment.

10. Calling collect in Tallinn Prison

Case No. 7-4/070094

(1) On the basis of a petition from a remand prisoner, the Chancellor of Justice carried out supervision over the procedure for providing an intermediated telephone call service in Tallinn Prison.

(2) Tallinn Prison implemented a telephone calling system where only one company's phone card could be used for outgoing calls and it was no longer possible to call collect from the prison.

The Chancellor of Justice was contacted by a remand prisoner complaining that Tallinn Prison did not enable prisoners to call collect and only a *Turbo* phone card could be used to pay for calls.

In order to clarify the situation, the Chancellor sent a request for information to the director of Tallinn Prison and to the company *OÜ Top Connect* which provided the phone service for Tallinn Prison.

In his reply, the director of Tallinn Prison admitted that both remand prisoners and sentenced prisoners could only use a *Turbo* phone card for making calls in Tallinn Prison. The director explained that the limitation was the only possible solution considering the currently available technical facilities. In the procurement procedure organised by the prison, *OÜ Top Connect* made the only bid for providing communication services in the prison. As it is not possible to use phone cards other than *Turbo* in payphones installed by *OÜ Top Connect*, the prison does not consider it necessary to sell other companies' phone cards in the prison shop. Due to distinct technical features of the phones and the conditions for providing the service, it is also impossible to call collect. Thus, for technical reasons, it is not possible to call collect or use other phone cards besides *Turbo* in Tallinn Prison. Moreover, the prison director added that under current legislation remand prisoners were required themselves to pay for their calls. Such a legal restriction precludes the possibility of calling collect even if it was technically possible.

OÜ Top Connect explained that on the Estonian telecommunications market the companies *Elion* and *EMT* offer a possibility to call collect. The telephone service provided in Tallinn Prison does not enable prisoners to call collect, because the terms of reference for the pilot project required that prisoners (including remand prisoners) should not be able to call collect.

Technically, providing a collect calling service is not impossible. Two options for this are available. The first would be to use the existing *Elion* service 16116 via the *Top Connect* phone network which can be opened for subscribers in Tallinn Prison. Implementing this alternative would entail minimum additional costs and could be arranged within a few days. When calling to a fixed-line phone or a public payphone, the person receiving the call would need to pay 2.20 kroons a minute, and 3.30 kroons a minute for calls made to a mobile phone. The other option would be

to extend the range of *OÜ Top Connect* services to enable calling collect to phone numbers in the networks of other operators. Arranging such a possibility would require more time because a separate contract with each operator would need to be concluded and after that the service would need to be activated technically. The price of calls per minute in the case of the second option would probably not differ significantly from prices applicable under the first option.

(3) The main issue in the case was whether Tallinn Prison was acting lawfully when denying the possibility of calling collect.

(4) Remand prisoners in Tallinn Prison can pay for their phone calls only by using a *Turbo* phone card, and calling collect is prohibited. As a basis for prohibition, the prison referred to § 96(2) of the Imprisonment Act, under which costs related to correspondence and use of telephone are borne by remand prisoners themselves.

A similar provision in § 28(2) of the Imprisonment Act stipulates that costs related to a sentenced prisoner's correspondence and use of telephone are borne by the individual prisoner. The Supreme Court Administrative Law Chamber concluded that this principle means that sentenced prisoners had no subjective right to correspondence or making phone calls at the expense of the prison. It is wrong to link § 28(2) of the Imprisonment Act to the provisions regulating the use of a prisoner's personal account. It is also necessary to take into account the objective under § 23 of the Imprisonment Act, which requires facilitating prisoners' contact with the outside world and maintaining their social links in order to contribute to their process of re-socialisation after release. The court also found that prohibiting collect calls and use of rechargeable phone cards would unreasonably restrict the possibility of communicating with the outside world (including communication with defence counsel) for those prisoners who do not have any money in their personal account. On that basis, the Supreme Court came to the conclusion that neither § 28(2) nor § 96(2) of the Imprisonment Act prohibit sentenced or remand prisoners from calling collect or using a rechargeable phone card.[74]

Under § 90(1) of the Imprisonment Act, the provisions of Chapter 2 of the Imprisonment Act together with the relevant specifications provided for in this Chapter apply to staying in custody pending trial. No special regulation exists concerning purchases made by remand prisoners. Thus, the provisions regulating purchases by sentenced prisoners also apply to remand prisoners.

Further, the Chancellor verified whether § 96(2) of the Imprisonment Act enables prisons to restrict the right of individuals in custody to buy a phone card of their choice.

Sentenced and remand prisoners may, through the mediation of the prison, buy foodstuffs, toiletries, and other items the holding of which is permitted in prison, out of the funds deposited in their personal accounts and under the procedure established in the internal rules of the prison (§ 48(1) Imprisonment Act). The money in the personal prison account is used to pay for purchases (internal prison rules § 74(2)). Thus, remand prisoners can buy phone cards through the mediation of the prison from the money available in their personal prison account.[75]

Under § 96(1) of the Imprisonment Act, remand prisoners have the right of correspondence and use of telephone (except mobile phone) if relevant technical conditions exist. Thus, the right to use the telephone is subject to a prison's technical conditions. Existing technical possibilities may be taken into account in restricting the choice of phone cards sold via the prison, i.e. remand prisoners should be able to purchase phone cards which can in practice be used in the prison.

Based on the above-mentioned judgment of the Supreme Court, remand prisoners are not prohibited from using rechargeable phone cards which can also be charged by other persons who know the card's password besides the owner of the card. The restriction imposed by the prison on the operator with regard to the use of such phone cards does not conform to the intended meaning of § 96(1) of the Imprisonment Act.

Thus, Tallinn Prison must ensure remand prisoners the opportunity to use rechargeable phone cards if such cards are technically compatible with the existing system. Prisoners should also be able to purchase those cards through the mediation of the prison.

In choosing a telephone service provider, the prison should prefer a service provider whose service complies with the requirements of the Imprisonment Act (including the option of calling collect). In choosing a service provider, the prison may not cause a situation where the practical options of prisoners for communicating with their families and close friends are restricted to a greater extent than permitted by the law.

(5) The Chancellor of Justice proposed to Tallinn Prison as follows:

1. to allow remand prisoners to use existing possibilities to call collect;
2. to allow remand prisoners, through the mediation of the prison, to use and buy rechargeable phone cards which can be used in the existing telephone system.

74 Supreme Court Administrative Law Chamber judgment of 01 March 2006, No. 3-3-1-103-06.

75 Phone cards may not be sent to remand prisoners by parcel (see § 74^1 internal prison rules).

Tallinn Prison agreed with the Chancellor's opinion and informed the Chancellor that as of 04 April 2007 it was possible to use the collect call service of *AS Elion Ettevõtted* company from all *OÜ Top Connect* payphones installed in the grounds of Tallinn Prison.

After the Chancellor had made these proposals to Tallinn Prison, he was contacted by another prisoner from Tartu Prison complaining that the prison did not enable prisoners to call collect or use rechargeable phone cards. Together with a request for information to Tartu Prison, the Chancellor also forwarded a copy of the letter sent previously to Tallinn Prison. As a result, Tartu Prison also informed the Chancellor that they had changed their practice and ensured all the legally required options for sentenced and remand prisoners to pay for their phone calls.

11. Personal data on prisoner's name tag in Ämari Prison

Case No. 7-4/070500

(1) The Chancellor of Justice launched proceedings on the basis of a petition where a prisoner was not satisfied that the beginning and end of his term of imprisonment was marked on the name tag that he was required to wear in Ämari Prison.

(2) Prisoners in Ämari Prison were required to wear name tags which included their first name and surname, date of birth, sentencing data, beginning and end of their imprisonment, number of the accommodation block, and photograph.

The petitioner contacted the Chancellor of Justice complaining that the information on the beginning and end of his term of imprisonment could endanger his security.

To specify the circumstances, the Chancellor sent a request for information to the director of Ämari Prison, asking for the following clarifications:

1. which legal act regulates the duty of sentenced prisoners to wear a name tag, the requirements for information on the name tag, and the kind of information that must be entered on the name tag;
2. what is the purpose of the data on the name tag;
3. in the director's opinion, would it be necessary to have all the above-mentioned types of data on the name tag in order to achieve the purpose.

In its reply, Ämari Prison explained that the duty of prisoners to wear a name tag on their clothes is established in § 46(1) of the Imprisonment Act. Internal prison rules specify that prisoners must wear a name tag issued by the prison, and the information on the name tag must be clearly legible and visible. No further specific requirements exist for name tags (e.g. measurements, material, fastening, name tag data), and no provisions regulate the type of information entered on name tags. Therefore, the prison itself had designed the name tags. Ämari Prison explained that the main purpose of the duty to wear the name tag is to be able to identify prisoners. With the help of the data on the name tag, prison officers are able quickly to establish the identity of a prisoner. This is necessary in view of the functions and purposes of prisons and to ensure security and supervision in prisons. In the opinion of Ämari Prison, it is not sufficient to have only the prisoner's first name and surname on the name tag, because in practice cases have arisen where several individuals with the same name are serving a sentence in the same prison. Therefore, it is necessary that name tags include a prisoner's photo and year of birth. Ämari Prison has more than 500 prisoners, so that it is not conceivable that prison officers know all of them by sight. The data on criminal offences committed by a prisoner (i.e. the relevant sections of Acts, term of imprisonment, beginning and end of imprisonment) provide information about the severity of crimes committed by a prisoner. This information enables assessment of a prisoner's potential behaviour and the risk that they may pose. The name tag also indicates whether a prisoner is new in the prison or has been there for a longer time. This information is important when a prisoner infringes prison rules. It is then possible to see whether they should be familiar with the rules or may have infringed a rule out of ignorance, having only recently arrived in the prison. Data on the date of release help prison officers to assess the reasons for prisoners' behaviour and their level of threat, because when a date of release is approaching a prisoner's behaviour often becomes arrogant, non law-abiding, and spiteful with regard to security and supervision rules in prison, the instructions of prison officers, or other legal restrictions. This means it is significantly more difficult and risky for the prison to exercise its functions of ensuring security and supervision. The number of a prisoner's accommodation block on the name tag provides information about their rights and restrictions related to movement and communication in the prison, which is necessary for exercising supervision. Ämari Prison noted that the meaning and importance of the name tag had somewhat expanded as compared to its initial purpose of identifying the person.

The prison admitted that not all data entered on a prisoner's name tag were strictly necessary in view of the purpose of processing personal data. As of 20 May 2007, the data entered on the name tag were changed. In the future, data would be limited to the following: photograph, first name and surname, year of birth, and number of the accommodation block. In the opinion of the prison, these data are indispensable for the prison to ensure performance of its functions.

(3) The main issue in the case was whether the practice used in Ämari Prison to include on prisoners' name tags the data on their sentence and the beginning and end of imprisonment was lawful.

(4) The Personal Data Protection Act, which regulates the processing of personal data, imposes on administrative authorities the duty to process personal data only in conformity with the intended purpose of processing, and to process data as little as possible (§ 6 clause 1-4 and § 18 cause 1 Personal Data Protection Act). This means that a prisoner's name tag should only include those data which are absolutely necessary with regard to the purpose of processing.

Ämari Prison in its reply thoroughly analysed the need for the categories of data entered on the name tag and admitted that not all data were strictly necessary. Since 20 May 2007, the data entered on the prisoners' name tags were changed, and are now limited to the prisoner's photograph, first name and surname, year of birth, and the number of the accommodation block.

The Chancellor agreed that the data planned to be included on the name tag were indispensable for ensuring supervision and security of prisoners. Disclosure of sentencing data through the name tag may endanger a prisoner, and therefore the Chancellor consented to the prison's decision not to enter those data on the name tag in the future.

Ämari Prison in its reply explained that in order to perform their duties prison officers needed information on the crimes committed by prisoners and the beginning and end of serving their sentence, but it was not necessary to include those data on the name tag. By knowing a prisoner's name, a prison officer could ascertain those data when necessary without making them available to other prisoners.

(5) The Chancellor of Justice closed the proceedings of the case, as during the proceedings Ämari Prison had found a proportionate solution for entering personal data of prisoners on name tags.

12. Long-term visit

Case No. 7-4/070071

(1) The Chancellor of Justice was contacted by a prisoner who complained that he had not been given permission for a long-term visit with his legal spouse.

(2) A prisoner in Murru Prison explained in his petition that the director of the prison refused to give him permission for a long-term visit because his spouse (visitor) was a prisoner. The petitioner noted that in May 2006 he and a female prisoner in Harku Prison had been allowed to marry and had been given permission for a long-term visit lasting two days. The new request for a long-term visit was refused.

To verify the petition, the Chancellor sent a request for information to the director of Murru Prison.

Documents enclosed with the reply demonstrate that on 04 August 2006 the petitioner had contacted the Ministry of Justice with a request for information on the legal provisions regulating long-term visits between two prisoners. In its reply of 30 August 2006, the Ministry of Justice explained that the Imprisonment Act did not include any exceptions for arranging long-term visits between individuals who are simultaneously serving a sentence. Individuals who are simultaneously staying in prison may apply for a long-term visit in accordance with the general procedure, i.e. they may first apply for short-term prison leave for the purpose of visiting a close relative located in another prison, and then apply for a long-term visit.

The enclosed documents also show that on 10 October 2006 the prisoner had contacted Murru Prison administration and asked for a reply to his application for a long-term visit. On 17 October 2006, Murru Prison replied that long-term visits between two prisoners could not be allowed as it would infringe the principle of segregation under § 12 of the Imprisonment Act. In his reply to the request for information, the director of the prison explained that due to the absence of special regulative provisions and the need to comply with the requirement of segregation, it was not possible to allow long-term visits between two persons who were simultaneously staying in prison.

(3) In this case, it was necessary to answer the question whether the prison's refusal to allow long-term visits between prisoners was lawful.

(4) Under § 25(1) of the Imprisonment Act, prisoners may receive long-term visits from their spouses. Under § 45 of the Minister of Justice Regulation No. 72 of 30 November 2000 "Internal prison rules", prisoners must be allowed at least one long-term visit in six months. A prisoner must apply for a long-term visit at least one month before the planned time of the visit (§ 42(1) and (2) internal prison rules). Permission for a long-term visit may be refused if the prisoner has already had a long-term visit during the previous six months and no vacancy is available in long-term visiting rooms, or if suspicions exist with regard to the reputation of the visitor, if the visit may endanger prison security, or may endanger the health of the prisoner or visitor (§ 45^1(1) internal prison rules).

In view of these rules, it must be concluded that the legislation does not provide a clear answer to the question whether long-term visits between two prisoners should be allowed or not. In the opinion of the Chancellor of Justice, the issue raised in the petition allows different interpretations of legal norms, while implementing practice varies. On the basis of the same norm, a long-term visit between two prisoners was allowed once and on another occasion was refused. In this case, it is also essential to take into account the requirement of the inviolability of the family under § 26 of the Constitution. It must be admitted that, due to the unique character of imprisonment, establishing restrictions on the enjoyment of fundamental rights by prisoners is justified, but restrictions may not be excessive or arbitrary. It is questionable whether the state has the right to evaluate marriage between prisoners and to stipulate that the state would allow enjoyment of family life only between a prisoner and a spouse who is at liberty.

Under § 54 of the Administrative Procedure Act, an administrative act is lawful if issued by a competent administrative authority under legislation in force at the moment of issue, is in accordance with legislation in force, is proportional, does not abuse discretion, and complies with requirements for formal validity. Naturally, an administrative act must also conform to the Constitution.

The prison director refused to allow a long-term visit to the prisoner, justifying this by the requirement of segregation under § 12 of the Imprisonment Act. The Chancellor expressed the opinion that such reasoning is insufficient with regard to refusal to allow a long-term visit. The principle of segregation includes requirements which need to be taken into account when placing or replacing prisoners. Compliance with the principle of segregation should ensure security of prisoners and of the prison, i.e. the restrictions have a defined purpose. Thus, the prison director did not apply the norm in accordance with its purpose.

Under § 1^1(1) of the Imprisonment Act, the provisions of the Administrative Procedure Act apply to administrative proceedings prescribed in the Imprisonment Act. The director's refusal to grant the prisoner's request is an administrative act within the meaning of § 51(1) of the Administrative Procedure Act. Under § 56(1) of the Act, written reasoning must be provided for refusal to issue an alleviating administrative act. The reasoning must also set out the legal basis for issuing the act (§ 56(2) Administrative Procedure Act). Providing reasoning for the issue of administrative acts is important in order to ensure that the addressees of an act understand whether their rights were restricted lawfully. This means that individuals should be able to understand why and on what legal basis the decision was made, and why and on what legal basis their rights were restricted. Reasoning provided in an administrative act must also enable individuals to challenge the act with the aim of protecting their rights. Without knowing the reasons for restricting rights, it is difficult to provide arguments when challenging an act. Reasoning of an administrative act also enables supervisory authorities to decide whether the act was lawful. An act without reasoning is unlawful merely because it is impossible to verify why and on what legal basis it was issued.[76]

Reasoning must point out with sufficient clarity the facts relevant to the specific case. The Supreme Court has noted that the more complicated the interpretation of the law and ascertaining of facts, and the greater the discretion of an administrative body, and the more serious the interests that clash in making the decision, the greater the need to have in writing the reasons for issuing the act. The factual justification of an act must include the circumstances based on which the underlying legal norm is applied. It is important to link the factual and legal reasoning. This should convince the addressee of an act and anybody else who reads it that the facts of the case, in combination with the applicable legislation, do indeed lead to this kind of administrative decision. Reasoning of an administrative act also needs to convince the court that an administrative body has taken into account all the important circumstances and interests in exercising its discretion, and that weighing facts and interests was rational.[77] Thus, reasoning of an act must contain both the legal basis for issuing the act and a description of the facts. Facts must be proved or provable in potential subsequent administrative court procedure, and not be assumptive or declarative.[78]

Under § 45^1(1) of the internal prison rules, a prison director may refuse to allow a long-term visit only if the prisoner has already had a long-term visit during the previous six months and no vacancy is available in long-term visiting rooms, or if suspicions exist with regard to the reputation of the visitor, if the visit may endanger prison security, or may endanger the health of the prisoner or visitor.

Based on the materials of the case, it can be seen that it was not sufficient for the prison director only to refer to § 12(1) clause 1 of the Imprisonment Act as a basis for refusal. In addition to formal legality, a discretionary decision of an administrative authority must also be legal in substance. To assess the lawfulness of such a decision, it is necessary to consider the meaning of legal norms and the values and requirements of the Constitution. The Constitution establishes the requirement of respect for family life as an important value, presenting it as a norm which may only be restricted by law and on the bases listed in the Constitution itself. In the opinion of the Chancellor, the petitioned administrative act is not in conformity with the currently effective law.

In his reply to the request for information, the prison director also mentioned that neither the Imprisonment Act nor

76 See Supreme Court Administrative Law Chamber judgment of 22 May 2000, No. 3-3-1-14-00, par. 5; 28 October 2003, nr 3-3-1-66-03, p 18.
77 Supreme Court Administrative Law Chamber judgments of 14 October 2003, No. 3-3-1-54-03, par. 34; 28 October 2003, No. 3-3-1-66-03, par. 19.
78 Supreme Court Administrative Law Chamber judgments of 14 October 2003, No. 3-3-1-54-03, par. 32; 10 October 2002, No. 3-3-1-42-02, par. 16; 18 October 1999, No. 3-3-1-32-99, par. 2.

other legislation regulating implementation of imprisonment explicitly enable long-term visits between two prisoners. According to the director, the primary objective of long-term visits is to help maintain a prisoner's relationships with persons at liberty.

The Chancellor concurs with this opinion in general, but finds that it does not necessarily rule out the possibility of long-term visits with a spouse staying in another custodial institution.

(5) The Chancellor proposed to the director of Murru Prison to reconsider the prisoner's application for a long-term visit and make a new decision.

The director of Murru Prison did not agree with the Chancellor's opinion. The director found no reason to reconsider the application, and found that it would be sufficient to supplement the reasoning of the contested decision.

The Chancellor intends to send a memorandum to the Ministry of Justice with regard to the issue of long-term visits of prisoners' spouses, asking the Ministry to revise the relevant provisions in the Imprisonment Act and establish explicitly whether two prisoners may have long-term-visits with each other or not.

13. Transport of prisoners who have fallen ill

Case No. 7-7/071341

(1) The Chancellor of Justice received a petition from relatives of a prisoner who had died in Tallinn prison, complaining that the prison had not provided the prisoner with necessary medical treatment.

(2) A close relative of the petitioners was taken into custody as a suspect on 14 June 2007. According to national state register of sentenced and remand prisoners, and persons serving a misdemeanour detention, the prisoner was held in Kohtla-Järve police detention centre after having been taken into custody, and then in Tartu Prison medical department. From Tartu Prison, the prisoner was escorted to Tallinn Prison hospital where he died on 27 June 2007 from generalised liver lymphoma and bilateral pneumonia.

The petitioners were of the opinion that their relative had been seriously ill and the custodial institutions had not sufficiently taken into account his health condition.

The Chancellor forwarded the petition together with the materials concerning all the other cases of death in prisons in 2007[79] to the Health Care Board for their opinion.

Prompted by the Chancellor's request, the expert committee on the quality of health care under the Health Care Board convened on 29 November 2007. A representative of the Chancellor of Justice attended the meeting.

The Chancellor forwarded the minutes of the expert committee's meeting of 29 November 2007 to Tartu Prison. In his letter, the Chancellor asked to be informed how Tartu Prison intended to avoid such cases in the future and ensure that transport of sick prisoners takes place in conformity with requirements, i.e. in a prison vehicle with medical equipment.

(3) In this case, the issue was whether transporting a seriously ill prisoner in an ordinary prison vehicle is lawful.

(4) The reason why the Chancellor contacted the Health Care Board was the Chancellor's own limited possibility for dealing with substantively medical issues. The Chancellor cannot independently reach an opinion on the quality of health services provided to prisoners. Under § 107(3) of the Imprisonment Act, supervision over compliance with the requirements for health care providers in prisons is exercised by duly authorised officials of the Health Care Board.

The expert committee on the quality of health care at its meeting of 29 November 2007 reached the conclusion that escorting the prisoner from Tartu Prison to Tallinn Prison hospital in an ordinary prison bus (and not in a specially equipped hospital vehicle with an attendant) was incorrect. The health of a patient, who was in the final stage of a serious chronic disease and generally feeble, deteriorated during the journey and the individual reached Tallinn Prison hospital in an extremely serious condition. However, the expert committee admitted that in the present case the death of the prisoner would have been inevitable even if he had been transported in a proper hospital vehicle. The committee did not ascertain any violations in respect of requirements for provision of health services or quality of medical treatment. The committee found that the treatment provided to the prisoner had been adequate and proper.

Based on the assessment of the expert committee on the quality of health care, the Chancellor of Justice expressed the opinion that improper transport of sick prisoners between Estonian prisons may become a serious problem in the future. In order to prevent potential serious consequences as a result of improper transport, the Chancellor decided to

79 A total of seven cases in 2007.

forward to Tartu Prison a copy of the minutes of the meeting of the expert committee held on 29 November 2007. In his letter, the Chancellor asked to be informed how Tartu Prison intended to avoid such cases in the future and ensure that transport of sick prisoners takes place in conformity with the requirements, i.e. in a prison vehicle with medical equipment.

(5) In its reply, Tartu Prison explained that since 2007 the medical department of Tallinn Prison has a special vehicle for transporting sick prisoners. If necessary, other prisons can use the vehicle for transporting their sick prisoners. Tartu Prison also assured the Chancellor that it had taken into account the considerations contained in the minutes of the meeting of the expert committee on the quality of health care and would use the Tallinn Prison special vehicle for transporting sick prisoners in the future.

In view of the above, the Chancellor decided to close the proceedings.

14. Health services in Tartu Prison

Case No. 7-4/061664

(1) The Chancellor of Justice was contacted by a prisoner from Tartu Prison, complaining that the prison did not enable him treatment corresponding to the condition of his health.

(2) The petitioner contacted the Chancellor of Justice on 12 December 2006. According to him, he had been diagnosed with two serious and incurable diseases when he had been at liberty. The prisoner claimed that after the start of serving the sentence his health had significantly deteriorated. According to the petitioner, the prison had not provided him with sufficient health services or taken into account the specific needs arising from his diseases when deciding his placement (e.g. daily access to hot water, which prisoners in ordinary cells do not have). The petitioner also enclosed with his petition various letters to the Ministry of Justice and the Health Care Board, and a copy of his medical file.

Considering the petitioner's possible serious health condition, the Chancellor decided to forward the petition to the Health Care Board, asking them to examine the situation and, if necessary, issue an instruction for compliance to Tartu Prison.

(3) In this case, the main issue was whether Tartu Prison was able to ensure necessary treatment to prisoners with specific medical needs.

(4) Health is an important value without which it is impossible to enjoy many other fundamental rights. Under § 28(1) of the Constitution, everyone has the right to protection of health. The right to protection of health is a social fundamental right. In ensuring social fundamental rights, the state is obliged to take active steps in the interests of individuals. Access to health services must be ensured on a level that enables individuals to enjoy a decent life in line with human dignity. The Supreme Court has emphasised that "[...] human dignity is a basis for all fundamental rights and the purpose of protection of fundamental rights and freedoms. Human dignity is an integral part of the essence of fundamental rights. Human dignity must be respected and protected."[80]

The right of prisoners to health services is guaranteed by the Imprisonment Act and legislation adopted on the basis of the Act. Health services to prisoners, necessary medicines and medical devices are provided free of charge for the individuals concerned. Prison doctors are required constantly to monitor the health of prisoners and, in case of problems, provide necessary medical assistance. Thus, on the one hand, prisoners are entitled to receive necessary services and medicines for protection of their health, and, on the other hand, the prison is obliged to guarantee the right of individuals to protection of health.

Under § 106 of the Imprisonment Act, a prison director directs the work of the prison and performs other duties assigned. Under §47(3), prisoners are ensured dietetic food as prescribed by a doctor. As far as possible, prisoners are permitted to observe the dietary habits of their religion.

Based on these provisions, custodial institutions are required to respect human dignity of prisoners and ensure medical treatment corresponding to the condition of their health.

(3) In cooperation with the Ministry of Justice and the Health Care Board, the Chancellor decided to convene a medical council to assess the petitioner's health and determine further need for treatment. In preparing for the medical council, the Chancellor met with representatives from the Ministry of Justice and the Health Care Board. Top medical specialists in the relevant fields from Tartu University Clinic and the Academy of Sciences were invited to participate in the medical council. In addition, a member of the Riigikogu expressed a wish to participate.

The medical council for assessing the health of the prisoner convened in the medical department of Tartu Prison on

80 Supreme Court Administrative Law Chamber judgment of 28 March 2006, No. 3-3-1-14-06, par. 11.

22 January 2007. The minutes of the meeting show that the petitioner has a permanent chronic disease which does not respond to treatment. The council found that in order to prevent deterioration of the petitioner's health, it was necessary to guarantee him special conditions: he needs to be administered a relevant drug on a daily basis, he needs daily access to hot water, and sporting opportunities.

The Chancellor asked Tartu Prison immediately to take measures to stop treatment which possibly degrades the petitioner's human dignity and to ensure medical treatment corresponding to the condition of his health, as well as general medical services corresponding to the instructions given by the medical council.

In his reply to the Chancellor, the director of Tartu Prison explained that the petitioner was ensured all necessary special conditions and immediate medical treatment to avoid deterioration of his health. To verify the activities of Tartu Prison, on 19 March 2007 the Chancellor conducted a written follow-up examination in respect of compliance with the instructions of the medical council as contained in the minutes. In his response to the follow-up examination, the director of Tartu Prison confirmed that all the special conditions and treatment prescribed by the medical council in its minutes had been ensured to the petitioner.

15. Inspection visit to Tallinn Prison

Case No. 7-7/071234

(1) Advisers to the Chancellor of Justice conducted an own-initiative inspection visit to Tallinn Prison on 10 August 2007.

Tallinn Prison is a custodial institution within the area of government of the Ministry of Justice for holding male and female remand prisoners and male sentenced prisoners. In August 2007, Tallinn Prison had 997 prisoners, of whom 628 were remand prisoners.

(2) Advisers to the Chancellor of Justice verified whether the conditions of detention in terms of cell temperature and air circulation conformed to the requirements established by law. The inspection visit was induced by hot weather at the time.

(3) During the inspection visit, advisers to the Chancellor inspected four cells on different floors of the remand prisoners' section and talked to prisoners.

According to the director of Tallinn Prison, the prison ventilation system was designed to guarantee room temperature and air circulation adequate to four persons in a cell.

It was found that all the inspected cells had been equipped with an extra ventilator and the prisoners explained that, if possible, prison officers opened food-serving hatches in the doors to improve ventilation. Nevertheless, while staying in the room the air temperature felt unacceptably high. Air circulation was also almost non-existent. An exception was one cell with only one prisoner. That cell had adequate temperature and sufficient ventilation.

Under § 45(1) of the Imprisonment Act, the cell of a prisoner must meet general requirements established for dwellings on the basis of the Building Act. Under § 3(7) of the Building Act, the insulation and the heating, cooling and ventilation installations of construction works must ensure that the amount of energy required by the construction works corresponds to the climatic conditions of their location and to the purpose of their use.

A lease contract has been concluded between the Ministry of Justice and the State Real Estate Company, under which the Company is required to maintain ventilation systems in Tallinn Prison. The head of the economic department of Tallinn Prison provided correspondence between Tallinn Prison and the State Real Estate Company,[81] according to which the prison had drawn the Company's attention to insufficient air circulation and high temperature in cells in summer.

(4) Following the inspection visit, the Chancellor made the following proposals and recommendations to Tallinn Prison:

- placement of prisoners in cells in the remand prisoners' section should take into account that the cells have been designed for four people, thus not to place more persons in a cell;
- if necessary, ask the Ministry of Justice to transfer prisoners from the remand section to Tartu Prison;
- if possible, equip cells with extra ventilators;
- in cooperation with the State Real Estate Company, find opportunities to renew the ventilation system in Tallinn Prison and bring it into line with practical needs.

In his reply to the Chancellor, the director of Tallinn Prison explained that upon taking the buildings of Tallinn

81 Letter from Tallinn Prison 20 April 2007 No. 4-4/9529 and letter from the State Real Estate Company 07 May 2007 No. 200103/209.

Prison into use the company *AS Variax* had tested the ventilation systems. *AS Variax* had assured the prison that the installation company had built the systems according to the design and using proper equipment and materials or their counterparts. According to information available to the prison director, test results had shown that air circulation prescribed by the design was guaranteed in rooms (with a variation of up to 20%). Despite this, according to the prison director, hot outside weather caused high temperature in cells.

The director affirmed that Tallinn Prison had taken steps to improve the situation. The prison contacted the State Real Estate Company, which did some repair and maintenance work on ventilation pipes, regulated systems, increased the speed of airflow, etc. As a possible additional solution, the plan was to modify the ventilation system in October 2007, so as to increase air flow by installing a more powerful motor. The prison for its part would try to reduce the number of prisoners in cells.

16. Inspection visit to Murru Prison

Case No. 7-7/070307

(1) The Chancellor of Justice organised a planned visit to Murru Prison on 16 April 2007. Murru Prison, located in Rummu town in Harju County, is a closed camp-type prison which also includes an open prison department. A maximum of 1500 prisoners may be placed inside the enclosed grounds of Murru Prison. Prisoners are divided between ten accommodation blocks. The eighth and ninth accommodation block includes admission departments, punishment cells, and isolated locked cells. In addition, the ninth accommodation block has separate cells for prisoners serving a life sentence. Thus, these quarters house prisoners whose right to move around in the prison grounds is more limited than normal.

(2) The Chancellor of Justice verified whether the eighth and ninth accommodation block at Murru Prison guaranteed fundamental rights and freedoms of prisoners.

(3.1) Inspection revealed that prison officers had temporarily isolated some prisoners in smaller rooms outside the cells.

Rooms that can be used for this purpose are also located in a building housing the main surveillance centre and the prison sports hall. To the left of the main entrance to the building, a tin-plate square structure with a very small floor area was found, resembling a cupboard rather than a cell. According to prison officials, the structure is mostly used for storing items (e.g. when a prisoner refuses to go to an accommodation block and is placed in the nearby isolation room with bars, his items would be placed in this cupboard). However, various signs indicated that the structure had been used for isolating prisoners (e.g. graffiti on the walls). Reports and explanatory statements submitted to the Chancellor prior to his visit on the use of weapons and special equipment contained hints that prisoners had been placed in the metal cupboard for various reasons.[82]

Section 18 of the Constitution and Art 3 of the European Convention on Human Rights prohibit torture, cruel, or degrading treatment or punishment. According to the case-law of the European Court of Human Rights,[83] treatment of prisoners can be considered degrading if the suffering and humiliation caused to them exceed the level normally associated with legally-imposed medical treatment or punishment. In assessing conditions of detention, the combined effect of circumstances must be taken into account.

The above metal structure only lets in a limited amount of sunlight and fresh air through holes in the ceiling. No seating is available, but even if a chair or bench existed the small floor area would not enable prisoners to sit on it. The Chancellor of Justice expressed an opinion that the combined effect of the circumstances amounts to inhuman and degrading treatment.[84]

Other opportunities also existed for temporarily isolating prisoners: e.g. rooms with bars to the right of the main entrance of the main surveillance centre and the sports hall, and on the ground floor of the medical department.

Considering the numerical ratio of prisoners to security staff in Murru Prison, it may be justified to place prisoners temporarily in a room which does not fully meet requirements for cells. However, the relevant room must conform to basic requirements in order to avoid inhuman and degrading treatment of prisoners. The room used for isolation must have sufficient light and fresh air, and a prisoner must have an opportunity to sit. In addition, they must have access to drinking water and a toilet without a long delay. The Chancellor is of the opinion that prisoners should not

82 E.g. in respect of two prisoners, for approximately one hour, the "security service isolation chamber was used – for pacification"; reason: aggressive behaviour (according to the statement, this involved use of indecent expressions in respect of a laboratory assistant in the medical department). Another report found that for some two hours a prisoner had been "brought to cell 300, as he had swallowed a package with an unknown substance; refused to have a drug test".

83 E.g. European Court of Human Rights judgment of 08 November 2005 in case No. 64812/01, *Alver v Estonia*.

84 Tallinn Administrative Court reached the same conclusion in case No. 3-1889/2004 on 10 November 2004.

be placed in such rooms for longer than is necessary for finding further placement, waiting for a doctor's appointment, etc., but for not longer than one hour. The Chancellor believes that such time restriction prevents misuse of cells.

At the same time, use of such temporary holding facilities for punitive reasons or for pacifying aggressive prisoners should be excluded, as § 63(1) of the Imprisonment Act clearly establishes sanctions that may be imposed on prisoners, including placement in a punishment cell, which must meet the requirements under § 7(2) of the Minister of Justice Regulation No. 72 of 30 November 2000 "Internal prison rules". The Imprisonment Act also contains an exhaustive list of additional security measures in respect of prisoners (§ 69(2)), including use of restraining measures and placement in isolated locked cells, which must meet the requirements for cells under § 7(1) of internal prison rules.

(3.2) The inspection visit revealed extremely unhygienic living conditions in places in the eighth and ninth accommodation block of Murru Prison. For example, some walls of cells and punishments cells were dirty and full of graffiti and, based on visual inspection, the beds and bedclothes of prisoners had often been in use for a long time. The situation of corridors is not adequate either. For example, advisers to the Chancellor found a large hole in the floor of a corridor, which posed a danger to both prisoners and prison staff.

In many cells, the toilet was not adequately separated from the rest of the cell, and the stench coming from it filled the whole cell. For incomprehensible reasons, both in renovated and unrenovated punishment cells, the toilet was right under the tap. In some punishment cells, the furnishing did not meet the requirements of § 7(1) of internal prison rules: there were no benches or a table. In some punishment cells prisoners could arbitrarily adjust lighting (e.g. darken the room) which may significantly hamper visual monitoring during the night and may pose an internal security risk for prison officers who must open the cell. In the ninth accommodation block the prison had allowed some life prisoners to renovate their cells, while some other cells again were in an unsanitary condition.

The majority of cells in the eighth and ninth accommodation block are used temporarily by prisoners (punishment cells, isolated locked cells, admissions department). Therefore, it must be admitted that their condition can never be on the same level as cells in ordinary accommodation blocks, as prisoners do not treat them with the same amount of care. The plan to close down Murru Prison is welcome (at meetings with Ministry of Justice officials, 2016 has been mentioned as an approximate deadline). This must be taken into account in deciding the amount of investment in current buildings.

The Chancellor of Justice is of the opinion that, even if the prison is to be closed down, the cells in the eighth and ninth accommodation block may not be left unrenovated if they continue to be used. In conversations during the inspection visit, the management of Murru Prison expressed a similar opinion. As a result of further disrepair of the rooms and vandalism by prisoners, it is probable that soon the eighth and ninth accommodation block of the prison would be in an inhuman and degrading condition, endangering the health of both prisoners and prison staff.

(3.3) During the inspection visit, the prison management explained that with staff existing at the time of the inspection visit they were able to ensure availability of 14 prison officers on duty as part of the 24-hour in-house guard unit. At the same time, the prison held 1400 prisoners.

Although legislation does not regulate the numerical ratio of prisoners to guards, it is unacceptable from the point of view of security of both prisoners and prison officers if one guard has to monitor approximately 100 prisoners. In assessing this ratio, it should also be kept in mind that Murru Prison is a camp-type prison where it is not possible to lock doors for the night in all the dwelling quarters. According to the prison management, it would be necessary to have at least 25 officers constantly on duty in the in-house guard unit.

The medical department of the prison was also suffering from shortage of staff. According to the composition of staff positions of Murru Prison,[85] the medical department has 30.5 staff positions. According to notes taken by officials of the Health Care Board who accompanied the Chancellor during his visit, only 14 of those positions were filled, while the position of psychiatrist and dentist were vacant. No replacements had been found for staff on parental leave. The head of the department had been away on sick leave for a long time.

The Chancellor was aware that the Ministry of Justice had taken measures to hire more people for the prison service (wage increase for prison officers as of 01 January 2007). However, prison officers will probably be sent to work primarily in the new Viru Prison (i.e. the wage rate of prison officers in Viru Prison has increased significantly more than in Murru Prison[86]). The Chancellor of Justice is of the opinion that the situation of other prisons should not deteriorate as a result of opening Viru Prison.

85 Minister of Justice Regulation No. 18 of 19 March 2007.

86 Government Regulation No. 84 of 18 March 2003 "Wages of prison officers", § 2 clauses 9 and 10: the wage rate of prison officers at Murru Prison who are not in the outdoor guard service is increased by a differential rate of 10%. The salary grade of chief inspectors and first- and second-category prison inspectors is increased by 30%, of first- and second-category guards in the outdoor guard service by 20%, and of first- and second-category guards in the in-house guard service by 35%.

(3.4) Inspection revealed that 60 prisoners had been placed in an isolated locked cell at their own request.
The basis for placing a prisoner in a locked cell at their own request is the existence of a relevant application from the prisoner and a written document drawn up after verifying the substance of the application. This document is not delivered to the prisoner, and the sample copy shown to the Chancellor had been approved by the highest official (deputy director for imprisonment). The prisoner is transferred back to an accommodation block with a normal regime according to the same procedure described above.

Section 69(1) of the Imprisonment Act in the version that came into effect on 01 February 2007 allows prisoners to be placed in an isolated locked cell, inter alia, for preventing a serious offence. Thus, placing a prisoner in an isolated locked cell at their own request should be considered permissible.

Nevertheless, the Chancellor would like to point out the following aspects. Under § 1^1(1) of the Imprisonment Act, the provisions of the Administrative Procedure Act apply to administrative proceedings prescribed in the Imprisonment Act, while taking account of the specifications provided for in the Imprisonment Act. Under § 51(1) of the Administrative Procedure Act, an administrative act is an order, resolution, instruction for compliance, directive or other legal act issued by an administrative authority upon performance of administrative functions in order to regulate individual cases in public law relationships and directed at creating, altering or extinguishing the rights and obligations of individuals.

A prison is an administrative body in a public law relationship with prisoners. Ensuring security is one of the administrative tasks of the prison (see § 66(2) Imprisonment Act). A prison's decision to place a prisoner in an isolated locked cell restricts their right under § 8 of the Imprisonment Act to move about within the prison grounds at locations and at times provided in the prison internal rules and rules of procedure. Thus, a decision to place a prisoner in an isolated locked cell is an administrative act (which in this case can be both burdensome and alleviating) which must conform to the requirements of an administrative act[87] even when placement took place at the request of a prisoner.

Under the Administrative Procedure Act § 55(2) 2nd sentence, an administrative act must be issued in writing, unless otherwise provided by an Act or regulation. Under § 62(2) clause 1, individuals whose rights are restricted by an administrative act must be notified of the administrative act by delivery under the procedure established in Division 7 of Chapter 1 of the Act.

In addition, the Imprisonment Act explicitly regulates the competence to decide on additional security measures and does not allow for the usual possibility under § 8(2) of the Administrative Procedure Act to appoint officials to act on behalf of the prison in respect of this issue. Under § 69(4) of the Imprisonment Act, additional security measures are normally applied by the director of a prison (including placement in an isolated locked cell). In practice, situations in a prison may occur where additional security measures need to be taken operatively without having time to draw up a written administrative act. Arising from the 2nd sentence of § 55(2) of the Administrative Procedure Act and the 2nd sentence of § 69(4), in such cases of urgency the highest-ranking prison officer currently present may issue oral administrative acts.[88] However, at the first opportunity the prison director must issue a written administrative act on applying the additional security measure. The act must be delivered to a prisoner if it appears that measures restricting the rights of the prisoner also need to be applied after the situation requiring swift action was resolved.

(4) In the opinion of the Chancellor of Justice, use of the above-described metal structure for isolating prisoners was degrading and thus constituted a serious violation of fundamental rights. The Chancellor drew the attention of the prison management to this violation even on the day of the inspection visit. And already by the time the Chancellor informed Murru Prison of the results of his inspection, he had received information that the metal structure had been rebuilt so as to exclude placing people in it.

The Chancellor asked the prison to specify how the metal structure had been changed. He also proposed to avoid using any similar isolation cupboards in the future.

In addition, the Chancellor proposed observing the above principles (sufficient light and air circulation, opportunity to sit, access to drinking water and toilet, isolation of a prisoner for a maximum of one hour) in using any other rooms intended for temporary isolation of prisoners and to establish these principles in a document regulating the activities of prison officers (e.g. in the internal prison rules or duty regulations).

In its reply, Murru Prison informed the Chancellor that shelves had been placed in the isolation cupboard.

As Murru Prison is not competent to resolve all the problems detected during the inspection, the Chancellor also forwarded the results of the inspection to the Minister of Justice.

87 General legal regulation of administrative acts is established in Chapter 4 of the Administrative Procedure Act (§§ 51-57).
88 The Supreme Court in its judgment of 25 September 2006, No. 3-3-1-49-06, explores the issue in which cases the highest-level prison officer currently present may apply restraining measures and how the competent officer should be appointed in such cases.

The Minister of Justice in his speech at the Riigikogu expressed an intention to observe criminal policy development guidelines,[89] and in his statements in the media[90] the intention to close down Murru Prison. However, the intention to close down the prison is not included in any strategic development plan or any similar documents. According to the Ministry of Justice development plan in effect at the time of the inspection visit,[91] Murru Prison would be one of four prisons operating in 2011, and the development plan does not prescribe measures which would directly prepare for closing down the prison. Moreover, experience with the new Viru Prison shows that observing deadlines in building and launching a new prison could be very complicated.

The Chancellor proposed to the Minister of Justice to analyse in which strategic documents it would be best to establish measures necessary for closing down Murru Prison, and to initiate the relevant draft legislation. Looking at the current situation it must be said that the wider objective to close down outdated camp-type prisons and introduce modern cell-type prisons would require more than five years, which exceeds the period covered by the Ministry's current development plan.[92] Therefore, the Chancellor recommended considering initiating a domain-specific development plan for custodial institutions[93] which would establish measures for achieving the above-mentioned objective.[94] The Chancellor has also repeatedly drawn attention to the need in police detention centres to ensure conditions of detention acceptable regarding human dignity, which requires cooperation between the Ministry of Internal Affairs and the Ministry of Justice.

The Chancellor proposed to the Minister of Justice and Murru Prison to prepare a joint action plan on how to renovate the eighth and ninth accommodation block at Murru Prison in order to ensure safe implementation of imprisonment that respects human dignity until closure of the prison and find sufficient financial resources for carrying out the plan.

In connection with shortage of staff, the Chancellor proposed to the Minister of Justice to post prison officers and health workers to work at Murru Prison, at least until the required staff positions in the medical department are filled, and to guarantee at least two prison officers for each dwelling quarter (i.e. a total of at least 20 officers[95]) in a 24-hour in-house guard unit.

In addition, the Chancellor proposed to Murru Prison to draw up orders for placing prisoners in locked cells so as to comply with the requirements for administrative acts under § 69(4) of the Imprisonment Act, and deliver the order to the prisoner even if they themselves requested applying the additional security measure.

In response to the Chancellor's proposals, the Minister of Justice explained that the next Ministry of Justice development plan envisages laying down a more precise deadline for closing down Murru Prison. The Ministry would also consider drawing up a joint domain-specific development plan for custodial institutions together with the Ministry of Internal Affairs.

In 2008, some prisoners from Murru Prison will be transferred to Viru Prison. This will allow removal from use of accommodation blocks with poorer conditions in Murru Prison. Therefore, the Ministry does not plan to carry out major repairs to accommodation blocks at Murru Prison. However, the room in the 9th accommodation block for prisoners to spend their free time was renovated in 2007.

The Ministry plans to find a solution to staff problems by merging Ämari and Murru Prisons. During the merger, it will be ensured that as many prison officers as possible from Ämari Prison continue within the composition of Murru Prison (including some qualified staff of the medical department).

89 "Criminal policy development guidelines to 2010", 2006 implementing report, transcript of the Riigikogu session on 13 February 2007, available online at www.riigikogu.ee.

90 The latest in the daily *Eesti Päevaleht* on 01 September 2007.

91 Ministry of Justice development plan to 2011 (available online at www.just.ee), p. 18: "By 2011, there will be four prisons in Estonia. Tallinn, Tartu, and Viru Prison will be regional prisons, and Murru Prison will be used for persistent criminals."

92 Government Regulation No. 302 of 13 December 2005 "Types of strategic development plans, and the procedure for their preparation, supplementation, implementation, evaluation, and reporting" § 9(1): "An organisation-based development plan is prepared for the next budget year and the three following years. Each year ministries and state agencies supplement their development plan by one year to ensure constant strategic four-year planning."

93 See reference 94 § 2(2) and Chapter 2.

94 Point 26 of the Riigikogu decision of 21 October 2003 "Approval of criminal policy development guidelines to 2010" also imposes a task

95 According to point 6 of Murru Prison rules of procedure, at least ten accommodation blocks for prisoners exist on enclosed prison territory.

17. Inspection visit to Harku Prison

Case No. 7-7/061242

(1) The Chancellor of Justice with his advisers conducted an own-initiative inspection visit to Harku Prison on 06 February 2007.

Harku Prison is a custodial institution for female sentenced prisoners within the area of government of the Ministry of Justice. Prisoners who are mothers may live in the prison together with their children who are up to (and including) three years of age. Harku Prison has a capacity of 186 prisoners. The average occupancy in 2006 was approximately 140 prisoners.

(2) The Chancellor, fulfilling in parallel his function as the national preventive mechanism under Art 3 of the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel or Degrading Treatment or Punishment, verified whether the fundamental rights of female prisoners were guaranteed. Particular attention was paid to daily living conditions in the prison department for mothers with children, and to accessibility of medical assistance.

(3.1) Inspection revealed that officers in Harku Prison only accepted from prisoners letters in open envelopes addressed to the Chancellor of Justice, and the content of the envelopes is checked visually in the presence of the prisoner. Only after a check is the envelope sealed. Letters with a reply from the Chancellor are also opened in the presence of the prisoner to check the contents of the envelope for prohibited items.

Under § 29 of the Imprisonment Act, a prison officer must open letters sent by or to a prisoner in the presence of the prisoner and will confiscate any items of which possession in a prison is prohibited by internal prison rules. It is prohibited to examine the contents of prisoners' letters and telephone messages to criminal defence counsel, the prosecutor, a court, the Chancellor of Justice, or the Ministry of Justice. It is also prohibited to refuse to forward a prisoner's letters to state agencies, local authorities and their officials, to criminal defence counsel, and consular officers of a prisoner's country of nationality.

Under § 50(2) of the Minister of Justice Regulation No. 72 of 30 November 2000 "Internal prison rules", letters sent by the Chancellor of Justice to a prisoner are delivered to the prisoner against signature, in a sealed envelope and without delay.

(3.2) Inspection revealed that the prison director did not sufficiently justify the administrative acts issued by him, and in most cases merely referred to a provision of a relevant legal act. Therefore, prisoners did not understand the circumstances and reasoning based on which administrative acts had been issued.

Under § 54 of the Administrative Procedure Act, an administrative act is lawful if issued by a competent administrative authority under legislation in force at the moment of issue, is in accordance with legislation in force, is proportional, does not abuse discretion, and complies with requirements for formal validity.

Under § 55(2) of the Administrative Procedure Act, an administrative act must be issued in writing, unless otherwise provided by an Act or regulation. An administrative act may be issued in any other form if it is necessary to issue an order which allows no postponement. In drawing up administrative acts, the Administrative Procedure Code makes an exception to the general principle of freedom of form, because usually administrative acts concern important individual rights and therefore need to be drawn up in writing. Administrative acts may be issued in other form in cases of urgency, but even then they must be drawn up in writing subsequently.

Under § 56(1) of the Administrative Procedure Act, written reasoning must be provided for issue of a written administrative act and refusal to issue an alleviating administrative act. The reasoning for issue of an administrative act is included in the administrative act or in a document accessible to participants in proceedings and the administrative act must refer to the document. Under subsection 2 of the same section, the reasoning for issue of an administrative act must set out the factual and legal basis for issue. Under § 56(3), the reasoning for issue of an administrative act issued on the basis of the right of discretion must set out the considerations from which the administrative authority has proceeded upon issue of the administrative act.

Providing reasoning for the issue of administrative acts is important in order to ensure that they are comprehensible and it can be verified whether the rights of the addressee were restricted lawfully. This means that individuals must be able to understand why and on what legal basis the decision was made, and why and on what legal basis their rights were restricted. Reasoning provided in an administrative act must also enable individuals to challenge the act to protect their rights. Without knowing the reasons for restricting rights, it is difficult to provide arguments when challenging an act. Reasoning of an administrative act also enables supervisory authorities to decide whether the act was lawful. An act without reasoning is unlawful merely because it is impossible to verify why and on what legal basis it was issued.[96]

96 See Supreme Court Administrative Law Chamber judgment of 22 May 2000, No. 3-3-1-14-00, par. 5; 28 October 2003, No. 3-3-1-66-03, par. 18.

Reasoning must point out with sufficient clarity the facts relevant in the specific case. The Supreme Court has noted that the more complicated the interpretation of the law and ascertaining of facts, and the greater the discretion of an administrative body, and the more serious the interests that clash in making the decision, the greater the need to have in writing the reasons for issuing the act. The factual justification of an act must include the circumstances based on which the underlying legal norm is applied. It is important to link the factual and legal reasoning. This should convince the addressee of an act and anybody else who reads it that the facts of the case in combination with the applicable legislation, do indeed lead to this kind of administrative decision. Reasoning of an administrative act needs to convince the court that an administrative body in exercising its discretion has taken into account all the important circumstances and interests, and that weighing the facts and interests was rational.[97] Thus, reasoning of an act must contain both the legal basis for issuing the act and a description of the facts. Facts must be proved or provable in potential subsequent administrative court procedure, and not be assumptive or declarative.[98]

If a legal norm gives discretion to an administrative body, i.e. the right to decide whether to make a decision or not, or what kind of decision to make, then under § 56(3) of the Administrative Procedure Act the reasoning must include the considerations from which the administrative authority has proceeded upon issue of the administrative act. The reasoning must explain what considerations the administrative body took into account and what conclusions it reached.[99]

On that basis, a prison must observe the duty of providing reasoning for its administrative acts as required by the Code of Administrative Procedure. Moreover, a prison may not disregard this duty by referring to insufficient administrative capacity, time-consuming nature of the reasoning process, etc. As the Supreme Court has also pointed out,[100] administrative obstacles may not justify restricting fundamental rights. All state agencies, including prisons, are bound by the obligation to comply with the law (§ 3(1) Constitution).

(3.3) Inspection revealed that Harku Prison was complying with the minimum requirement under the Imprisonment Act to ensure opportunities for prisoners to take care of personal hygiene, i.e. providing shower access once a week. Orally, prison officers explained during the inspection visit that this meant at least once a week. However, oral arrangements for use of showers did not allow definite conclusions to be reached or the truthfulness of claims verified, and it is still somewhat unclear whether the opportunity exists to use showers in addition to the minimum of once a week, or who has the opportunity to do so. Lack of a clear written arrangement always provides grounds to suspect that allowing additional benefits depends on the discretion of an officer.

It was also found that prisoners had to wash their clothes manually, and using time intended for taking care of personal hygiene. The accommodation block of the prison had no washing machines. Prisoners were not allowed to use the services of the laundry house. In addition, prisoners were not allowed to use the washing machines intended for washing bedclothes.

Under § 50(1) of the Imprisonment Act, prisoners must take care of their personal hygiene. Under subsection 2 of the same section, prisoners are to be given the opportunity to have a sauna, bath, or shower at least once a week and upon reception into prison.

Council of Europe Committee of Ministers recommendation Rec(2006)2 on European Prison Rules emphasises in its preamble that enforcement of custodial sentences and treatment of prisoners necessitate taking account of the requirements of safety, security, and discipline while also ensuring prison conditions which do not infringe human dignity. According to paragraph 18.1 of the European Prison Rules, accommodation provided for prisoners should respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, lighting, heating, and ventilation.[101]

Based on the above, human dignity also includes compliance with hygiene requirements. The prison is required to guarantee human dignity of prisoners. Thus, prisons must also focus on ensuring prisoners sufficient facilities for taking care of personal hygiene. Human dignity is connected with all fundamental rights and the purpose of protecting fundamental rights and freedoms. Human dignity is part of the essence of fundamental rights. Human dignity must be respected and protected.[102] The right to treatment in line with human dignity extends to everyone, including prisoners.

In today's society, the majority of people consider it normal to have a shower daily or every other day and do not accept anything less. Under the Imprisonment Act, prisoners can use washing facilities at least once a week, but this

97 Supreme Court Administrative Law Chamber judgment of 14 October 2003, No. 3-3-1-54-03, par. 34; 28 October 2003, No. 3-3-1-66-03, par. 19.

98 Supreme Court Administrative Law Chamber judgment of 14 October 2003, No. 3-3-1-54-03, par. 32; 10 October 2002, No. 3-3-1-42-02. par. 16; 18 October 1999, No. 3-3-1-32-99, par. 2.

99 A. Aedmaa *et al.* Haldusmenetluse käsiraamat. [Handbook on administrative procedure] Tallinn 2004, p. 306.

100 Supreme Court Constitutional Review Chamber judgment of 21 January 2004, No. 3-4-1-7-03, par. 39.

101 Supreme Court Administrative Law Chamber judgment of 22 March 2006, No. 3-3-1-2-06.

102 EU Charter of Fundamental Rights, Art 1, European Court of Justice judgment of 09 October 2001 in case C-377/98 *Netherlands v the European Parliament and the Council*, ECR 2001, par. 7079.

really is the absolute minimum. In accordance with the principle of human dignity, prisons should try to ensure more frequent washing opportunities. The latter applies in particular with regard to female prisoners and washing opportunities in hot weather in summer.

Personal hygiene habits of prisoners are definitely not similar. The prison, however, should proceed from the principle of human dignity and guarantee a frequency of opportunities corresponding to the personal needs of prisoners. The Chancellor of Justice is of the opinion that the prison should find additional resources to enable prisoners to take better care of personal hygiene (including both themselves and their clothes) and to establish relevant clear written rules.

(3.4) The Chancellor of Justice toured the prison and spoke confidentially with prisoners. On that basis, the following problems were found:

1) No hot water was available for washing hands on the first floor of the accommodation block of Harku Prison, as the hot water boiler was broken at the time of the visit. Upon closer inspection, this was confirmed.
2) Prisoners lack sufficient information for contacting various authorities. The prison is obliged to provide prisoners with information about legal norms (§ 14(2) Imprisonment Act). Under this requirement, not later than the day following a prisoner's arrival in a prison, they should meet with the prison director or a prison officer appointed by the director who explains to the prisoner their rights and obligations as a prisoner. A prisoner is given written information concerning the Acts regulating application of their imprisonment, the internal rules of the prison, and submission of complaints. The duty of the prison to explain legal acts also arises from the Response to Memorandums and Requests for Explanations Act.
3) At the time of the inspection visit, prisoners had received no information about the procedure for release on parole.
4) Prisoners had problems with borrowing dictionaries and textbooks.
5) During his tour, the Chancellor inspected the visiting room of the prison. It was found that foodstuffs (e.g. bakery products) brought by visitors are prodded with a special rod in order to avoid prohibited items being brought into the prison. As a large number of rods were in a container on the table without any plastic wrapper, a suspicion arose that they were used repeatedly.
6) The Chancellor inspected the department for mothers with children. It was found that sockets on the wall were uncovered and children could get an electric shock from them.

(4) As a result of the inspection visit, the Chancellor made the following proposals and recommendations to Harku Prison:

– not to examine prisoner letters addressed to the Chancellor of Justice and not to open letters received from the Chancellor of Justice;
– to comply with the duty of providing written reasoning when issuing administrative acts, as required by the Administrative Procedure Act;
– to find additional resources to enable prisoners to take better care of their personal hygiene and to establish clear rules for this. The Chancellor recommended the prison to obtain washing machines for use by prisoners or to arrange for them to do their laundry in some other way;
– to ensure that the boiler on the first floor of the accommodation block is fixed as soon as possible or to ensure the opportunity for daily use of hot water in some other way;
– to inform prisoners about various possibilities to complain to state agencies;
– to explain to prisoners the provisions regulating release on parole;
– to enable all prisoners to use the library and borrow necessary books;
– to ensure that prodding rods intended for checking foodstuffs are not used repeatedly;
– in cooperation with the Ministry of Justice, to organise health examination of female prisoners to check for breast and cervical cancer.

In his reply, the director of Harku Prison explained that the prison had started eliminating the shortcomings pointed out by the Chancellor. The prison has already changed its practice in respect of most of the recommendations. For example, letters sent by the Chancellor of Justice to prisoners are no longer opened. Prison officers regularly inform prisoners about the procedure for release on parole. In addition, the prison director had requested the Minister of Justice for financing for health examination (breast and cervical cancer detection) of female prisoners.

Advisers to the Chancellor of Justice carried out a follow-up inspection visit to Harku Prison on 27 June 2007. It was found that the prison had observed a number of proposals and recommendations made by the Chancellor. A new building with punishment cells had been completed. A drug-free department had been established for prisoners who wish to free themselves from drug-addiction.

Important changes had also occurred in opportunities for prisoners to take care of personal hygiene. The follow-up visit revealed that washing opportunities had improved and a solution to the problem with hot water had been found. The deputy director of the prison also explained that financial resources for health examination of female prisoners (breast and cervical cancer detection) had been found and the examination process would start at the latest in autumn 2007.

IV AREA OF GOVERNMENT OF THE MINISTRY OF DEFENCE

1. General outline

The area of government of the Ministry of Defence includes organising national defence and preparing related policy proposals, implementing national defence policies, coordinating Estonia's international defence cooperation, preparing and carrying out mobilisation of troops, calling up conscripts for compulsory military service, managing registration and records of reservists and training of reservists, funding and equipping the Defence Forces and the Defence League, developing defence industries, overseeing the activities of the Defence Forces and the Defence League, and preparing relevant draft legislation. The institutions under the area of government of the Ministry of Defence are the Defence Forces, the Defence League, the Intelligence Agency, and the Defence Resources Agency.

In 2007, six amendments to the Defence Forces Service Act entered into force, changing the principles and procedure for remuneration of members of the Defence Forces, as well as the basis for payment and calculation of pensions. Changes in the basis and system of payment of service pay and calculation of pensions have caused some implementation problems in practice.

The President of the Republic submitted to the Riigikogu for deliberation a Draft Act for amending the Estonian Constitution,[103] which aims to reduce the role of the President in dealing with issues of national defence. For example, under the amendments the President would no longer propose candidates for the position of Commander of the Defence Forces.[104]

An important step in 2007 was adoption of Government Regulation No. 141 (passed 10 May 2007, entered into effect 25 May 2007), which amended Government Regulation No. 262 of 21 December 2006 "The extent and procedure of payment of the conscript's allowance" and raised the monthly allowance paid to conscripts. At a meeting of the Cabinet of the Government, the Chancellor of Justice proposed linking the allowance to the minimum monthly wage established on the basis of the Wages Act. This would help to ensure flexible change of the relevant sum in line with the rise in the cost of living. Nevertheless, the Government decided to establish the allowance as a fixed sum.[105]

In 2007, either on the basis of petitions from individuals or on his own initiative, the Chancellor initiated 21 proceedings to verify activities of agencies within the area of government of the Ministry of Defence or to supervise the legality and constitutionality of legislation related to the Ministry's area of government. By performing his ombudsman functions, the Chancellor found a violation of the requirements of lawfulness and the principle of good administration on six occasions. In reviewing legislation of general application, the Chancellor once found a contradiction with the Constitution or an Act. As final conclusions in some of the proceedings were reached only in 2008, they are not included in this Report.

The Chancellor's proceedings were mostly concerned with issues of service in the Defence Forces. Both conscripts and regular members of the Defence Forces contacted the Chancellor. In general, they were seeking support on the grounds of infringements in applying, or failure to apply, the law to protect their fundamental rights, involving issues such as promotion in rank, calculating length of service, or service pay.

In 2007, the Chancellor of Justice conducted an own-initiative inspection visit to the training centre of the Viru Single Infantry Battalion with the aim of verifying whether fundamental rights and freedoms of conscripts were ensured. Unfortunately, the inspection revealed a number of problems with guaranteeing fundamental rights and freedoms.

The Chancellor ascertained that conscripts were unlawfully punished with physical tasking ("physical burdening"). Conversations with conscripts revealed that they often had to do press-ups as a punishment for disciplinary infringements. Legislation regulating the functioning of the Defence Forces does not contain physical tasks as a disciplinary punishment. In the Chancellor's opinion, physical tasking constitutes a severe interference with fundamental rights and freedoms, so that a legal basis for it must exist. Physical tasking without the existence of a legal basis may take the form of degrading the human dignity of conscripts. The Chancellor proposed to the battalion to take measures to avoid using unlawful punishments. The battalion agreed with the Chancellor's opinion.

The Chancellor welcomes the opinions of the Minister of Defence and the Commander of the Defence Forces expressing the need to pay more attention to improving daily living conditions in Defence Forces training centres. According to clause 17.4 in the Annex to Government Order No. 579 of 20 December 2007 "The Government action plan for 2007-2011", the Minister of Defence is responsible for developing troops, modernising training conditions, and improving living and sporting conditions in the Defence Forces.

103 Draft Act (47 SE) for amending the Constitution of the Republic of Estonia, initiated by the President of the Republic on 15 May 2007. Available online at http://www.riigikogu.ee.

104 Section 1 clause 1 of Draft Act (47 SE) for amending the Constitution of the Republic of Estonia. Available online at http://www.riigikogu.ee.

105 See, in addition, Government Regulation No. 262 of 21 December 2006 "The extent and procedure of payment of the conscript's allowance".

On 11 April 2007, the Commander of the Defence Forces inspected the infantry training centre of Kuperjanov Single Infantry Battalion, examining the infrastructure of the formation and its barracks. According to the Commander of the Defence Forces, Kuperjanov Single Infantry Battalion is the best formation in the Defence Forces, but nonetheless many things can be improved in the battalion.[106]

On 26 October 2007, the Minister of Defence visited the Single Guard Battalion and assessed the training infrastructure as completely depreciated. According to the Minister, the situation where living and training conditions do not meet minimum requirements must not continue. Relocating of units needs to be decided. The Minister said: "This decision must be carried out when harmonising our planning cycle with that of NATO, which means within revising the defence planning process in the military national defence development plan for 2009-2018."[107]

2. Inspection visit to the infantry training centre of Viru Single Infantry Battalion

Case No. 7-7/081197

(1) Advisers from the Office of the Chancellor of Justice carried out an own-initiative inspection visit under § 19(1) and § 27 and § 33 of the Chancellor of Justice Act to the infantry training centre of Viru Single Infantry Battalion ('the battalion').

Under § 38 clause 3 of the Government of the Republic Act, the Defence Forces are an agency of executive power. Under § 12(1) of the Peace-Time National Defence Act, the Defence Forces operate under subordination of the Government. Under § 12(2) of the same Act, the Defence Forces fall under the area of government of the Ministry of Defence.

Under § 3 clause 1 of Government Regulation No. 172 of 22 May 2002 "Structure of the Defence Forces" ('the structure regulation'), the General Staff of the Defence Forces, and under § 3 clause 3, the Commander of the Army, are directly subordinate to the Commander of the Defence Forces. Under § 4(1) and (3) clause 2 of the structure regulation, Staff of the Army and the battalion infantry training centre are directly subordinate to the Commander of the Army.

(2) During the inspection visit, the Chancellor's advisers, also fulfilling the function of the national preventive mechanism established under Art 3 of the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel or Degrading Treatment or Punishment, verified whether fundamental rights and freedoms of conscripts were guaranteed in the battalion.

(3.1) Confidential interviews with conscripts revealed that during training they had also been set physical tasks outside the time set for this in the daily programme. It was pointed out that there had been incidents where conscripts had to do press-ups in order to receive letters addressed to them. Allegedly, press-ups were also required when a conscript dropped a weapon or weapon part. Additionally, it was found that conscripts had been made to do press-ups or other physical exercises (e.g. standing in a forced position) as a group for lack of group discipline or when a member of a group had infringed a requirement imposed by Defence Forces legislation. Regular members of the Defence Forces did not deny these allegations during introductory and confidential interviews. For example, it was claimed that forcing a conscript to do press-ups before and after smoking could be considered good because smoking damages health and physical exercise strengthens it. It was also claimed that in order to ensure better discipline in subdivisions it was necessary that conscripts felt responsibility for the actions of their fellow conscripts. Regular members of the Defence Forces were of the opinion that physical training was not a punishment contravening legislation, but rather it could be seen as a reminder or admonishment.

Evidence gathered in connection with the speed of properly making up beds was contradictory.[108] Conscripts claimed that such exercises were frequent. However, regular members of the Defence Forces claimed that such exercises had not been organised for a very long time.

Under § 124(1) of the Constitution, Estonian citizens have a duty to participate in national defence on the basis of and pursuant to procedure established by law.[109] Persons in the Defence Forces[110] have all constitutional rights and freedoms,

106 Available online at http:// www.mil.ee/?id=2039

107 Available online at http:/ www.mil.ee/?id=2187.

108 Special exercises include so-called "bed and sheet rallies". In the first case, conscripts are ordered to carry their beds out of the barrack room and to remove the bedclothes (sheets, blankets, and pillow). A time is set for carrying the beds back to the room and properly making up the beds. If conscripts fail to follow the order within the prescribed time or do not do it properly, the exercise may be repeated. The "sheet rally" involves an exercise where conscripts are told to remove the sheets from the bed, take the sheets with them and stand in line in the corridor. Then they are given a time to make up the beds. Failure to complete the order within the prescribed time usually results in repeating the exercise.

109 One form of the duty to participate in national defence is performing compulsory service in the Defence Forces. Under § 3(1) of the Defence Forces Service Act, only male Estonian citizens must serve in the Defence Forces.

110 Members of the Defence Forces are divided into conscripts, regular members, and reservists participating in reserve training (§ 8(1) and (2) clause 1-3 of the Defence Forces Service Act). In terms of restricting constitutional fundamental rights and freedoms, whether the individuals concerned are conscripts or regular members of the Defence Forces makes no difference.

unless otherwise prescribed by law due to the special interests of the service.[111] Rights of conscripts may only be restricted on the basis of an Act, regardless of whether the restriction is due to the special interests of the service or not.

The Supreme Court has found that restriction of fundamental rights is permissible if formally and substantively lawful. Formal lawfulness of restriction of fundamental rights presumes, first of all, conformity with the competence, form, and procedural requirements laid down in the Constitution and, secondly, the guarantee of legal clarity arising from § 13(2) of the Constitution and, thirdly, compliance with the general principle under the first sentence of § 3(1) of the Constitution which requires that state authority is exercised solely pursuant to the Constitution and laws in conformity with it. The precondition for substantive constitutionality is the existence of a legitimate aim of a restriction and compliance with the principle of proportionality. The Supreme Court has said: "The principle of proportionality arises from the second sentence of § 11 of the Constitution, according to which restrictions on rights and freedoms must be necessary in a democratic society. The Chamber reviews compatibility with the principle of proportionality on three levels – firstly, the suitability of a measure, then necessity and, if necessary, proportionality in the narrower sense (i.e. moderateness) is reviewed. [...] A measure that fosters achievement of an objective is suitable. In terms of suitability, a measure which in no way fosters achievement of an objective is indisputably disproportional. The requirement of suitability is intended to protect an individual against unnecessary interference by public power. A measure is necessary if it is not possible to achieve an objective by some other measure which is less burdensome on an individual but which is at least as effective as the former. It is also important to consider how much different measures burden third parties, as well as differences of expenditure for the state. In order to determine the moderateness of a measure, the extent and severity of interference with a fundamental right on the one hand, and the importance of the aim, on the other, have to be weighed."[112]

No need exists to analyse substantive constitutionality of a fundamental right if a restriction is found to be formally in conflict with the Constitution. Under § 3(1) and § 11 of the Constitution, fundamental rights and freedoms of individuals may only be restricted in the cases and pursuant to the procedure established by laws adopted by the Riigikogu or in a referendum.[113]

The European Court of Human Rights has stated that fundamental rights and freedoms under the European Convention for the Protection of Human Rights and Fundamental Freedoms also extend to members of the armed forces.[114] The Convention enumerates several rights which may be restricted only on the basis of a law, and it often also sets out an objective which may be considered as a permissible cause of restriction.[115]

In conclusion, it may be said that fundamental rights and freedoms of conscripts may only be restricted on the basis of an Act. Additionally, the requirements of § 124(3) of the Constitution must also be taken into account (i.e. a fundamental right may only be restricted on the grounds of the special interests of the service). It should also be noted that under § 14 of the Constitution the guarantee of rights and freedoms is the duty of the state.[116]

The inspection revealed that incidents occurred in performance of the duty of national defence where fundamental rights and freedoms of conscripts had been unconstitutionally restricted.

Physical tasking may extensively encroach upon fundamental rights of individuals and may constitute degrading treatment. Section 10 of the Constitution establishes human dignity as a general principle which the state is required to guarantee to everyone. The enumeration of rights in § 124(3) does not include § 10 of the Constitution, which might at first sight lead to the conclusion that the right to treatment in line with human dignity may be restricted on the grounds of the special interests of the service. However, such a conclusion is premature and erroneous – human dignity forms the basis of all fundamental rights and freedoms and it must not be restricted in any case. The Supreme Court has also emphasised that "[...] human dignity is a basis for all fundamental rights and the purpose of the protection of fundamental rights and freedoms. Human dignity is an integral part of the essence of fundamental rights. Human dignity must be respected and protected."[117]

Section 18 of the Constitution prohibits torture and cruel or degrading treatment. In addition to what the Constitution provides, Estonia has assumed an international obligation to prevent torture or degrading treatment in its territory. To do so, on 21 October 1991 Estonia acceded to the UN Convention for the Elimination of Torture

111 In case of compulsory military service, restrictions due to special interests of the service should be understood as only including measures necessary for smooth organisation of training.

112 Supreme Court Constitutional Review Chamber judgment of 06 March 2002, No. 3-4-1-1-02. See also Supreme Court Administrative Law Chamber judgment of 17 March 2003, No. 3-3-1-11-03; 17 June 2002, No. 3-3-1-32-02; 25 February 2004, No. 3-3-1-60-03; 11 November 2004, No. 3-3-1-66-04; 13 November 2006, No. 3-3-1-45-06.

113 Supreme Court Constitutional Review Chamber judgment of 24 December 2002, No. 3-4-1-10-02.

114 „[…] the Convention applies in principle to members of the armed forces and not only to civilians. It specifies in Articles 1 and 14 (art. 1, art. 14) that "everyone within (the) jurisdiction" of the Contracting States is to enjoy "without discrimination" the rights and freedoms set out in Section I. Article 4 par. 3 (b) (art. 4-3-b), which exempts military service from the prohibition against forced or compulsory labour, further confirms that as a general rule the guarantees of the Convention extend to servicemen.[…]" European Court of Human Rights judgment of 08 June 1976 in the case of *Engel et al v The Netherlands*.

115 See e.g. ECHR, Art 8, Art 12 ff.

116 See also Supreme Court Constitutional Review Chamber judgment of 09 May 2006, No. 3-4-1-4-06; 14 April 2003, No. 3-4-1-4-03.

117 Supreme Court Administrative Law Chamber judgment of 28 March 2006, No. 3-3-1-14-06.

and other Cruel or Degrading Treatment or Punishment. Under the Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. The European Court of Human Rights has repeatedly emphasised that prohibition of torture or inhuman treatment under Art 3 of the ECHR emphasises one of the fundamental values in a democratic society. This includes a complete prohibition of torture and inhuman or degrading treatment or punishment, regardless of the situation or behaviour of the victim of such treatment.[118]

Physical and psychological preparation of members of the Defence Forces does not justify degrading treatment or arbitrary acts by superiors, including punishment without legal basis or punishments not permitted by legislation, regardless of how superiors themselves call the punishments. Therefore, it is important that educational and instructional measures used in training should not degrade human dignity and that all restrictions of fundamental rights and freedoms are in conformity with the Constitution.

It cannot be considered constitutional if a conscript is forced to do press-ups in order to receive a letter addressed to him. No legal basis exists to demand such activity,[119] and it is difficult to reconcile the purpose of such activity with the overall aim of compulsory military service.

It is also questionable whether demanding special exercises from conscripts to ensure that they properly make up their beds is in conformity with the overall aim of national defence: to protect the Republic of Estonia.

It is important to find an answer to the question whether physical tasking in cases where a conscript has infringed requirements established by legislation in essence constitutes training, a reminder, admonishment, or punishment, and whether such tasking conforms to requirements established by legislation.

According to a dictionary, training means systematic physical practice to reach or maintain certain qualities (e.g. methodical training of athletes by developing their maximum physical [strength, stamina, speed, skill] and moral qualities and abilities).[120] According to clause 309 of Government Regulation No. 273 of 14 December 1998 "Approval of internal rules and regulations of the Defence Forces", all activities in a battalion are organised according to a daily schedule drawn up by the chief of staff and approved by the battalion commander. The daily schedule must include the time of daily activities (clause 310 of internal rules and regulations).[121]

Under clause 324 of internal rules and regulations, the length of study time on workdays is eight lessons. The battalion commander may exceptionally by directive establish longer days for periods of field exercises and shooting exercises and may organise them on holidays, but must ensure at least one free day per week and that the number of weekly working hours corresponds to Acts regulating the Defence Forces service. The time after the end of studies until evening roll-call, and on Saturdays and Sundays after general cleaning is free, unless the company commander has ordered maintenance of weapons and equipment or general physical training (clause 327 of internal rules and regulations).

Physical tasking which does not conform to these requirements cannot constitute physical training for the purposes of Defence Forces legislation. Press-ups for receiving a letter do not fall within the concept of training.

Under clause 27 of internal rules and regulations, higher-ranking members of the Defence Forces are also required to monitor the behaviour of lower-ranking members outside the service and take measures to restore order in case of infringements. For this, they have the right to make observations to lower-ranking members of the Defence Forces, and the latter are obliged to follow them like orders from their superiors. If a subordinate or lower-ranking member of the Defence Forces infringes rules of behaviour of the Defence Forces in the presence of a superior or of higher-ranking members of the Defence Forces, the superior or higher-ranking members must draw the infringer's attention to this. If the reminder has no effect, the superior must take measures to restore order (clause 48).

Thus, reminders and observations have a clear meaning and purpose under current legislation, i.e. to draw an infringer's attention to the infringement and thereby terminate the infringement. Based on the principle of proportionality, measures least restrictive in respect of an individual's rights should be used to achieve the purpose.

The Chancellor is of the opinion that a reminder or observation in internal rules and regulations are intended as verbal remarks. Physical tasking involves encroaching on the security of the person (§ 20 Constitution), which presumes the existence of a legal basis in an Act. The provisions of internal rules and regulations do not provide a basis for restricting fundamental rights.

In addition, it should be mentioned that, normally, verbal reminders or observations fulfil their purpose and are less burdensome for individuals than physical reminders of necessity to comply with rules of behaviour.

118 See the European Court of Human Rights judgment of 06 April 2000 in the case of *Labita v Italy*.

119 Such an order is clearly unlawful as it degrades human dignity.

120 Vääri, E. Kleis, R. Silvet, J. Võõrsõnade leksikon. [Lexicon of foreign words] Tallinn, 2000, p. 1005.

121 E.g. the daily schedule must include free time (clause 327 and 328 of internal rules), study and work time (clause 324 and 325), and visiting time for guests (clause 329 and 330).

Therefore, the Chancellor cannot concur with the opinion according to which physical tasking constitutes a reminder or admonishment. It is inconceivable, for example, that a member of the Defence Forces applies physical tasking in respect of a lower-ranking member outside service time for violating the rules of military greeting. Therefore, it also cannot be considered right that during service time attention to this violation is drawn through physical tasking.[122]

In order to answer the question whether physical tasking of members of the Defence Forces constitutes punishment for violating requirements established in legislation, it is first necessary to analyse the essence of the concept of punishment. A distinction has to be drawn between what the concept of punishment means in formal terms, and what it means in substantive terms.

Formally, punishment is considered a legal consequence following conviction as established under a legal act.[123] Under § 15(1) of the Disciplinary Measures in Defence Forces Act, disciplinary punishment is punishment of a member of the Defence Forces for committing a disciplinary offence. A disciplinary offence committed by a member of the Defence Forces is wrongful failure to comply, or unsatisfactory compliance, with requirements prescribed by Acts, or legislation established on the basis thereof, or requirements arising from duties. A disciplinary offence is also an indecent act or failure to comply with generally recognised moral standards by a member of the Defence Forces which discredits the Estonian Defence Forces, regardless of whether or not it occurred in performance of duties (§ 8(1) and (2)). Thus, the precondition for applying a disciplinary punishment is wrongful failure to comply with behavioural norms established by legislation or with generally recognised traditions. Legal consequences of a disciplinary offence by members of the Defence Forces are stipulated under § 15(2) clauses 1-12 of the Disciplinary Measures in Defence Forces Act. It must be noted that the disciplinary punishments listed there do not include physical tasking as a possible punishment. Therefore, it may be concluded that, formally, physically tasking a conscript is not a punishment permitted by law.

In substantive terms, punishment is a repression applied to a convicted individual in respect of an offence. Such repression damages an individual's constitutional position,[124] expresses condemnation, and forces an individual to take responsibility for their actions.[125] The European Court of Human Rights has found that in order to determine the essence of a coercive measure it is necessary to establish whether it contains penal substance. Penal substance is a characteristic feature forming part of the essence of punishment.[126] The Court has said that in order to determine the essence of a sanction it is necessary to take into account the duration of the punishment and the material damage involved in the sanction.[127]

Without doubt, any physical tasking in cases of violation of requirements established by legislation (be it, for example, an order to stay in a forced position, or do press-ups) constitutes in essence a punishment, as it contains characteristics of punishment[128] and exceeds the "material damage" threshold even if tasking only lasts for a short period. The Chief of General Staff of the Defence Forces has come to the same conclusion.[129]

As was found above, no legal basis exists for punishing conscripts with physical tasking, as the Disciplinary Measures in Defence Forces Act does not include such a punishment. On that basis, the Chancellor is of the opinion that punishing conscripts with physical tasking must be stopped immediately and training methods must be chosen in accordance with the purpose of compulsory military service.

(3.2) Interviews with conscripts revealed that in order to register for a doctor's appointment, it was necessary to con-

122 It is important to note that internal rules and regulations do not distinguish between the ranks of members of the Defence Forces to whom a reminder or observation is made.

123 See also Sootak, J. Sanktsiooniõigus. [Law of sanctions] Tallinn 2007, p. 74.

124 "Damaging of the constitutional position" in this case should be understood as restriction of fundamental rights and freedoms.

125 See also Sootak, J. Sanktsiooniõigus. [Law of sanctions] Tallinn 2007, p. 74.

126 Sootak, J. Karistusõiguse alused. [Introduction to penal law] Tallinn 2003, p. 178–183.

127 European Court of Human Rights judgment of 08 June 1976 in the case of *Engel et al v The Netherlands*.

128 Physical tasking constitutes a reproach to a conscript for violating the requirements established in legislation or of the traditions of the Defence Forces (penal substance). Thereby, "a conscript is revenged" and physical tasking in such a situation is in essence definitely sensed as something repressive (unpleasant for the individual concerned).

129 Circular No. JK-19/11048 of 12 November 2001 of the Chief of General Staff of the Defence Forces: "During supervisory investigation carried out [...] by the military police and the investigation department of the General Staff of the Defence Forces [...] it was found that squad leaders [...] had committed the following disciplinary violations:

1. Violations of the Disciplinary Measures in Defence Forces Act in imposing punishment:
   - conscripts who dropped a weapon or a weapon part, who violated the requirements of internal rules and regulations when addressing a squad leader, were punished with press-ups or being forced to lie in a certain position;
   - in case of a disciplinary violation by a conscript, a whole group of conscripts was punished with physical exercises;
   - writing essays was used a punishment.

   In imposing punishments, squad leaders violated § 9(2) of the Disciplinary Measures Act, under which only disciplinary punishments established by the Act may be imposed for a disciplinary offence. By also punishing other conscripts who had not committed a disciplinary violation for a disciplinary violation by one conscript, squad leaders violated § 9(1) of the Disciplinary Measures Act, under which a member of the Defence Forces who has committed a disciplinary offence bears disciplinary liability for it, meaning imposition of a disciplinary punishment corresponding to the nature and gravity of the offence committed by the individual.
2. Other disciplinary violations:

2.1 Requiring press-ups from conscripts who wished [...] to go smoking and from conscripts who wished to receive correspondence addressed to them."

tact the squad leader after morning line-up. In reply to the Chancellor's request for information, the battalion commander assured that conscripts were not required to say the reason for wanting to see the doctor. However, during confidential interviews conscripts claimed that cases had occurred where they had to give a reason for wanting to see the doctor, and they had to say it in front of everybody in the line.

The Constitution guarantees everyone's right to inviolability of private and family life (§ 26) and to self-realisation (§ 19). These fundamental rights are intended to maximally ensure that individuals could decide themselves whether and to what extent they want to reveal personal information. This also imposes significant limits on state processing of personal data. The state may not use or distribute personal data more than is necessary for achieving the lawful aim established by an Act. In addition, it arises from § 11 of the Constitution that rights and freedoms may not be restricted disproportionately. This means that a measure used by the state (in this case processing sensitive personal data) must be suitable for achieving the aim, least burdensome for the individual concerned, and the benefit to be obtained must outweigh the restricted fundamental right. These principles must also be observed when processing health data of conscripts.

Under § 4(3) clause 3 of the Personal Data Protection Act, data relating to state of health or disability are considered sensitive personal data. Processing of personal data means any operation performed in respect of personal data, such as collecting, recording, organising, storing, altering, granting access, consulting, retrieving, using, transmitting, cross-using, combining, blocking, erasing or destroying, or several of these operations regardless of the manner in which they are performed or the means used (§ 5). Under § 6 clause 1, personal data may be collected in an honest and legal manner (i.e. principle of legality). Under § 6 clause 2, personal data may be collected only for specified and legitimate purposes and personal data may not be processed in a manner which fails to comply with the purposes of data processing (i.e. the principle of purposefulness). The principle of minimality also applies in processing of personal data, meaning that personal data may be collected only to the extent necessary for the purposes for which they are collected (§ 6 clause 3).

Under clause 185 point 5 of internal rules and regulations, the warrant officer must also be familiar with the health condition of soldiers. Regulatory provisions on medical services are also contained in clauses 120-124 of "Internal rules of Viru Single Infantry Battalion infantry training centre". Under clause 120, a conscript must inform the squad leader of their illness. The squad leader, in turn, informs the platoon sergeant. Under clause 122, a doctor of a military unit must regularly monitor the health of conscripts and, if necessary, relieve a conscript from performing service duties. Conscripts must inform the platoon sergeant about their temporary relief from performing service duties or prescription of medical treatment (clause 122).

However, it does not arise from these provisions that the company warrant officer, squad leader, or platoon sergeant are entitled to ask about a conscript's health condition (i.e. sensitive personal data) more than is absolutely necessary for smooth organisation of training.

Members of the Defence Forces who organise training need to know whether a conscript's health allows them to participate in training. However, not all members of the Defence Forces are competent to assess health. Under clause 431 of internal rules and regulations, only a doctor is competent to relieve conscripts from training or fatigue-duty.[130] Thus, under the principle of minimality arising from § 6 clause 6 of the Personal Data Protection Act, persons who do not absolutely need to know the relevant data for performing their functions are not allowed to process health data of conscripts (i.e. sensitive personal data). For example, squad leaders do not need to know the medical reasons why a conscript cannot participate in drill. For performance of their functions, it is enough for them to know that a conscript cannot participate in drill for medical reasons.

It should also be pointed out that due to the hierarchical structure and traditions of the Defence Forces, conscripts cannot refuse to answer questions concerning their health, as failure to answer may be mistakenly interpreted as refusal to comply with an order, which may be followed by punishment.

Although the battalion commander in his reply to the Chancellor's request for information and during the introductory interview at the start of the inspection visit assured that conscripts were not asked the reason for seeing the doctor, interviews with conscripts revealed that they had been asked the reasons. The Chancellor hopes that these have been isolated cases caused by lack of awareness.

In order to avoid similar situations, the Chancellor proposed to the battalion commander to prohibit members of the Defence Forces from asking for sensitive personal data concerning health of conscripts if they do not need such information to perform their functions. The Battalion medical staff have the right to process sensitive personal data of conscripts.

(3.3) During the tour conducted as part of the inspection visit, it was found that a journal of diagnoses was open on the doctor's desk. It was possible to read from the entries in the journal what problems conscripts had complained of to the doctor.

130 The duty-nurse of the dispensary is entitled to process personal data because they are required to provide first aid in case of necessity (clause 272 of internal rules and regulations).

The Chancellor hopes that this was only an isolated incident and that normally the journal is inaccessible to third parties. If the journal is normally kept on the desk in the doctor's office, this constitutes a violation of elementary principles of protection of personal data.

The Chancellor proposed to the battalion commander to take measures to minimise the risk of processing of personal data by unauthorised persons, e.g. by placing the journal in a locked cupboard or drawer.

(3.4) Inspection revealed that initial health examination of conscripts was also performed elsewhere than in the infirmary. Health examination was also performed in the computer class and other rooms. During initial health examination, sensitive personal data are processed, as information about the health of conscripts is collected. This must be done in conformity with certain requirements. Performing health examination in a room not intended or prepared for this purpose constitutes failure to comply with requirements under the Personal Data Protection Act.

The Chancellor proposed to the battalion commander to designate specific rooms for performing initial health examination on battalion territory in order to avoid unauthorised processing of personal data.

(3.5) From the reply to the request for information for preparing the inspection visit, it could be seen that guests are received in the battalion on Sundays between 09.00-17.00. A conscript must inform his squad leader about the arrival of guests and register himself in the relevant journal. It was also found from the reply that in the period from 01 January 2006 to 31 August 2007 visits to conscripts were restricted as compared to the frequency required in internal rules and regulations. During the introductory interview, it was stressed that visits to conscripts had not been restricted. However, confidential interviews with conscripts revealed that visits had been restricted in limited cases, but only rarely had visits been prohibited for all conscripts in the battalion.

Although information concerning visits is contradictory, the Chancellor considered it necessary to provide explanations as to whether restricting visits conformed to the Constitution.

The aim of the provisions regulating visits by guests is to protect fundamental rights and freedoms of conscripts to the protection of privacy and family life under § 26 and 27 of the Constitution. Prohibiting receiving guests definitely constitutes a violation of these above rights.

The Supreme Court Administrative Law Chamber has stated that "[...] Section 26 of the Constitution guarantees everyone's right to the inviolability of family life and stipulates that state agencies, local authorities and their officials may not interfere with anyone's family life except in the cases and pursuant to procedure established by law to protect health, morals, public order, or the rights and freedoms of others, to combat a criminal offence, or to apprehend a criminal offender. [...] Section 27(1) of the Constitution contains a subjective right. The scope of protection of this provision includes everything connected to the family from its creation to the most diverse areas of family life. Section 27(1) of the Constitution is worded as a right not subject to restrictions imposed by law, i.e. as an absolute right. However, this does not mean that this right may not be restricted at all. No fundamental rights in society can never be restricted. The reverse situation would mean that exercising such a right might prevent exercising some other rights. In a competition between fundamental rights, a necessity to restrict rights not subject to restrictions by law may arise. [...] by not mentioning the possibility of restriction by law in respect of some fundamental rights, the Constitution guarantees certain rights even more comprehensively than rights which may be subject to restriction by law. However, even such a comprehensive guarantee may not mean unlimited freedom. Every right may be restricted by something. To restrict a right which is not subject to restriction by law, a very important reason must exist and it must be contained in the Constitution itself. The restriction must be justified by another fundamental right or a constitutional principle, for example by an aim stipulated in the preamble to the Constitution [...]"[131]

Receiving guests is regulated in clauses 329-330 of internal rules and regulations. Under clause 329, receiving guests is only permitted during free time. The battalion commander in his directive establishes the precise time for it.

The provisions of internal rules and regulations proceed from the premise that a conscript must be able to receive guests normally every day after study and on Saturdays and Sundays after general cleaning.[132] In the opinion of the Chancellor, exceptions under internal rules and regulations include situations where for some good reason conscripts need to be given an opportunity to receive guests outside free time.

According to the second sentence of clause 329, a battalion commander is entitled to determine the precise time for receiving guests, but it should be taken into account that the right of conscripts to receive guests should not be restricted more than allowed under internal rules and regulations. Determining the time may not make virtually nonexistent the right of conscripts to receive guests arising from clause 329 of internal rules and regulations and § 26 of the Constitution.

131 Supreme Court Administrative Law Chamber judgment of 18 May 2000, No. 3-3-1-11-00.

132 Under clause 327 of internal rules and regulations, time after study until evening roll-call, and on Saturdays and Sundays after general cleaning is free time for conscripts, unless the company commander has given an order for cleaning weapons and equipment or for general physical training. Under clause 36 point 13, free time is in the period 16.30-18.50.

Under clause 330 of internal rules and regulations, meetings with visitors take place in a designated room or place. On Saturdays, Sundays, and public holidays the duty officer may allow guests together with the individual visited to get acquainted with the living conditions of conscripts and to move around in the battalion according to the procedure approved by the battalion commander in his directive. On that basis, it may be concluded that conscripts are also entitled to receive visitors during free time on weekdays.[133]

On that basis, it is doubtful whether the currently effective internal rules of the battalion, under which visits are allowed only once a week, conform to the delegating norm provided in the rules and regulations. The right to protection of private and family life may be restricted only in the cases and under the procedure established by law. Acts regulating the activities of the Defence Forces do not contain a basis for prohibiting conscripts from receiving visits. Thus, a situation where visits for all conscripts are prohibited under normal circumstances cannot be considered lawful.

The Chancellor proposed to the battalion commander to bring the internal rules of the battalion into line with the provisions of the rules and regulations of the Defence Forces.

(3.7) When touring the battalion, advisers discovered cells used for sobering up. Interviews revealed that conscripts placed into the cells for sobering up were not given bedclothes. The cells had no proper light, seating, water, or toilet. According to members of the Defence Forces, persons are rarely placed into the cells for sobering up, and then only for as long as is necessary. Under § 14^1(1) and (2) of the Disciplinary Measures in the Defence Forces Act, a member of the Defence Forces in case of whom reason exists to suspect that they may commit a disciplinary offence, or if they are unable to control their behaviour and may endanger their own health, life, or property or the health, life, or property of others, may be placed in a room designed or adapted for this (disciplinary detention). Under § 14^2(1) clause 1 of the Act, a member of the Defence Forces serving disciplinary detention has the right to treatment and conditions of detention which do not harm their dignity. Legislation regulating the activities of the Defence Forces does not contain more precise provisions specifying what conditions the room used for disciplinary detention should meet. However, on the basis of analogy, the requirements for prison cells and cells in police detention centres may be applied.[134] Under § 7(1) clauses 1-9 of the Minister of Justice Regulation No. 72 of 30 November 2000 "Internal prison rules", the following facilities must be located in a cell: 1) bunk beds; 2) storage for personal belongings; 3) table; 4) a seat for each prisoner; 5) a loudspeaker, if possible; 6) clothes rack; 7) washing facilities, if possible; 8) a toilet, if possible.

The Chancellor is of the opinion that confining an individual, even if for a short time, in a cell lacking washing facilities as well as a toilet, seat, or adequate bed with bedclothes, amounts to treatment degrading human dignity. Tallinn Administrative Court has also analysed detention in a similar cell, and concluded the following: "In the opinion of the court, a person's detention [...] in a room [...] where it is not possible to sit, drink water, or use the toilet, is manifestly disproportionate to the objective sought. [...] The court agrees with the applicant that placement in such a room [...] is degrading to human dignity."[135]

To stop inhuman and degrading treatment of individuals in the future, the Chancellor proposed removing doors from the above rooms, in order to avoid using the rooms for detention, or bringing the rooms into conformity with the general requirements for rooms used for detention.

(4) In his reply to the Chancellor's proposals, the battalion commander explained that the summary of the results of the inspection visit was introduced to members of the Defence Forces. The battalion commander also assured that measures had been taken to avoid unlawful punishment of conscripts by physical tasking.

133 The battalion commander may exceptionally by directive establish longer days for periods of field exercises and shooting exercises and may organise them on holidays, but must ensure at least one free day per week and that the number of weekly working hours corresponds to the Acts regulating Defence Forces service (clause 324 internal rules and regulations). Under § 168(3) of the Defence Forces Service Act, standard working time is eight hours per day and forty hours per five-day working week.

134 Under § 62(3) of the Disciplinary Measures in the Defence Forces Act, in war-time, upon imposition of disciplinary arrest in cases where use of a detention house is impossible or impracticable due to the circumstances, it is permitted to use premises (space) at the location of the military unit (subordinate unit) for execution of punishment which complies with the general requirements set for detention houses. The conditions set for night-time rest ensured to individuals subject to punishment, the requirements for day-time lighting of premises, and the procedure for provision of food may not be restricted.

135 See also Tallinn Administrative Court decision of 10 November 2004 in case No. 3-1889/2004.

V AREA OF GOVERNMENT OF THE MINISTRY OF THE ENVIRONMENT

1. General outline

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

The area of government of the Ministry of the Environment includes the Land Board and the Environmental Inspectorate.

During the reporting year, a new Forestry Act entered into effect (01 January 2007) and a new Environmental Liability Act was passed and entered into effect (16 December 2007). Entry into effect of the Environmental Liability Act is significant first and foremost because it enables requiring the person causing the damage to actually remedy the damage instead of the earlier monetary compensation. Under the Environmental Liability Act, remedying environmental damage takes place through remedial measures for restoring the original or equivalent status as compared to the moment of causing the damage. As a rule, costs of preventing and remedying environmental damage are covered by the person causing the damage. Thus, the Environmental Liability Act created a legal framework for restoring damaged natural values in their former shape, thereby avoiding impoverishment of the surrounding natural environment.

During the reporting year, work began on codifying environmental law and preparing the general part of the Environmental Code. In preparing the general part of the Environmental Code, current legislation is revised, conflicts are resolved, and whenever possible gaps are filled in order to create a code of laws meeting generally recognised principles of environmental law in Europe. The general part of the Environmental Code should define the legal framework of environmental law and policies, and would serve as a basis for future codification of environmental law.

The Chancellor of Justice scientific conference in 2007 was dedicated to environmental law. The conference entitled *Elurikkus või rikutud elu* (Wealthy life or spoilt life) included debates over European environmental law, emission protection, environmental penal law, and codification of environmental law. Presentations dealt with European nature protection law and its supervision, principles of environmental law in the administration of justice by the European Court of Justice, protection of subjective rights of individuals in Estonian court practice, penal law applied in cases of environmental violations, and problems of drafting environmental legislation in Estonia and Germany. Based on conference presentations, a special issue of the journal *Juridica* was published.[136]

During the reporting year, the Chancellor received 54 petitions concerning the area of government of the Ministry of the Environment. While in the two previous years the majority of cases involved abstract review of norms, this year the majority of cases dealt with compliance with fundamental rights and freedoms of individuals (i.e. concerning functions of the Chancellor as ombudsman). Issues raised in petitions concerned the major part of the Ministry's area of government.

Several petitions to the Chancellor raised problems of shipment of municipal waste and the price of water and wastewater. Establishing the price of these services can be controlled only to a limited extent – first of all with respect to the existence of a legal basis for price regulation, and whether the price was established by a competent body. If in previous years the Chancellor found various shortcomings in the legislation of local authorities in respect of these issues, it must be said that the quality of legislation during the current reporting year had improved. As the Chancellor lacks expert knowledge on waste and water management, the Chancellor is not competent to verify substantive justifications concerning prices of waste and water management. However, the courts when dealing with the issue of justification of prices for these services, have said that recourse to the Chancellor of Justice is the only legal remedy available to individuals. On the other hand, as proceedings conducted by the Chancellor do not constitute a judicial remedy, a situation exists where individuals are not guaranteed fundamental right of recourse to the court for protection of their rights and freedoms as required by § 15(1) of the Constitution. Section 14 of the Constitution also gives rise to a general right to organisation and procedure. However, lack of possibility of price control fails to guarantee enjoyment of this right, because individuals have no certainty about fairness and justification of prices. Unlike in the energy market or the communications services market, no independent supervisory body exists to verify substantive justification of established prices.

On that basis, the Chancellor on his own initiative decided to analyse whether a special supervisory body should exist to verify justification of prices established for shipment of municipal waste and water and wastewater services. The Chancellor submitted a relevant request for information to the Minister of the Environment. The Minister admitted that, due to absence of an independent supervisory body verifying justification of prices for shipment of municipal waste and water and wastewater services, the right of consumers to organisation and procedure under § 14 of the Constitution was not guaranteed. The Ministry is dealing with the issue of the need to establish state supervision over water and waste management.

136 *Juridica* 7/2008.

2. Expenses of post-sorting of mixed municipal waste in Tallinn

Case No. 6-4/070612

(1) On the basis of a petition from the Estonian Waste Management Association, the Chancellor supervised the legality of expenses established in Tallinn waste management regulations for post-sorting of mixed municipal waste.

(2) Tallinn City Council by regulation No. 6 of 08 March 2007 approved "Tallinn waste management regulations". Section 4(3) of the regulations says the following:

"Waste must be separated by type, so as to allow recovery as much as possible. Mixed waste left over after separation must be handed over for sorting to a municipal waste treatment company in or near Tallinn in accordance with the requirements of clauses 1 and 2 of this section, unless this involves excessive costs or the cost of delivering mixed municipal waste to a treatment company exceeds the costs of handing over and transport to a landfill by more than 35 per cent."

The Chancellor was contacted by the Estonian Waste Management Association, which found that the permitted cost rate of sorting mixed municipal waste in the Tallinn City Council waste management regulations (i.e. the cost of post-sorting may be up to 35% higher than the cost of reception of waste in Tallinn landfill) was contrary to the Waste Act and the Constitution. Waste handlers were of the opinion that the company dealing with post-sorting of municipal waste increased the price of its service by up to 35%. Waste management regulations require that mixed municipal waste must be delivered to a company dealing with post-sorting of waste. Only one company in or near Tallinn deals with post-sorting of municipal waste. Thus, the result of the provisions in the waste management regulations is that all mixed municipal waste must be delivered to a specific person and enables the person to ask a 35% higher price for the service. The waste handlers petitioning the Chancellor had not understood why the price for sorting mixed municipal waste had been increased and why exactly the permitted increase was 35%.

To verify the facts, the Chancellor submitted a request for information to the Ministry of the Environment, the Competition Board, and Tallinn City Council.

The Minister of the Environment replied that § 4(3) of Tallinn waste management regulations did not contravene the Waste Act. The Minister also explained that some other companies dealing with collection of segregated waste and post-sorting would also be able to organise post-sorting of mixed waste if they considered it economically justified. The waste management regulations do not mention a specific company to which waste should be delivered. Deciding the excessiveness of costs relating to sorting of waste falls within the competence of local authorities. The Minister added that he would consider the Tallinn City Council decision enabling charging a higher price for post-sorting of mixed waste as a provision which takes into account the possibility of insufficient separation of waste by type. In addition, the Minister said that the material separated during post-sorting had so far played a significant role in fulfilling obligations under the EU packaging directive. Separation of such an amount of waste from mixed waste proves that a significant part of the population do not sufficiently segregate their waste, including segregating of packaging waste. Undoubtedly, the cause for such behaviour has been the price of handling mixed waste, which has not been stimulating enough.

The Competition Board replied that the second sentence of § 4(3) of the waste management regulations interferes with the conditions of price-formation by companies, as the provision essentially lays down the maximum possible price which a company may charge clients. According to the Competition Board, the only company active in the market of sorting municipal waste at the time of filing the petition was Tallinn Waste Sorting Plant. From the substance of the waste management regulations, it may be concluded that the price should be formed in a situation of competition, as waste can be taken to a company dealing with treatment of municipal waste, but at the same time the second part of the sentence imposes a price limitation. Even a new company entering the market would not result in a significant price drop. The price is not a market-shaped price but the maximum price allowed by a legislative act, so that price differences can only be small. Thus, under such conditions probably no competition would develop in the municipal waste sorting market. At the same time, the waste management regulations do not restrict entry into the market for other companies. The Competition Board added that it was unclear why Tallinn had imposed in its waste management regulations an obligation to deliver already segregated waste for another round of sorting to a sorting company. If a sorting company could separate such a quantity of recoverable material from mixed waste so as to be able to cover the cost of sorting, it would be economically justified and reasonable to do so from the point of view of preserving the environment. In the present case, however, work and covering of costs is ensured to one company, regardless of performance. No reason exists to presume that a company would not make use of the possibility provided under a legal act to charge a price 35% higher than the cost of transport and delivery to a landfill. Such an intervention by a local authority is justified only if adequate reasoning is provided, if it is necessary and complies with the procedures established by law.

Tallinn City Council found that establishing conditions for sorting of waste and their collection by type fell within the competence of the local authority and conformed to the relevant Acts and the Constitution.

(3) The main issue in this case was whether the local authority may by regulation determine the maximum cost of waste treatment, and whether and how it should provide reasoning for its decision.

(4) The second sentence of § 4(3) of the waste management regulations lays down the maximum price (the cost of transport and delivery of waste to a landfill, to which 35% of the cost is added) at which mixed waste must be handed over to a sorting company.

Under § 36(1) of the Waste Act, mixed municipal waste is sorted before it is deposited in landfills. Subsection 2 of the same section imposes a direct prohibition on depositing unsorted mixed municipal waste in landfills. Under § 31, local authorities organise sorting, including separate collection of waste in order to enable maximum waste recovery. Recoverable waste and hazardous waste are separated from other waste if technically feasible and if not entailing excessive costs. Under § 30(1), waste must be recovered if technologically possible and if not involving excessive costs compared to other methods of waste handling.

The precondition for waste recovery is separation of recoverable waste from waste which cannot be recovered technologically or at reasonable cost. Two possibilities exist for separating recoverable waste from mixed municipal waste: waste is collected separately by type at the place of origin, or recoverable waste is picked out in the process of post-sorting.

Thus, legislation does not establish a general obligation to re-sort the volume of waste left over after collection by type in a waste treatment company (the so-called sorting company). Such an obligation does not exist only when collection by type has been organised and functions effectively. Under § 36(3) of the Waste Act, waste collected separately is post-sorted if necessary. The necessity under § 36(3) is determined under the Minister of the Environment Regulation No. 4 of 16 January 2007 "The procedure for sorting municipal waste and the basis for separation of sorted waste" (the sorting regulation). Under § 7(2) of the sorting regulation, mixed municipal waste must be sorted before depositing it in a landfill, if sorting and separate collection of waste at their site of generation has not been organised or if sorted waste has mixed during collection and transport and is contaminated with other waste, substances, and materials.

Sections 30 and 31 of the Waste Act make the obligation of recovery and sorting of waste dependent on costs. Both recovery and sorting must be technically possible and not involve excessive costs. The Waste Act does not define the concept "excessive costs".

Section 4(3) of Tallinn City Council waste management regulations also establishes the maximum cost rate of sorting in addition to the obligation of sorting waste. Tallinn City Council has justified establishing the specific percentage range of prices by the need to define the concept of "excessive costs".

The Chancellor of Justice agreed with the opinions of the Minister of the Environment and Tallinn City Council that deciding excessiveness of cost of sorting waste lies within the competence of local authorities. This is because excessiveness of sorting costs can only be assessed based on specific circumstances which are somewhat different in each particular local authority. Although local authorities are justified in providing substance to the undefined legal concept of "excessive costs", this right also entails an obligation to provide reasoning for the decision.

Tallinn City Council in its waste management regulations has found that costs for sorting municipal waste become excessive when they exceed by more than 35% the costs of transport and the cost of delivery to the landfill. Thus, if sorting mixed waste in a sorting company is more costly than delivering the waste to Tallinn landfill, the mixed municipal waste must be delivered to the sorting company.

The preparatory materials to the regulation and the explanations provided by Tallinn City Council during the proceedings do not reveal the justification why exactly this percentage was established. Tallinn City Administration submitted the disputed provision to the City Council without having inserted the 35% threshold. The proposal to add to the provision the words "unless this involves excessive costs or the cost of delivering mixed municipal waste to a treatment company exceeds the costs of delivery and transport to a landfill by more than 35 per cent" was made by a member of the City Council on 08 March 2007.

Under § 14 of the Constitution, the guarantee of rights and freedoms is the duty of the legislative, executive, and judicial powers, and of local authorities. Thus, the state, including local authorities, has a general duty of guaranteeing fundamental rights and freedoms.[137] A legal norm must be clear in substance (i.e. the principle of legal clarity). Alongside the clarity of a legal norm, it is also important to know why the body enacting the norm decided to establish it exactly in this form. In a state governed by the rule of law, state authority may not act arbitrarily,[138] and the exercise of authority is restricted by individual rights and general principles of law. Under § 13(2) of the Constitution, which prohibits arbitrary exercise of state authority, government bodies, including local authorities, are required to

137 M. Ernits. Comments on § 14. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Constitution of the Republic of Estonia. Commented edition] Tallinn 2002, § 14 comment 4.1.

138 Supreme Court Civil Law Chamber judgment of 10 April 2007, No. 3-2-1-37-07.

explain their decisions of principle and to provide reasoning for them. Otherwise, it is not possible to analyse whether or not particular activities of a local authority violate the prohibition under § 13(2) of the Constitution, i.e. abuse of discretion in respect of an individual.

The duty of reasoning by bodies exercising state authority, including local authorities, emanates from the principle of good governance under § 13(2) in combination with § 14 of the Constitution, in addition to the principle of the rule of law. According to the principle of good governance,[139] when drafting legal norms the purpose of the norms is kept in mind, and this must also be the basis for selecting relevant measures. The effects of legal regulation must equally be taken into account. According to the principle of good governance, legislative decisions must be transparent and reasoned.

In the present case, it is necessary to have reasoning why the threshold between excessive and ordinary costs for post-sorting in a waste sorting company is exactly 35%. Providing reasoning in this case is even more important because currently no agency exists to supervise costs of waste treatment. Allowing any price increases by one third is a significant change which may not be laid down only on the basis of abstract arguments. As reasons for establishing the particular threshold are allegedly rational, Tallinn City Council could present them and provide calculations and reasoning for the established price rate.

If the objective is to pick out a certain volume of recoverable material, it should be possible, for example based on the three-year practical experience of the sorting company, to lay down specific objectives. Thereby, focus should be on the end result and not on the process. Theoretically, it is possible to pick out and recover the majority of materials from mixed municipal waste, but in practice it might not be feasible considering the technical possibilities and costs of waste treatment in Estonia. Drafting a legal norm must be based on realistic possibilities of recovery in practice. The actual volume of segregated and recovered waste should be used as a point of reference for drafting the norm.

The Chancellor found that § 4(3) of Tallinn City Council regulation No. 6 of 08 March 2007 "Tallinn waste management regulations" does not conform to the rule of law principle under § 10 of the Constitution and to the principle of good governance under § 13(2) in combination with § 14 of the Constitution, as it is not clear why exactly 35% higher costs as compared to the cost of landfilling waste was defined as a threshold for excessive costs.

(5) The Chancellor proposed to Tallinn City Council to present reasoning for the 35% criterion used in § 4(3) of its regulation and to bring the regulation into line with the rule of law principle under § 10 and the principle of good governance under § 13(2) in combination with § 14 of the Constitution.

Tallinn City Council in its reply did not agree with the Chancellor, but added that Tallinn Waste Sorting Plant had finished with the business of collecting and sorting waste.

139 In European legal space, the following principles are recognised as a basis for the exercise of state powers: openness, participation, accountability, effectiveness, and transparency. In summary, these principles could be called part of the process of good governance. According to the principle of effectiveness, legislative drafting must be based on clear objectives, an evaluation of future impact and, where available, of past experience. The principle of transparency means that legislative drafting and the implementing process must be transparent and understandable. *European Governance*. White Paper.
Available online: http:// eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001DC0428:EN:NOT.
See also http:// www.coe.int/t/e/legal%5Faffairs/legal%5Fco%2Doperation/Law%5Fmaking/.

VI 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 developing and implementing state economic policy and strategic plans for the economy in the areas of industry, trade, energy, housing, construction, transport (including transport infrastructure, transport services, transit, logistics, and public transport); traffic management (including rail, road, street, and air traffic as well as navigation on waterways), improvements in traffic safety and reducing emissions and other environmental damage caused by vehicles; information technology, telecommunications, postal services, and tourism; coordinating development of state information systems; technological development activities and innovation; metrology, standardisation, certification, accreditation, operating licences, registers, industrial property, and competition supervision; consumer protection, export promotion, trade protection; issues involving regional economic development and investment; managing minimum stocks of liquid fuel; and preparing relevant draft legislation.

On 22 November 2007, the Riigikogu passed an Act amending the Government of the Republic Act and other relevant Acts. In order to improve state supervision and ensure sustainability of agencies, the Competition Board, the Communications Board, the Energy Market Inspectorate, the Technical Inspectorate, and the Railway Inspectorate were merged into two new agencies – the Competition Board dealing with market regulation, and the Technical Surveillance Authority dealing with surveillance of technical safety. The amendment entered into effect on 01 January 2008.[140]

On 11 September 2007, on a proposal from the Government the Riigikogu initiated a Draft Alcohol (Amendment) Act. The amendments would specify regulatory provisions for requesting termination of violations relating to handling of alcohol and for issuing instructions for compliance to prevent further offences.[141]

Petitions submitted to the Chancellor of Justice in 2007 were concerned with various areas of law within the area of government of the Ministry of Economic Affairs and Communications, including construction law, traffic management law, public water supply and sewerage law, energy law, economic administration, trade administration and competition law, business law and credit institutions law, transport and roads law, consumer protection law, and telecommunications, broadcasting and postal communications law.

Some petitions dealt with activities of agencies and inspectorates within the area of government of the Ministry, as well as activities of local authorities in connection with implementing and supervising laws within the Ministry's area of government. For example, issues relating to construction law were mostly aimed at supervising the activities of local authorities. In the field of transport and roads law and economic administration, issues raised were fairly equally divided between the Ministry and local authorities. In addition, petitioners asked the Chancellor to verify the constitutionality and legality of certain Acts.

Similarly to previous years, in the majority of cases no violations were found and the Chancellor simply explained to petitioners the contents and meaning of relevant Acts. Some petitions had to be rejected due to lack of competence. In that case the petition was forwarded to a competent supervisory authority or was returned to the petitioner (if recourse to other more effective legal remedies was available to the individuals concerned).

The range of problems which still have not been completely resolved and which the Chancellor has been highlighting since 2005 is concerned with rail transit of hazardous substances through Estonia and handling these substances in companies.[142] In his Annual Report for 2006, the Chancellor of Justice noted that he had not been informed about drafting of the relevant Act (the Chancellor then sent a letter to the Minister of Economic Affairs and Communications, pointing out the relevant shortcomings and noting that drafting of legislation within this area was within the Ministry's competence). Resolving the problems of transit of hazardous goods presumes amending several pieces of legislation. By now, the Riigikogu, the Government, as well as the Ministry of Economic Affairs and Communications have taken certain steps. Revision and mapping of all legislation relating to transport safety has started in order to ascertain the need for and feasibility of drawing up a separate Act for regulating transport of hazardous goods in Estonian legal space. Some legislation relating to organising transport of hazardous goods has already been adopted or amended. The Riigikogu economic affairs committee specifically emphasised the importance of the topic at its meeting on 11 March 2008 when dealing with a presentation by the Ministry of Economic Affairs and Communications on transport of hazardous goods.[143]

The Chancellor dealt with a petition where a petitioner was dissatisfied with the procedure for registration of domain

140 Explanatory memorandum to the Draft Act amending the Government of the Republic Act and other relevant Acts due to merging of government agencies, as at 08 October 2007, No. 125 SE, available online at http://www.riigikogu.ee.

141 Explanatory memorandum to the Draft Alcohol (Amendment) Act, as at 11 March 2008, No. 89 SE, available online at http://www.riigikogu.ee.

142 An analysis of transport of hazardous goods is contained in the Chancellor of Justice Report for 2005, pp 99-105; the Chancellor referred to the same problem in his annual report for 2006, pp. 276-277.

143 Agenda of the Riigikogu economic affairs committee for the week of 10-16 March 2008 as at 11 March 2008, available online at http://www.riigikogu.ee.

names, more specifically with the limitation excluding the possibility for natural persons to apply for a .ee domain containing their name. The Chancellor reached the conclusion that legal regulation of registering and managing Estonian domain names was extremely ambiguous and it was not clear who was responsible for what and whether the relationship between the registrar and a recipient of a domain name was a relationship falling under public or private law, etc. As under § 63(1) of the Government of the Republic Act the area of government of the Ministry of Economic Affairs and Communications also includes coordinating development of information systems, technological development and innovation, maintaining registers, and preparing relevant draft legislation, the Chancellor asked the Ministry to explain how it intended to deal with issues relating to registration of domain names.

The Chancellor sent a report to the Board of the Riigikogu, drawing their attention to the need to observe the principle of good governance in determining the price of renewable electricity and the extent of support for its production.[144] The report was drawn up based on the following considerations: on 04 December 2006, the Government initiated a Draft Act for amending the Electricity Market Act. The Draft Act envisaged a purchase price higher than the market price for renewable electricity and support for producers of renewable electricity. Despite Government resistance, the Riigikogu decided to change the Draft Act and adopt it so that the purchase price and support to producers of renewable electricity was established at a significantly higher level than originally proposed by the Government. The initiator of the change justified it by proposals made by associations uniting potential producers. The lead committee did not draw up a new explanatory memorandum to explain changes in the draft. In other words, when introducing a significant change the Riigikogu failed to justify why it was necessary to raise support and prices exactly by that amount. Therefore, the Chancellor concluded that in determining the purchase price and support for renewable electricity the Riigikogu had failed to observe the principle of a state governed by the rule of law under § 10 and the principle of good governance under § 13(2) in combination with § 14 of the Constitution. In his report, the Chancellor pointed out that, under the principles of the rule of law and good governance, the lead committee is obliged to draw up a new explanatory memorandum when making significant changes to the initial draft. Moreover, the right to draw up a new explanatory memorandum for the second reading of a Draft Act is also contained in § 18 of the Riigikogu Rules of Procedure Act.

2. Legal regulation of organisation of registration and administration of Estonian domain names

Case No. 7-4/070137

(1) On the basis of a petition, the Chancellor of Justice initiated supervisory proceedings over organisation of registration of domain names.

(2) In order to register a web address designated in words in Estonia, it is necessary to contact the Estonian Educational and Research Network (EENet).[145] The legal basis for operation of EENet is the Minister of Education and Research Regulation No. 25 of 04 May 2004 "Statutes of the Estonian Educational and Research Network". In connection with the registration of domain names, EENet provides the following information: "EENet functions as the registrar in accordance with an agreement between .ee administrators and the Ministry of Education, as laid down in the statutes."[146]

EENet has adopted "Rules for the registration of subdomains" laying down the procedure for registering domain names.[147] Clause 3 of the rules states:

"3. The following may apply for a domain name:
- a. An organisation located in Estonia and having a permanent connection here.
- b. Sole proprietors who have registered themselves in the Estonian Central Commercial Register may apply for a domain name directly under .ee. Otherwise under .pri.ee.
- c. Departments and structural units of an organisation may not register an independent domain name.
- d. Private individuals may not apply for a domain name directly under .ee. Private individuals who wish to have their own domain name may register it under the second-level domain .pri.ee."

The same information is given under the FAQ section on the EENet homepage.

The petitioner contacted the Chancellor of Justice and complained that the limitation under which natural persons could not register a domain under their own name (www.personsname.ee) and that the possibility was available only for legal persons was unconstitutional.

To clarify the facts, the Chancellor submitted a request for information to the Ministry of Education and Research, the Ministry of Economic Affairs and Communications, the National Institute of Chemical Physics and Biophysics

144 The Chancellor of Justice report of 21 June 2007 No. 1 "Observing the principles of good governance in determining the price of renewable electricity and the size of support to its production", available online at http:// www.oiguskantsler.ee/?menuID=15.
145 Available online at http:// www.eenet.ee.
146 Available online at http:// www.eenet.ee/EENet/dom_reeglid.html.
147 Available online at httP:// www.eenet.ee/EENet/dom_reeglid.html.

(KBFI) (a response to the letter came from the Estonian Academy of Sciences), and the Estonian Educational and Research Network (EENet).

The Ministry of Education and Research explained in its reply that EENet was responsible for all technical procedures related to management of domain names. The administrator is competent to establish rules and make exceptions to them. The administrator's decisions are forwarded to EENet by a contact person. The Ministry admitted that the principles for managing domain names needed updating, and said that the EENet Council had been dealing with the issue. The administrator has prepared new rules but their implementation has been postponed until a consensus between the administrator and the manager is reached. The Ministry agreed that the limitation on applying for a .ee domain name for private individuals was not justified. Under the new rules, it is envisaged to reduce limitations both in respect of applicants as well as the number of names that may be applied for. The Ministry expressed the hope that the new rules would come into effect in the nearest months. The Ministry emphasised that rapid expansion of the internet has taken place thanks to flexible regulation, so that excessive regulation of domain names would not be reasonable. At the same time, the state should not completely stand aside in this process. The current system is balanced and has proved reasonable in practice. However, it would be necessary to involve internet service providers and other organisations related to internet services to a wider extent than before.

The Ministry of Economic Affairs and Communications in its reply expressed the view that EENet had so far managed registration of .ee domain names very well so that no need arose to change the work of the register of domain names. However, the Ministry saw problems in the rules for registration of domain names and in the distribution of work between the KBFI, the internet service providers (ISPs), and EENet. The Ministry believes that it is necessary to change the current distribution of work where the KBFI as the .ee official administrator lays down rules, EENet manages registration, and the ISPs are artificially cut off from the process of granting domain names. It would be reasonable to merge the functions of the .ee administrator (KBFI), the register of domain names, and the manager of the .ee name server (EENet). Competence for procedures for applying for domain names should be given to ISPs. The role of the KBFI as the .ee administrator is artificial, as the KBFI as an organisation has lost the actual connection with organising the internet. The Ministry of Economic Affairs and Communications found that the Ministry of Education and Research (or the Government of the Republic) could propose to the KBFI to initiate transfer of the .ee administrator functions to a new organisation in accordance with the Internet Assigned Numbers Authority (IANA) rules. Merging the functions of administering and managing the .ee domain in one organisation would make procedures more transparent and quicker, and responsibility would be clearer. The new administrator should, of course, comply with the rules established by IANA. The Ministry emphasised that EENet should draw up new rules for registering .ee domain names and do it in cooperation with the KBFI and the Ministry of Education and Research. The rules for registering .eu domain names could serve as a model. Limitations for obtaining domain names and limitations on private individuals should largely be removed. The requirement for the applicant's connection to Estonia should be retained. An annual fee for registration of domain names could also be introduced. It was also found that regulating the organisation of domain names by legislation would not be practicable. Other countries have also refrained from government regulation of the internet environment.

The Estonian Academy of Sciences explained in its reply that universal rules for the functioning of the internet are established by ICANN (Internet Corporation for Assigned Names and Numbers), and that IANA (Internet Assigned Numbers Authority) is one of its bodies. Work of the internet system is legally regulated by thousands of RFC (Request for Comments) system documents, which are also mandatory for eeTLD administrators. Internet functioning mechanisms are not regulated by any intergovernmental agreements or conventions, so that no state can assume an independent legislative function. The legal relationship between an applicant and the registrar is regulated by private law agreements. Standard conditions of agreements are based on global internet rules. The Academy of Sciences added that, under RFC 1591, organisational competence for implementing the rules of the internet has been given to ccTLD (country code Top Level Domain) administrators. A serious problem arises from similarity and overlapping of personal names, as domain names are registered according to the first come first served principle. In this situation it is extremely difficult to guarantee equal treatment of persons. The problem could be solved by a rule laying down that a natural person may register a domain name only in combination with a numerical supplement. Since November 2005, the Academy of Sciences in cooperation with EENet has been planning to change the procedure for registering domain names. The aim of the reform is to enable natural persons to register www.personsname.ee domains. Only the timing of the reform has not yet been determined. The new rules should be approved by as wide-ranging and representative an internet community as possible.

EENet emphasised in its reply that it considered the .ee domain as Estonia's country identification to be an important public resource and had proceeded from this principle in its work. EENet explained that "Rules for registration of subdomains" have not been established by the decision of EENet as a state agency but by the decision of the .ee administrator. Only technical work has been delegated to EENet. When necessary, the administrator also makes exceptions. Establishing such rules was reasonable years ago when the internet was not yet widespread. The aim of the limitations was to ensure registration of domain names to eligible users in order to avoid large-scale profiteering with names. EENet also explained that the necessity to allow registration of limited .ee domains ended several years ago. It would also not be appropriate to establish numerous exceptions. According to EENet, three years ago a proposal was made to the .ee administrator and the EENet Council to revise the rules. The programme work was completed by the

end of 2005. Most limitations could be removed, and only limitations arising directly from documents regulating the internet structure would remain, as well as the requirement that the applicant should have a connection with Estonia. The task of EENet would be to maintain the central register of .ee domain names. Register entries would be handled by registrars on the basis of contracts. The last time when the EENet Council discussed implementing the rules was in July 2006. As disagreements arose on some issues, any further action depends on the opinion of the .ee contact person's technical and administrative opinion. According to EENet, many countries have avoided regulating issues of domain names by legislation in order not to cause potential conflict between a country's legislation and the universal organisation of the internet. Therefore, Estonia too would be advised to refrain from such regulation.

(3) In this case, it was important to answer the question whether organisation of registration of domain names in Estonia complied with general principles of law and whether the limitation under which natural persons could not apply for a domain name directly under .ee was lawful.

(4.1) The principle of subsidiarity applies in establishing organisation of registration of domain names, i.e. the state itself decides how to organise registration – which body or person would be dealing with it, what the role of the public authority is, etc.[148] Both IANA and ICANN leave a very great role to the opinion of the relevant country (i.e. which body organises domain names, and how).[149]

In a number of countries, the institution dealing with registering domain names is a legal person in private law in the form of a foundation or similar institution (e.g. Austria, the Netherlands, Sweden, Norway, France, Ireland, Germany, Switzerland). However, it is clear that issues relating to domain names are not only a matter for persons under private law. Domains constitute an important public resource so that their distribution and use may infringe upon the rights of individuals (e.g. using someone else's name in one's domain name, protecting the rights of holders of registered trademarks[150]). The Supreme Court has stated: "In the opinion of the Chamber, a domain name is not only an address but, in addition to technical functions, it also has other functions. Referring to a holder of a domain name also influences internet users to visit exactly that particular website. Thus, in its functions a domain name resembles a trademark, as it facilitates differentiation and recall, provides information, indicates ownership or origin, and serves an advertising function. Accordingly, a domain name also has a proprietary value and, in principle, it may be an object of intellectual property [...].[151]

RFC 1591, which is used as a standard, indicates that administrators dealing with registration of domain names are providing a public service ("These administrators are performing a public service on behalf of the Internet community")[152]. Documents drawn up both by IANA and ICANN stress the importance of observing general principles of law (first and foremost equal treatment, avoiding discrimination, etc.) in the registration procedure.

Guidance materials "Principles and Guidelines for the Delegation and Administration of ccTLD", drawn up by the ICANN working group Governmental Advisory Committee and considered as best practice guidelines[153] for the organisation of domain names, state that the internet naming system is a public resource and its functions must be administered in the public interest. By reference to the WSIS plan of action of December 2003, it is stressed that Governments should manage or supervise their respective country code top-level domain name. Any such involvement should be based on appropriate national laws and policies (points 1.6-1.7). The importance of observing national laws is also stressed when talking about the activities and administration of the ccTLD register (e.g. points 2.1, 3.7, 4 ff).

The principle of subsidiarity applies in establishing organisation of registration of domain names, i.e. the state itself decides how precisely to organise it. As can be seen from the above discussion, the state must guarantee and take responsibility that registration and organisation of domain names proceeds from the public interest. Therefore, in some countries a state agency (and not a person in private law) takes care of registration of domains and the state has laid down general procedural principles in the form of public law (e.g. in parliamentary Acts). An example of such a country is

148 "The main principle is the principle of subsidiarity. […] There is currently a variety of legacy ccTLD situations with different legal or contractual frameworks." ("Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains"; available online at http:// gac.icann.org/web/home/ccTLD_Principles.rtf (25 March 2007)) "It is important to note that different governments have different degrees of involvement in a ccTLD – ranging from managing it, to merely observing a non-governmental organization's management." (Materials Presented at 03-04 April 2003 ccTLD Workshop "Administering the Root: Delegations and Redelegations – Every country is unique"; available online at http:// www.icann.org/cctlds/administering-the-root-25feb03.pdf (05 April 2007).

149 "The desires of the government of a country with regard to delegation of a ccTLD are taken very seriously." ("ICP-1: Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation)"; available online at http:// www.icann.org/icp/icp-1.htm (05 April 2007)).

150 See e.g. M. Toomsoo. Kaubamärgiomanike õiguste kaitse seoses domeeninimedega. [Protection of the rights of holders of trademarks in connection with domain dames] – *Juridica* 2000, p. 281 ff. WIPO (World Intellectual Property Organisation) activities also relate to protecting the rights of holders of trademarks, see more specifically http://www.wipo.int/amc/en/domains/ (08 April 2007).

151 Supreme Court Civil Law Chamber judgment of 30 March 2006, No. 3-2-1-4-06, par. 49.

152 RFC 1591 is available online at ftp://ftp.eenet.ee/doc/rfc/rfc1591.txt; http:// www.isi.edu/in-notes/rfc1591.txt (25 March 2007). The same: "ICP-1: Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation)"; available online at http://www.icann.org/icp/icp-1.htm (05 April 2007).

153 "Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains"; available online at http:// gac.icann.org/web/home/ccTLD_Principles.rtf (25 March 2007). This is an extremely important document, which has also served as a basis for the IANA report on the delegation of .eu TLD, available online at http:// www.iana.org/reports/eu-report-05aug05.pdf (05 April 2007).

Finland, where the Finnish Communications Regulatory Authority (FICORA) deals with registration of domains, and a Domain Names Act and the Minister of Communications and Transport regulation on fees have been adopted.[154]

On the level of the European Union, separate (public) regulation of domain names also exists, without merely relying on self-regulation (in the form of contracts, etc): Regulation No. 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain; Commission Regulation No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration.

The KBFI is registered with the US-based IANA as administrator of the country code .ee.[155] The KBFI has delegated the registration function to EENet, which is a state agency in the area of government of the Ministry of Education and Research. Section 6 clause 3 of the Minister of Education and Research Regulation No. 25 of 04 May 2004 "Statutes of the Estonian Educational and Research Network" states that the aim of EENet is to ensure correct administration of the DNS Top Domain .ee based on the Estonian country code. Under § 7(13) of the statutes, EENet organises registration and management of .ee domain names based on agreements with the .ee domain administrator. The state has not adopted a law or regulation on issues of domain names. Registration of domain names takes place under standard rules for registration of subdomains established by the .ee administrator.

The Chancellor of Justice reached the conclusion that legal regulation of registering and managing Estonian domain names was extremely ambiguous and it was not clear who was responsible for what and whether the relationship between the registrar and a recipient of a domain name was a relationship falling under public or private law, etc.

First, the role of the KBFI (a legal person under public law, i.e. a decentralised bearer of an administrative function and created in the public interest) as the administrator is unclear – whether and to what extent it deals with organising registration of domains in practice and what its responsibility is. Neither the Institute of Chemical Physics and Biophysics Act nor the KBFI statutes approved by KBFI science council decision No. 4 on 13 October 2000 include a clear indication as to competence relating to organisation of domains (indirectly, it would probably only fit under the competence for development of the latest research directions in informatics). For example, the KBFI does not belong directly to the EENet Council, and Endel Lippmaa as the .ee administrator is designated as a member of the Council. Moreover, the function of EENet as a state agency to deal with registration and management of .ee domain names does not arise from an Act but only from a regulation of the Minister of Education and Research.

The indication in the reply to the Chancellor's request for information that in practice exceptions to the rules established by the administrator have been made, deserves serious attention. The rules do not contain a clear reference to the possibility or basis of making exceptions. It cannot be claimed that abuses have occurred in practice, but the question inevitably arises whether principles of equal treatment, transparency, etc have been observed.

Secondly, the legal character of the relationship between EENet as registrar and an applicant for (recipient of) a domain name is unclear, i.e. whether the relationship falls under public or private law.

On the one hand, the Supreme Court has said that "[...] a private law contractual relationship between the registrar and the owner of a domain name arises upon registration of a domain name".[156] The World Intellectual Property Organisation (WIPO) also considers the ensuing relationship as a contractual one (without directly specifying whether it is public or private) in its "ccTLD Best Practices for the Prevention and Resolution of Intellectual Property Disputes".[157] This document is directly applicable only in respect of countries with an open country code, among which Estonia does not belong.

On the other hand, EENet is a state agency administered by a government agency. Under § 43(2) of the Government of the Republic Act, state agencies administered by government agencies provide services to government agencies or perform other state functions in cultural, educational, social, or other areas. Thus, in the light of international practice described above, a reasonable question arises whether registration and management of .ee domain names should be considered a state function (under public law).

Qualification of the legal relationship as either private or public also influences the possibility of challenge, i.e. whether disputes between EENet and an applicant for a domain name fall within the jurisdiction of the administrative court or county court (here we do not mean disputes between an owner of a domain name and third parties).

In international practice, use of extrajudicial dispute settlement mechanisms is widespread, but that would be applicable primarily in respect of relations between an owner of a domain name and third parties.[158]

154 Available online at http:// www.ficora.fi/en/index/saadokset/lait/verkkotunnuslaki.html (25 March 2007).

155 Available online at http:// www.iana.org/root-whois/ee.htm (26 January 2007).

156 Supreme Court Civil Law Chamber judgment of 30 March 2006, No. 3-2-1-4-06, par. 48.

157 "ccTLD Best Practices for the Prevention and Resolution of Intellectual Property Disputes" (Version 1: June 20, 2001); available online at http:// www.wipo.int/export/sites/www/amc/en/docs/bestpractices.doc (08 April 2007).

158 See e.g. "Uniform Domain Name Dispute Resolution Policy"; available online at http://www.icann.org/udrp/ (05 April 2007). See also http://www.wipo.int/amc/en/domains/resources/index.html (08 April 2007).

It is also important to emphasise that EENet as an administered state agency is essentially maintaining a database. It is unclear how the Databases Act (regulating public relationships between a registrar and an individual) and the database originating as a result of registration of domain names relate to each other.

Thirdly, based on information in the media and replies to the Chancellor's requests for information, it appears that there are plans to establish a fee for domain names.[159] The provision of § 113 of the Constitution also needs to be taken into account in this context, i.e. to analyse whether in the light of the above constitutional provision it may constitute a public fee which may only be established on the basis of a delegating norm in a parliamentary Act.[160]

(4.2) The Chancellor's request for information was motivated by a petition where an individual claimed that refusal to allow natural persons to apply for a domain name directly under the .ee domain was unconstitutional and unjustified. Under § 4(2) point b indent iii of Regulation No. 733/2002 of the European Parliament and of the Council of 22 April 2002 on implementation of the .eu Top Level Domain, natural persons resident within the Community may apply for registration of domain names in the .eu TLD through any accredited .eu Registrar.[161] In other countries, too, natural persons may apply for a domain name directly under the relevant country domain.

Limitation under point 3 clause 4 of the rules, excluding the possibility of natural persons to apply for a domain name directly under the .ee domain, may constitute an infringement not only upon the right of individuals to self-realisation in the broadest sense (§ 19(1) Constitution), but also upon the inviolability of private life in the narrower sense (§ 26(1) Constitution), as a domain name in the form www.personsname.ee relates to a person's identity, as well as infringement upon freedom of expression (§ 45(1) Constitution), because use of the domain www.personsname.ee is one way of expressing ideas, opinions, and beliefs by identifying oneself.

The KBFI is a legal person in public law and EENet is an administered state agency. Even if the relationship between the registrar and an individual could be seen as governed by private law, the public authority even in private law relationships must observe general principles of law. For example, the Supreme Court has emphasised: "Private and public law cannot be completely separated in practice. In many cases, both private and public law norms need to be applied simultaneously in respect of activities of agencies. This situation may arise when legal persons in public law participate in private law relationships, because even in such relationships legal persons in public law must observe fundamental rights, the principles of proportionality, equal treatment, legitimate expectations, and other norms and principles under public law."[162]

Thus, a limitation excluding the possibility of natural persons to apply for a domain name directly under the .ee domain, which may constitute restriction of fundamental rights of individuals by public authorities, must both formally and substantively conform to the Constitution.

Replies to the Chancellor's request for information indicated that the current limitation was not considered justified and there were plans to change it in the process of revising the rules for registration of domains. As it was envisaged to change the current limitation, the Chancellor did not consider it necessary to analyse in more detail the formal and substantive constitutionality of the limitation in the context of fundamental rights.

However, the Chancellor added that this prohibition had enabled limiting applying for domain names at a time when no other effective restrictions (e.g. a fee) existed. For example, in Finland a significant increase in the number of registrations occurred after the reform in March 2006 which alleviated restrictions on applicants for the .fi domain (also allowing natural persons to apply for domains)[163] (nevertheless, registration of domain names owned by natural persons has remained within reasonable bounds[164]). Intentionally occupying domain names and then trading in them may definitely infringe upon the rights of persons (both natural and legal persons). Therefore, all arguments for and against should be weighed when defining the range of eligible persons and imposing limitations. Domain name

159 *Eesti Ekspress* 14.12.2006 ".ee domeenid tuleval aastal tasulised" [".ee domains available for a fee next year"]: "Good news: private individuals can also start applying for .ee domains, and legal persons will be able to obtain several domains if they wish, without having to apply for an exception as currently."

160 E.g. Supreme Court *en banc* judgment of 22 December 2000, No. 3-4-1-10-00, par. 20: "The wording of § 113 mentions state taxes, duties, fees, fines, and compulsory insurance payments. In practice the scope of protection of the provision is wider. The provision attempts to provide an extensive list of public financial obligations. The Supreme Court *en banc* is of the opinion that the scope of protection of § 113 extends to all public financial obligations, regardless of how they are called in different pieces of legislation. The purpose of § 113 is to ensure a situation where all public financial obligations are only established by an Act passed by the Riigikogu."

161 See also paragraph 6 in the preamble; the same arises from Commission Regulation No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration, Art 16(2), Art 19(2), Art 21(2) p b.

162 Supreme Court Special Panel ruling of 20 December 2001, No. 3-3-1-8-01.

163 "The Finnish Communications Regulatory Authority (FICORA) began granting fi-domain names to private persons on 1 March at 8.00 a.m. By 4 p.m., private persons had applied for about 2,000 domain names, of which about half were based on a person's name." Available online at http://www.ficora.fi/en/index/viestintavirasto/lehdistotiedotteet/2006/private0103.html (05 April 2007)

164 A limitation exists for registering domain names based on personal names, i.e. a personal domain name can only be obtained if the applicants themselves bear the name they apply for.

piracy and so-called cybersquatting are a serious problem in international practice.[165]

(4.3) The Chancellor of Justice reached the opinion that legal regulation of registering and managing Estonian domain names was extremely ambiguous and it was not clear who was responsible for what and whether the relationship between the registrar and a recipient of a domain name was a relationship falling under public or private law, etc. The Chancellor's analysis demonstrates that the state may not leave the area for complete "self-regulation", as it constitutes an important public resource where fundamental rights of individuals may become infringed.

The Chancellor cannot assume the role of the executive or legislative power and say how exactly issues of registration of domains should be organised in Estonia and whether and what kind of regulation to introduce. The state has a wide margin of discretion in this respect. Not all issues relating to registration of domains need to be regulated on the level of Acts or regulations. However, the state needs to take into account certain principles and problems (also raised in the Chancellor's analysis) when making this decision.

Under § 63(1) of the Government of the Republic Act, the area of government of the Ministry of Economic Affairs and Communications includes coordinating the work of state information systems; technological development and innovation policy; maintaining registers; and drawing up relevant draft legislation.

(5) On 19 April 2007, the Chancellor of Justice sent a memorandum to the Ministry of Economic Affairs and Communications, drawing attention to shortcomings that he had found, and asked the Ministry to inform him by 30 November 2007 at the latest how they planned to change the system of registration of domain names.

In its reply of 28 November 2007, the Ministry asked to extend the deadline for replying until 29 February 2008, as the field in question was complicated and an analysis of the choice of administrative and legislative measures was still under way. By the time of finalisation of this Annual Report,[166] the Chancellor had not yet received a reply.

165 "The number of cybersquatting disputes filed with the World Intellectual Property Organization (WIPO) in 2006 increased by 25% as compared to 2005. In a related development, the evolution of the domain name registration system is causing growing concern for trademark owners, in particular some of the effects of the use of computer software to automatically register expired domain names and their 'parking' on pay-per-click portal sites, the option to register names free-of-charge for a five-day 'tasting' period, the proliferation of new registrars, and the establishment of new generic Top Level Domains (gTLDs). […] In 2006, a total of 1,823 (gTLDs and country code Top Level Domains (ccTLDs)) complaints alleging cybersquatting - abusive registration of trademarks as domain names - were filed with the WIPO Arbitration and Mediation Center (Center), representing the highest number of cybersquatting cases handled by WIPO since the year 2000." (12 March 2007, WIPO/PR/2007/479: "Cybersquatting Remains on the Rise with further Risk to Trademarks from New Registration Practices"; available online at http://www.wipo.int/pressroom/en/articles/2007/article_0014.html (07 April 2007)).

166 01 June 2008.

VII AREA OF GOVERNMENT OF THE MINISTRY OF INTERNAL AFFAIRS

1. General outline

The area of government of the Ministry of Internal Affairs includes guaranteeing internal state security and protecting public order; guarding and protecting the state border and guaranteeing the border regime; managing issues relating to crisis management, state operation stockpiles, fire fighting and rescue works, citizenship and immigration, churches and congregations, and drawing up relevant draft legislation. Agencies within the area of government of the Ministry of Internal Affairs include the Security Police Board, the Citizenship and Migration Board, the Border Guard Administration, the Police Board, and the Rescue Board. The Minister of Internal Affairs is in charge of the area of internal security.

In 2007, the Chancellor of Justice had to resolve 120 cases pertaining to the area of the government of the Ministry of Internal Affairs. The majority of the cases concerned petitions against the activities of the Police Board (60 cases).

The main highlights of 2007 were institutional and legal changes for guaranteeing internal security and the Ministry's activities for joining the Schengen area.

In April 2007, important events in terms of guaranteeing internal security and public order in Estonia occurred in connection with the removal and relocation of the so-called bronze monument in Tallinn on 27 April 2007. During the events, the police detained a significant number of people to guarantee public order, thereby restricting their fundamental rights and freedoms by using special equipment and restraining measures. The Chancellor submitted his views on restricting fundamental rights and freedoms and on the legality of state actions, including constitutionality of legal norms, to the Ministry of Internal Affairs, which initiated a Draft Act for defining the limits of state competence in similar cases.

On 01 July 2007, a new Border Guard Service Act entered into force, transforming the border guard service into a civil service. When assessing the activities of the Border Guard Board in the reporting year, it may be concluded that subjective rights of public servants, including the principle of legal certainty, were not fully observed in implementing the new Border Guard Service Act and changing the service system.

In May 2007, activities started for merging the police, border guard, and the Citizenship and Migration Board into a joint internal security agency. The aim of merging the institutions is to be better placed to guarantee a secure living environment in changing circumstances. The merger plan would be submitted to the Government for deliberation in the first quarter of 2008. Draft legislation for amending the relevant Acts would be submitted to the Government for approval in the fourth quarter of 2008. Completion of the merger of the three institutions is planned for 2010.

In 2007, the Ministry of Justice and the Ministry of Internal Affairs put an end to a situation duplicating the competencies of state forensic institutions. On 01 January 2008, the Forensic Science Centre and the Forensic Service Bureau were merged into one institution operating under the area of government of the Ministry of Justice.

On 22 November 2007, the Minister of Internal Affairs submitted to the Government a summary report of the Schengen Facility programme which has now mostly ended for Estonia. Within the Schengen Facility programme, the European Commission allocated 1.2 billion Estonian kroons to Estonia for developing the EU external border and bringing it into line with Schengen requirements. Sub-programmes were implemented by the Border Guard Board, the Citizenship and Migration Board, the Ministry of Foreign Affairs, the Police Board, the Central Criminal Police, and the Ministry of Internal Affairs. The Ministry of Internal Affairs started developing an inter-agency operational radio communications network with support from the programme.

On 22 November 2007, the Minister of Internal Affairs gave an overview to the Government of implementing the inter-agency operational radio communications network. A common national digital radio communications network is necessary for joining the EU Schengen area. After delivery at the end of 2007, the new network can be used throughout Estonia in case of existence of end terminals. The Ministry of Internal Affairs is planning a complete transfer to the new operational radio communications network in 2008 within its area of government.

On 18 October 2007, the Government approved and submitted to the Riigikogu the Estonian general security policy guidelines to 2015. The guidelines define common principles, vision, and long-term objectives and action from which the public and private sector would have to proceed and to the achievement of which they have to contribute. The guidelines support establishing a system of protecting public order which helps to ensure greater internal stability in Estonia, including saving human lives and preventing and combating threats. Individuals are more widely included. Earlier, the Chancellor had drawn the attention of ministers to the need for preparedness in case of natural disasters or other large-scale emergencies.[167]

167 See e.g. the Chancellor of Justice Annual Report 2005. Tallinn 2006, pp. 115-140. Available online at http://www.oiguskantsler.ee/.

In 2007, the Chancellor of Justice analysed in detail the lawfulness of involving security firms and non-profit associations in fulfilling the functions of the police. The Draft Maintenance of Law and Order Act, currently under deliberation in the parliament, envisages creating delegating norms for concluding administrative agreements with private security firms and non-profit associations in order to transfer to them certain tasks of guaranteeing public order. One argument for involving the private sector in maintaining law and order is the need to legitimise the current situation.

In 2007, the Chancellor acquainted himself with the activities of the security firm AS G4S Estonia (at the time of the proceedings still AS Falck Estonia; hereinafter AS G4S Estonia) and non-profit associations involved in maintaining law and order about which the Chancellor found relevant information on the websites of local authorities and non-profit associations. It was found that in some local authorities in Harju County G4S patrols performed tasks of maintaining public order based on security contracts. It was also found that on 19 May 2004 the North Police Prefecture and AS G4S Estonia concluded a cooperation agreement for preventing and combating offences and maintaining public order. On the basis of the agreement, the police involve AS G4S security staff in their activities to operate as assistant police officers. The cooperation agreement included provisions constituting a transfer of competencies of the executive power, which presumes existence of an explicit delegating norm in an Act.

At the beginning of 2008, the Chancellor reached the conclusion that the North Police Prefecture lacked a legal basis for transferring competencies of executive state authority to a private security firm. The provisions in the cooperation agreement between the North Police Prefecture and AS G4S Estonia are unlawful, as they constitute transfer of competencies of executive power. Resolving the issue continues in 2008, and therefore the topic will be covered in more detail in the Chancellor's report next year.

Within the area of government of the Ministry of Internal Affairs, in 2007 the Chancellor made inspection visits to the Citizenship and Migration Board, the expulsion centre, and police detention centres falling under the responsibility of the Police Board.

During the inspection visit to the Citizenship and Migration Board, the Chancellor verified how the agency was complying with the principle of good administration (e.g. observing deadlines for replies and providing adequate content) when communicating with individuals.

The Chancellor first visited the expulsion centre in 2004. The impression after the 2007 inspection visit was generally positive. The proposals and recommendations made in 2004 had been mostly complied with. Nonetheless, following the visit the Chancellor made a few new proposals and recommendations to the Citizenship and Migration Board for better ensuring fundamental rights of people subject to expulsion.

Unfortunately, the Chancellor could not give a similar positive assessment of the situation in police detention centres.[168] During the reporting period, the Chancellor inspected the situation in Pärnu, Kuressaare, and Kärdla police detention centres under the West Police Prefecture; Põlva, Võru, and Valga police detention centres under the South Police Prefecture; and the police detention centre of the North Police Department under the North Police Prefecture. In his role as the national preventive mechanism for the prevention of torture and degrading treatment, the Chancellor provided numerous critical assessments concerning inhuman treatment in police detention centres and made proposals for improving the situation. Recurring problems detected during inspection visits included overpopulation, poor health care, poor living conditions, security problems, poor response to requests by detainees (e.g. compliance with deadlines, formal quality of administrative acts), and shortage of staff in police detention centres.

2. Mass riots in Tallinn

Case No. 16-4/07654

(1) The Chancellor of Justice supervised police activities based on petitions concerning quelling riots in downtown Tallinn on 26 and 27 April 2007.

(2) In the evening of 26 and 27 April 2007, major riots took place in downtown Tallinn, starting from the area of Tõnismägi. Approximately 1500 people took part in the riots.[169]

The Chancellor received 52 petitions from individuals detained by the police or individuals against whom restraining measures had been used. The petitioners noted that they had been in downtown Tallinn on 26 and 27 April 2007, and the police had used inadmissible physical force against them while suppressing the riots taking place at the same time. Some petitioners claimed that the police had used plastic binding strips for detaining individuals during a long period, and police officers had not worn name tags.

168 See e.g. the Chancellor of Justice Annual Report 2004. Tallinn 2005, pp. 145 *ff*.

169 Government press release of 27 April 2007, available online at http://www.valitsus.ee/?id=7184.

To verify the claims in the petitions, the Chancellor submitted a request for information to the National Police Commissioner and the Minister of Internal Affairs.

The Minister of Internal Affairs in his reply expressed the opinion that legal regulation of using means of binding and special equipment, as well as their use as restraining measures, would be specified in the new Draft Maintenance of Law and Order Act,[170] currently being deliberated by the Riigikogu. According to the Minister of Internal Affairs, restraining measures during the riots were applied in respect of detainees held in the D-terminal in Tallinn harbour in compliance with security considerations and the principle of proportionality. A risk existed that detainees could endanger police officers or each other, considering that in the room used for detaining individuals it was not possible to separate them from the officers, the number of detainees was large, and the reason for detention was aggressive behaviour and violating public order. Thus, the use of restraining measures was indispensable. According to the Minister, restraining measures were only applied until individuals were identified and released.

In his reply to the Chancellor, the Minister of Internal Affairs admitted that problems had arisen with identifying police officers during the major riots in Tallinn. During the riots, ordinary police officers had to have a name tag and the riot police a number on their uniform, allowing their identification. However, according to the Minister, considering the extent of the riots, the security of police officers and their family members was an important consideration, as real danger to their life existed. Therefore, officers were allowed to remove their name tags. In order to avoid further questions as to compatibility with international law, the Minister of Internal Affairs considered it reasonable to amend Government of the Republic Regulation No.160 of 13 July 2006 "Description of police uniform", so as to allow replacing name tags on police uniforms with an identifying number combination in exceptional situations (similarly to use of numbers on the uniforms of the riot police and special prison squad).

According to the National Police Commissioner, police officers applied special equipment in accordance with § 14(6) clause 6 and § 14(7) of the Police Act. In exercising their right of discretion, the police proceeded strictly from the principle of proportionality and relevant guidance materials in organising their work. The National Police Commissioner affirmed that handcuffs and binding strips were used in the temporary detention facility because the majority of police officers were busy with maintaining law and order in the streets of Tallinn and the existing scarce forces were not enough to control such a large number of detainees. Without the use of binding equipment, the life, health, and security of police officers would have been endangered. According to the National Police Commissioner, in the temporary detention facility binding straps were removed from minors and from individuals to whom they caused medical problems according to the doctor's assessment. Several ambulance crews were constantly present and monitored the health of detainees in the temporary detention facility.

The National Police Commissioner stressed that the D-terminal in the harbour was only used as a temporary detention facility and individuals were kept there only for a minimum time in order to ascertain their connection to the events. The majority of detainees were then released. Thus, binding strips were used only for a minimally necessary period.

According to the National Police Commissioner, the adequacy of threat assessment and necessity of measures applied was also demonstrated by several subsequent public threats and invitations to identify Russian police officers who participated in suppressing the riots.

The National Police Commissioner explained that the duty of police officers to wear name tags was established with an intention to develop good practice. Police officers without name tags (including criminal police officers working in civilian clothes) can still be identified on the basis of photographs available in the police staff service and in the *Persona* database, as well as on the basis of police placement tables. The Commissioner also noted that widespread use nowadays of video and photographic equipment has created additional effective possibilities for identifying individuals.

(3) In this case, it was necessary to find an answer to the question whether police activities in detaining individuals, using binding strips, and removing name tags had been lawful.

(4.1) Petitions submitted to the Chancellor demonstrate that on several occasions it was not completely clear to individuals why the police had detained them during the riots.

Detaining individuals within offence proceedings is directly established in the Code of Criminal Procedure and the Code of Misdemeanour Procedure. The new Draft Maintenance of Law and Order Act would establish the procedure and basis for detention within administrative proceedings, but until its adoption detaining individuals within administrative proceedings, including for purposes of identification, is problematic. It is important to take into account that essentially detention, regardless of the classification of its legal basis, is equally burdensome and perceivable as restriction of physical liberty in all cases. Formally, the law provides for a different legal basis in different cases of restricting physical liberty of individuals. Different legal bases also entail different procedural requirements and different appeal procedures.

170 Draft Maintenance of Law and Order Act as at 02 October 2007, No. 49 SE, available online at http://www.riigikogu.ee.

Under § 20 of the Constitution, everyone has the right to liberty and security of the person. However, this is not an absolute right. Subsection 2 of the same provision stipulates the bases for deprivation of liberty. The same provision gives rise to the requirement that deprivation of liberty may not be arbitrary, but must take place in the cases and under the procedure provided by law.

The bases for deprivation of liberty under § 20(2) of the Constitution can be divided in two: those mostly applicable in offence proceedings (clauses 1 and 3), and those constituting mostly administrative detention[171] (clauses 2, 4, 5, 6). Under the prohibition of arbitrary deprivation of liberty (i.e. deprivation may only occur in the cases and under the procedure provided by law), the relevant basis and procedure must be laid down in Acts regulating the corresponding field.

The bases and procedure for deprivation of liberty in offence proceedings are contained in the Code of Criminal Procedure and the Code of Misdemeanour Procedure. As detaining individuals is mostly performed by the police, the competence for detention in offence proceedings is also mentioned in § 13 of the Police Act.[172] The Police Act also contains the basis for detention in administrative proceedings. The basis for deprivation of liberty may arise from other Acts, e.g. the procedure for subjecting to involuntary psychiatric treatment is laid down in the Mental Health Act (emergency medical care) and the Code of Civil Procedure.

In this case, the bases for deprivation of liberty under § 20(2) clauses 2 and 3 are of primary importance.

Under § 20(2) clause 2 of the Constitution, individuals may be deprived of liberty for non-compliance with a direction of the court or to ensure fulfilment of a duty provided by law. According to the practice of the European Court of Human Rights, the latter may also include identification of a person or subjecting to customs control.[173] The words "to ensure fulfilment of a duty provided by law" only concern cases where the law allows detaining an individual to force them to comply with a specific defined duty which they had failed to comply with until then. In addition, a specific individual reason for detention must exist. Detention cannot be based on a general consideration, such as general preventive maintenance of law and order.[174] One such legal basis in the Estonian legal order is § 170(3) of the Code of Criminal Procedure, under which an individual may be detained for identification for up to twelve hours if they are an eyewitness to a criminal offence and refuse to participate in proceedings as a witness.

Section 20(2) clause 3 of the Constitution allows deprivation of liberty to combat a criminal or misdemeanour offence if a person is reasonably suspected of such an offence, or to prevent that person's escape. In this case, a reasonable doubt must exist, and the key problem lies in ascertaining the justification and reliability of reasonable doubt and finding a balance between conflicting interests, rights, values, and expectations, in particular between the individual right to liberty and public order and security.[175]

Section 20(3) of the Constitution should be interpreted in combination with the introductory sentence of § 20(2) (no one may be deprived of their liberty except in the cases and under the procedure provided by law) and § 21.[176] Preparation of a criminal offence is sometimes criminalised as an independent crime (e.g. §§ 189, 237^2, 251(2) Penal Code). In these cases, the procedure under the Code of Criminal Procedure fully extends to deprivation of liberty.

Section 20 of the Constitution and a similar provision in Art 5(1) of the European Convention on Human Rights establish protection against more serious interference with personal freedom. The scope of protection does not extend to situations such as stopping an individual in traffic, requiring registration of a person, or checking documents (e.g. identification of a person in the street, stopping a person for a few hours on the border, or in a police station).[177] For example, § 44(5) of the Code of Misdemeanour Procedure clearly provides for such a distinction: if a person is not detained on the bases under § 44(1),[178] their time under interrogation or performance of any other procedural act is

171 This generally also includes deprivation or restriction of liberty in civil court proceedings. It does not need separate analysis in the context of the April riots.

172 Here, it would be appropriate to refer to an important legal problem in public law in Estonia, which is otherwise not part of this analysis. The problem concerns lack of sufficiently clearly defined delegating norms for restricting fundamental rights and freedoms. The same problem is mentioned in the explanatory memorandum to the Draft Maintenance of Law and Order Act (49 SE) currently under deliberation by the Riigikogu, stating that the competence for a restricting administrative act and the delegating norms are currently often equalised from the point of view of the legislator as well as the implementer of the law.

173 R. Maruste. Kommentaarid §-le 20. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments on § 20. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition] Tallinn 2002, § 20 comment 9. See also judgment of the European Court of Human Rights of 25 September 2003 in case No. 52792/99 *Vasileva v Denmark*, par. 35, 40

174 European Court of Human Rights judgment of 08 June 1976 in case No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 *Engel v The Netherlands* par. 69. See also R. Maruste. *Op. cit.* § 20 comment 9.

175 R. Maruste. *Op. cit.* § 20 comment 10.

176 Similar connection between Art 5(1) c and (3) of the European Convention on Human Rights; see the European Court of Human Rights judgment of 01 July 1961 in case No. 332/57 *Lawless v Ireland*, par. 14.

177 R. Maruste. *Op. cit.* § 20 comment 3. P. Roosma. Kommentaarid §-le 34. – Justiitsministeerium. Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. [P. Roosma. Comments on § 34. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition] Tallinn 2002. § 34 comment 3.

178 A person suspected of committing a misdemeanour attempts to escape, has not been identified, is likely to continue committing misdemeanours, or is likely to hinder or evade the misdemeanour proceedings.

not considered detention or deprivation of liberty.[179]

It should also be taken into account that the difference between restriction and deprivation of liberty is not always so much a matter of nature as of degree and extent. In addition, the type, duration, effect, and manner of deprivation of liberty should be taken into account.[180]

A less serious interference with an individual's physical and mental security which does not fall under the protection of § 20 of the Constitution arises from another constitutional provision.[181] Areas of private life which are not protected by special rights may only be interfered with under conditions laid down in § 26(2) of the Constitution. Interference with private and family life is justified to protect health, morals, public order, or the rights and freedoms of others, to combat a criminal offence, or to apprehend a criminal offender. Interference with freedom of movement as a special right under § 34 of the Constitution is allowed for protecting rights and freedoms of others, in the interests of national defence[182], in the case of a natural disaster or a catastrophe, to prevent the spread of an infectious disease, to protect the natural environment, to prevent leaving a minor or person of unsound mind without supervision, or to ensure administration of a criminal procedure. If interference with a fundamental right does not fall under the scope of protection of any more specifically substantiated fundamental rights, then as a minimum requirement under § 19(2) of the Constitution each case of interference with a fundamental right must have a legal basis which must be observed.[183]

Under § 3, 11, and 26 of the Constitution, less extensive interference with fundamental rights (including restriction of freedom of movement), which do not fall within the scope of protection of § 20, must be based on laws and be proportional. The Supreme Court has expressed the following view: "[r]estriction of the rights of a particular individual cannot be justified only by existence of public interest, but specific legal and factual circumstances must also exist."[184] In restricting freedom of the person for purposes of maintaining law and order, the bases laid down in Acts regulating the relevant field (e.g. the Police Act, the Traffic Act, the State Borders Act) must be observed.

An additional basis for restricting freedom of movement and depriving individuals of their liberty is contained in § 124(3) of the Constitution concerning persons in the Defence Forces and alternative service due to the special interests of the service, and § 130 in the interests of national security and public order during a state of emergency or a state of war. Restriction of rights in these cases is only lawful if done in the cases and under the procedure prescribed by law.

During a joint meeting of the Riigikogu national defence committee and the legal affairs committee on 11 June 2007, the Ministry of Internal Affairs disclosed information according to which 921 individuals were detained in connection with the April riots (as at 30 May 2007, i.e. directly during the events), of whom 237 were suspected of having committed a criminal offence (subsequently 46 individuals were remanded in custody with the authorisation of the court). The total number of persons suspected of committing criminal offences in connection with the April riots is either 268[185] or over 300[186], depending on sources.

In the case of the remaining 600 detainees who were not suspected of committing a criminal offence, the following legal options exist: (1) after detention and questioning the suspicion ceased to exist; (2) individuals were detained on suspicion of committing a misdemeanour; (3) individuals were brought to the temporary detention facility as part of administrative proceedings, e.g. for identification; (4) individuals were detained as witnesses within criminal proceedings under § 170(3) of the Code of Criminal Procedure. The latter basis is more of a theoretical nature in the present context, as during the mass riots some detainees could have been considered witnesses and their identification had not been immediately possible at the place of detention for certain objective reasons. However, it is possible that the individuals were questioned as witnesses some time later, after their identification and release from the temporary detention facility.

The presumed and actual wrongful behaviour of participants in the riots falls under different sections on criminal offences under the Penal Code, such as aggravated breach of public order (§ 263), violence against a representative of state authority or other person protecting public order (§ 274), defaming or insulting a representative of state

179 See also Supreme Court Criminal Law Chamber judgment of 03 April 2006, No. 3-1-1-2-06, par. 8: "The Chamber finds that taking a person to a police establishment does not necessarily mean the person's detention within the meaning of § 44(1) of the Code of Misdemeanour Procedure."

180 R. Maruste. *Op. cit.* § 20 comment 3 and 4. See also Supreme Court Administrative Law Chamber judgment of 24 November 2005, No. 3-3-1-61-05, par. 33. See also European Court of Human Rights judgment of 22 February 1994 in case No. 12954/87 *Raimondo v Italy*, par. 39.

181 See also U. Lõhmus Kommentaarid §-le 26. - Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments on § 26. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition] Tallinn 2002, § 26 comment 8.

182 National defence may also relate to peace-time riots. See P. Roosma. *Op. cit.* § 43 comment 5.2.

183 M. Ernits. Kommentaarid §-le 19. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments on § 19. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition] Tallinn 2002, § 19 comment 3.2. and 4.2.; U. Lõhmus *Op. cit.* § 26 comment 8.

184 Supreme Court Administrative Law Chamber judgment of 24 November 2005, No. 3-3-1-61-05, par. 24.

185 Public Prosecutor's Office press release of 01 August 2007, available online at http://www.prokuratuur.ee/30250.

186 Public Prosecutor's Office press release of 08 May 2007, available online at http://www.prokuratuur.ee/28921.

authority (§ 275), and first and foremost committing an offence during mass disorder (§ 239).[187] Misdemeanours the elements of which may have occurred in the context of the events include, for example, § 276 of the Penal Code (disregard of a lawful order given by a representative of state authority), or violating the Alcohol Act.[188]

The Minister in point 3 of his reply mentioned aggressive behaviour and violating public order as a basis for detaining individuals, which in other words means suspicion of committing an offence.

The National Police Commissioner in his reply to the Chancellor's request for information explained that in using special equipment during the mass riots, police officers also proceeded from the "Plan for resolving an emergency situation", approved by the National Police Commissioner's directive No. 181 of 01 November 2005, and its appendix "Action during mass disorder".[189] The latter guidelines state that individuals are detained in accordance with the provisions of the Code of Misdemeanour Procedure and the Code of Criminal Procedure.

However, the National Police Commissioner in his reply mentioned that detainees were taken temporarily to the police detention centre not on the basis of internal rules of the centre but for purposes of identification during a police operation. Detaining an individual for identification without suspicion of committing a criminal offence constitutes detention as an administrative measure.

Detaining an individual, depriving of liberty, or restricting freedom of movement may only take place either within offence proceedings or administrative proceedings. This is also expressed in § 13 of the Police Act, subsection 1 of which distinguishes between the right of the police to detain individuals under different circumstances: detention on suspicion of committing a misdemeanour (clause 3), detention on suspicion of committing a criminal offence (clause 5), taking persons who have participated in offences to the police for immediate ascertainment of the facts of the offence (clause 4), taking persons who have violated public order to the police for identification and, where necessary, for preparation of a misdemeanour report (second part of clause 7), detention of persons illegally staying in Estonia (clause 6), taking persons who due to alcohol or narcotic intoxication might present a danger to themselves or to others to a medical institution or to the police (first part of clause 7), applying compelled attendance with regard to individuals in cases prescribed by Acts and other legislation (clause 8), and prohibiting or restricting traffic in sections of roads and streets, as necessary, or in case of danger (clause 14).

In the case of detention, it is important to bear in mind that one and the same measure restricting rights and freedoms may simultaneously have relevance in both administrative proceedings and offence proceedings. For example, detention as a suspect is aimed both at guaranteeing the conduct of offence proceedings as well as preventing further offences; cordoning off a crime scene is aimed at restricting the freedom of movement of third parties while collecting and securing evidence; and confiscating a weapon from a participant in a public meeting may simultaneously serve the aim of securing evidence within offence proceedings as well as guaranteeing peaceful progress of the meeting.

Use of a similar measure either in administrative or offence proceedings may serve a different end goal: either preventive (preventing a violation, obstructing an offence which has not yet been started or completed) or repressive (ascertaining the offender, proving guilt, and punishing).[190] Similarities and differences between risk prevention and offence proceedings are so important that from the aspect of the rule of law the relevant tasks and bases for action need to be clearly distinguished.[191]

The procedure for detention during offence proceedings is regulated by the Code of Criminal Procedure and the Code of Misdemeanour Procedure. The Police Act, as mentioned above, contains a delegating norm for the police to perform detention and compelled attendance within offence proceedings (see also § 139(4) Code of Criminal Procedure and § 43(4) Code of Misdemeanour Procedure).

Detention of individuals within criminal proceedings is regulated by the Code of Criminal Procedure § 217 (detention of suspect), § 102 (compulsory placement of suspect or accused in a medical institution), § 139(5) (detention of a person subject to compelled attendance), § 170(3) (detention of an as yet unidentified eyewitness to a criminal offence who refuses to participate in a criminal proceeding as a witness).[192] Detention as a suspect in criminal proceedings may be followed by deprivation of liberty as a result of remand in custody (Code of Criminal Procedure § 130).

187 For all the criminal proceedings initiated in connection with the riots, see the Public Prosecutor's Office press release of 08 May 2007, available online at http://www.prokuratuur.ee/28921.

188 See the Police Board press release of 03 May 2007, according to which 150 people had been taken to detention facilities during 24 hours, among them 14 people suspected of committing a criminal offence. The police also drew up about twenty misdemeanour reports, mostly in connection with consumption of alcohol. In the case of the remaining individuals, their connection to violations committed during mass riots in Tallinn was verified, and after questioning and identification they were released.
Available online at http:// www.pol.ee/index.php?id=121755.

189 The contents of both documents are classified for internal use only.

190 For distinction and principles for choosing a legal basis, see more specifically e.g. E. Denninger. Polizeiaufgaben. pp. 272-273, änr E 180. – H. Lisken, E. Denninger. *Handbuch des Poliseirechts. 3. Auflage*. München 2001.

191 K. Jaanimägi. Politsei sisemise rahu tagajana. [Police as guarantor of internal peace] – *Juridica* 1994, p. 459.

192 E. Kergandberg adds, among the measures restricting the freedom of the person, summoning an individual within offence proceedings, or more specifically "the duty following a summons to leave aside, at a specific time, one's normal rhythm of life and go to a specific place – to the body conducting the proceedings". (E. Kergandberg, M. Sillaots. Kriminaalmenetlus. [Criminal procedure] Tallinn 2006, pp. 81–82.)

The basis and procedure for detention on suspicion of committing a misdemeanour is regulated by § 44 of the Code of Misdemeanour Procedure. The Code does not contain separate provisions for detaining individuals subject to compelled attendance.

Compelled attendance as a restriction of freedom of movement in offence proceedings presumes that an individual mentioned on the summons has failed, without good reason, to appear before the body conducting the proceedings (§ 139(2) clause 1 Code of Criminal Procedure, § 43(3) Code of Misdemeanour Procedure), or that prior summoning of the individual may hinder criminal proceedings, or the individual refuses to come voluntarily (§ 139(2) clause 2 Code of Criminal Procedure).[193] Under § 139(5) of the Code of Criminal Procedure, an individual subject to compelled attendance may be detained for as long as necessary to perform the procedural act which is the basis for application of compelled attendance but not longer than forty-eight hours.

In addition to imposing misdemeanour detention or imprisonment as a punishment, the following measures under the Code of Criminal Procedure and the Code of Misdemeanour Procedure have relevance within the meaning of deprivation of liberty under § 20 of the Constitution: detention as a suspect[194] and remand in custody which may follow in criminal proceedings, as well as placement in a medical institution as a suspect or accused due to the need for in-hospital expert assessment. It should also be emphasised that both procedural codes mention that one of the alternative preconditions for detaining an individual as a suspect might also be the fact that the individual suspected of committing an offence has not been identified (§ 217(2) clause 2 Code of Criminal Procedure, § 44(1) clause 2 Code of Misdemeanour Procedure).

An order by the police to present an identity document or state one's name, age, etc. is an individual administrative act which requires a legal basis.[195] Although identification of an individual does not constitute serious restriction of their rights, it should be taken into account that identification may result in restriction of freedom in the form of detention.

The purpose of identification also needs to be taken into account, as under § 11 of the Constitution restrictions must be necessary in a democratic society and may not distort the nature of the rights and freedoms restricted. The nature of identification of an individual shows that its primary objective is to create a basis for taking other measures, or in other words, for administrative or offence proceedings.[196] Therefore, identification of an individual is not permissible or lawful if its only purpose is repression of checked individuals.[197]

Being present and gathering in a public place do not constitute a violation *eo ipso*. Few violations of the legal order are an object of state supervision[198] but not covered by a corresponding misdemeanour or criminal offence definition. A punishable violation occurs, for example, when an individual disregards a lawful order of a police officer or other representative of state authority (§ 276 Penal Code).[199] Thus, § 13(1) clause 7 of the Police Act provides a basis for detaining an individual for identification only in case of a suspicion of misdemeanour. This is also proved by the wording of clause 7 which ends with the phrase "where necessary, for the preparation of a misdemeanour report".

Suspicion of committing an offence may arise in respect of a particular individual either during offence proceedings which have already been initiated or may exist already at the commencement of offence proceedings (§ 194(1) Code of Criminal Procedure, § 2 Code of Misdemeanour Procedure). In both cases, the primary purpose of detaining and identifying an individual is to guarantee conduct of the proceedings in compliance with procedural rules.

Under § 13(1) clause 4 of the Police Act, the police may summon individuals to the police in criminal or administrative offence matters in police proceedings, and take individuals who have participated in offences to the police for immediate ascertainment of the facts of the offence. This wording shows that individuals to be interviewed as witnesses in

193 In the context of the present events, the bases for compelled attendance relating to execution of a punishment imposed within offence proceedings are not analysed.

194 E. Kergandberg has expressed the opinion that detention as a suspect under § 217 of the Code of Criminal Procedure should be rather seen as a measure restraining the freedom of the person, due to its short duration (up to 48 hours) and resulting modest severity. However, he admits that both the wording of § 21 of the Constitution and § 217 of the Code of Criminal Procedure support the approach where detention as a suspect is interpreted as deprivation of liberty. (E. Kergandberg, M. Sillaots. *Op. cit.* p. 81.)

195 M. Ernits. *Op. cit.* § 15 comment 6.2.

196 See also F. Rachor. Polizeihandeln. pp. 398-399, No. F 319-322.- H. Lisken, E. Denninger. *Handbuch des Poliseirechts. 3. Auflage*. München 2001.

197 F. Rachor. *Op. cit.* p. 399, No. F 321 and p. 402, No. F 344.

198 The police, in general, lack competence for resolving disputes in private law where a violation lies in breach of private law norms. However, different violations against property are punishable as offences.

199 See also Supreme Court Criminal Law Chamber judgment of 05 September 2007, No. 3-1-1-38-07: "Section 276 of the Penal Code is intended to ensure that an addressee complies with a lawful order by a representative of state authority given within administrative or offence proceedings and aimed at performing a procedural step or eliminating a specific risk situation. However, the purpose of § 276 of the Penal Code is not to ensure general law-abiding behaviour in all possible legal relationships. Thus, an order of a representative of state authority, disregard of which is punishable under § 276 of the Penal Code, must have a direct connection in time and space with the procedural step performed by the representative of state authority or with elimination of a situation endangering public order or legal benefits of other persons."

offence proceedings are summoned to the police, and only suspects may be taken to the police involuntarily.[200] As mentioned above, the procedure for compelled attendance of witnesses and the preconditions of compelled attendance in offence proceedings are separately regulated in procedural laws and have no relevance in the context of the April riots.

The National Police Commissioner in his reply to the Chancellor's request for information noted that detention of individuals for identification occurred in connection with a police operation. Under § 13(1) clause 25 of the Police Act, the police may conduct police operations under the procedure established by the Minister of Internal Affairs. However, this provision of the Police Act is not an independent basis for restricting rights and freedoms.[201] The delegating norm and conditions and procedure for applying specific measures during a police operation must arise from an Act.

As noted above, a delegating norm for deprivation or restriction of liberty may also arise from other Acts in addition to the Police Act, the Code of Criminal Procedure, and the Code of Misdemeanour Procedure.

In this case, the Child Protection Act is relevant. Section 23[1](2) of the Act lays down time limits for minors when they are prohibited from being in a public place without an accompanying adult. Punishment for violating the prohibition is imposed on the basis of § 262 of the Penal Code (violation of public order).[202] If a minor is not capable of guilt, i.e. is younger than 14 years of age (§ 33 Penal Code), then if they violate the prohibition their freedom of movement needs to be temporarily restricted in the interests of the safety of the child until the child can be handed over to a parent or other legal representative. Primary consideration of the best interests of the child ("at all times and in all cases") is a general principle also laid down in § 3 of the Child Protection Act. Such detention complies with restriction of freedom of movement allowed under the second sentence of § 34 of the Constitution to prevent leaving a minor without supervision.[203]

Also relevant for mass gatherings is § 14 of the Public Assemblies Act, which gives the police competence to remove from public gatherings individuals who violate public order or in respect of whom reason exists to believe that they may prepare or commit a criminal offence. Detention for purposes of taking to the police and for identification are measures which may follow such removal and which must have an independent basis in law.

In addition to different bases and preconditions for detention and deprivation of liberty, separate procedural rules apply for detention within administrative and offence proceedings.

Upon detention as a suspect, an individual acquires the status of a suspect and corresponding rights in offence proceedings (the right to be informed about the content of suspicion, the right to defence counsel, the right to inform close relatives or friends about detention, and the right to remain silent). These rights must be ensured to a suspect regardless of the duration of detention.

Under § 44(2) clause 2 of the Code of Misdemeanour Procedure, upon detention of an individual suspected of committing a misdemeanour, testimony is immediately taken from the individual with regard to commission of the misdemeanour. Under § 217(7) of the Code of Criminal Procedure, an investigative body must explain to an individual detained as a suspect their rights and obligations and must interrogate the suspect immediately. If detention of an individual on suspicion of committing a misdemeanour is the first procedural action commencing the misdemeanour proceedings, similarly to criminal proceedings, the individual subject to proceedings must immediately be informed of their rights and obligations under § 19 of the Code of Misdemeanour Procedure. However, no report of detention needs to be drawn up if the relevant data are entered directly into the misdemeanour report (§ 46(1) second sentence, Code of Misdemeanour Procedure).

Both within misdemeanour and criminal proceedings, a report must be drawn up in case of detention as a suspect (§ 46 Code of Misdemeanour Procedure, § 218 Code of Criminal Procedure). The Code of Criminal Procedure also includes the obligation to draw up a report when detaining an as yet unidentified eyewitness to a criminal offence who refuses to participate in criminal proceedings as a witness (§ 170(3) Code of Criminal Procedure).

Immediate interrogation as well as drawing up a report on detention must be done within a reasonable time. Depending on circumstances, the specific period may vary.[204]

200 Supreme Court Criminal Law Chamber judgment of 17 November 2005, No. 3-1-1-120-05, par. 10: ""Ascertainment of the facts" within the meaning of § 13 clause 4 of the Police Act primarily includes collecting evidence. Thus, under § 13 clause 4 of the Police Act, the police may take a person subject to proceedings to the police for purposes of collecting evidence. The Criminal Law Chamber is of the opinion that "taking to the police" within the meaning of § 13 clause 4 of the Police Act also includes other establishments besides the police station (e.g. medical establishments) where an individual needs to be taken for purposes of collecting evidence."

201 The explanatory memorandum to the Draft Maintenance of Law and Order Act also refers to unconstitutionality of the current legal regulation of conducting police operations, see p. 17.

202 Section 23[1](4) of the Child Protection Act refers to a punishment under § 142 of the invalid Code of Administrative Offences, but that provision, too, included a punishment for violating the rules of public order.

203 See also P. Roosma. *Op. cit.* § 34 comment 2 and 5.6.

204 For criminal procedure, see also E. Kergandberg. M. Sillaots. *Op. cit.*, p. 207 ("Probably it would be best to ensure through prosecutor's supervision that the period from actual detention to drawing up the report is minimal. In the Estonian context it would be hardly possible to consider a period longer than three hours as justified.")

Drawing up a report and explaining to suspects their rights are necessary for several reasons. A report on detention must include the time and legal basis of detention (§ 46(2) clause 5 Code of Misdemeanour Procedure, § 218(1) clause 1 and 2 Code of Criminal Procedure), and additionally in misdemeanour procedure the official title, first name and surname of the police officer who participated in detention of the individual (§ 46(2) clause 3 Code of Misdemeanour Procedure). The purpose of drawing up the report and explaining suspects their rights is to inform the detained individual, to enable them use of the right of defence, and to enable subsequent supervision of the legality of detention if necessary.

If an individual's detention and identification takes place outside offence proceedings, and unless otherwise prescribed by a special Act, the Administrative Procedure Act applies (§ 2(2) Administrative Procedure Act).

Under § 18(1) of the Administrative Procedure Act, in addition to cases explicitly prescribed by an Act or a regulation, minutes of a procedural act must also be taken if a participant in proceedings submits a reasoned application for taking minutes, if the administrative authority hearing the matter considers it necessary, or if the content of the procedural act comprises providing a statement, opinion, or explanation to an administrative authority.

Applying direct coercion is a measure within the meaning of § 107(1) of the Administrative Procedure Act. Under § 108 of the Act, an individual with whose rights a measure interferes is entitled to require reasoning of the measure in writing. Under subsection 2, a request for reasoning of a measure must be submitted to an administrative authority in writing. Requesting reasoning after an event is necessary primarily for ensuring effective legal protection, so that an individual can assess their situation prior to filing a challenge with an administrative authority or a complaint with an administrative court.[205]

The duty of an administrative authority to give explanations under § 36 of the Administrative Procedure Act also extends to implementing a measure intended for maintaining law and order. Section 13(1) clause 7 of the Police Act mentions the duty of the police to provide an initial explanation for inviting or taking an individual to the police.

In view of the objectives and functions of police work, it is possible to speak of the double functions of police measures, which are aimed at either a preventive (administrative procedure) or repressive (offence procedure) end result.[206] The main functions of the police under § 3 of the Police Act include guaranteeing public order, protecting the legal interests of individuals and organisations, combating crime, conducting pre-trial investigations in criminal offences, and conducting proceedings of misdemeanour matters.

A police operation is a good example of a situation where the police have to fulfil a double role. For example, German legal literature mentions that the aim of a police operation cannot be derived directly from police law, as in this situation the police are acting in the absence of specific suspicion of an offence and the activity is primarily aimed at detecting offences.[207]

In order to guarantee the rights of individuals, it is important to distinguish the legal basis for using each particular measure, because both in offence proceedings and administrative proceedings applying a measure is accompanied by a duty to explain. This also has relevance for explaining rights to individuals concerning their identification, and in particular during police operations where justification of restriction of rights in respect of certain individuals may in the end be motivated by a repressive, and in respect of others, by a preventive objective.[208]

Objectives also relate to differences in the principles of initiating proceedings. In offence procedure, the principle of mandatory proceedings applies (§ 6 Code of Criminal Procedure, § 2 Code of Misdemeanour Procedure), while in administrative procedure aimed at maintaining law and order the principles of feasibility and discretion apply.

The legal basis for applying a measure also determines the choice of court where individuals can obtain judicial protection in case of violation of their rights and freedoms. In offence proceedings, mandatory judicial review under § 15 of the Constitution is ensured in the final instance by the county court (§ 230 Code of Criminal Procedure, § 78 Code of Misdemeanour Procedure), while in administrative proceedings the administrative court is competent to resolve disputes (§ 3 Code of Administrative Court Procedure).

In connection with petitions submitted to the Chancellor in this matter, it is also important to take into account possible distinctions due to the nature and extent of the riots and the resources available for maintaining public order, so as to guarantee, on the one hand, constitutional behaviour of the executive authority and, on the other, effective protection of public order. From the point of view of rights and freedoms of individuals, the essence of the problem comes down to what measures may be taken, in respect of individuals whose behaviour does not pose a danger, to

205 A. Aedmaa jt. Haldusmenetluse käsiraamat. [Handbook on administrative procedure] Tartu 2004, p. 481.

206 See also references in footnote 192 and K. Jaanimägi. *Op. cit.* p. 459.

207 F. Rachor. *Op. cit.* p. 403, No. F 336.

208 A similar position is expressed by F. Rachor. *Op. cit.* p. 420, No. F 397. This is related to a construction in German law which gives law enforcement authorities the right to take restrictive administrative measures in so-called dangerous places where, according to experience and based on specific objective facts, reason exists to presume that criminal offences are being prepared or committed (F. Rachor. *Op. cit.* p. 400, No. F 326 ff).

prevent mass violations of public order and commission of criminal offences.

Under § 130 of the Constitution, during a state of emergency or a state of war the rights and freedoms of individuals may be restricted and duties may be placed on them in the interests of national security and public order to a larger extent than under normal conditions. In case of a threat to the constitutional order of Estonia[209], the right of additional restriction of rights and freedoms is established in the State of Emergency Act. However, the Act establishes restrictions only in general terms, so that the constitutionality of the regulation is highly questionable.[210]

If declaring a state of emergency is not justified or necessary, general rules apply, and the circumstances of a specific event have relevance primarily in terms of assessing the suitability, necessity, and proportionality of measures used. In assessing compliance with procedural deadlines, the principle of reasonable time, or necessity to take immediate action, delays attributable to unforeseeable situations or circumstances beyond the control of law enforcement authorities, should be considered as lawful.[211]

The Emergency Preparedness Act regulates organisation of emergency preparedness[212] and the legal basis for crisis management. The Act contains no authorising norms for restriction of rights.

Among the legal bases for using a weapon or special equipment, § 14(6) clause 4 of the Police Act mentions the need for combating mass disorders and group violations of public order. No other similar authorising norms exist in Estonian legislation for restricting rights in cases of mass disorders, except in respect of acts punishable as criminal offences under § 238, 239, and 327 of the Penal Code.[213]

The Chancellor of Justice concluded that based on existing information it was not completely clear whether and under what legal basis individuals were detained during the mass riots outside offence proceedings and placed in temporary detention facilities, including in the hangar in D-terminal in Tallinn harbour.

(4.2) Use of handcuffs and binding equipment primarily interferes with the right to security of the person under § 20 of the Constitution. Interference comprises restriction of physical liberty of individuals, as their freedom of movement is hindered and they are forced to stay and move in a specific physical position. Under the Constitution, the right to security of the person may only be restricted in the cases and under the procedure established by law, and the restriction must be proportionate, i.e. suitable, necessary, and proportionate in the narrower sense.

The European Court of Human Rights has repeatedly emphasised that, as a rule, use of handcuffs is not a violation of Art 3 of the European Convention on Human Rights ("no one shall be subjected to torture or to inhuman or degrading treatment or punishment"). The measure must be imposed in connection with lawful arrest or detention and may not involve use of violence or public demonstration of violence exceeding what is reasonably considered necessary under the circumstances.[214]

Under § 14(1) of the Police Act, the police are entitled to use handcuffs as an active means of protection. Binding strips used for the same purpose are not explicitly mentioned in the Police Act. However, under § 15^5(2), tying up is allowed as a means of restraint (but not as special equipment) in respect of persons taken into custody to recover from intoxication.

In current legislation, use of means of binding is also explicitly mentioned in § 10(2) of the Border Guard Act, which allows use of available means for tying up offenders. Section 70 of the Imprisonment Act mentions physical restraint among other means of restraint which may be used in respect of sentenced prisoners or persons serving a misdemeanour detention.

Under § 14(5) of the Police Act, objects and devices for civilian use (presumably also plastic means of binding originally intended for a different purpose) are deemed to be special police equipment only in cases where they are used in a police operation.

209 Under § 3 of the State of Emergency Act, a threat to the constitutional order of Estonia may arise from an attempt to overthrow the constitutional order of Estonia by violence, terrorist activities, collective pressure activities involving violence, extensive conflict between groups of persons involving violence, or violent isolation of an area of the Republic of Estonia.

210 Authors of comments on § 130 of the Constitution are of the same opinion. See O. Kask, E. Markvart. Kommentaarid §-le 130. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments on § 130. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition] Tallinn 2002, § 130 comment 5.

211 About delays in connection with detention during mass disorder, see also F. Rachor. *Op. cit.* p. 460, No. F 533.

212 Under § 2(1) of the Emergency Preparedness Act, emergency means an event or a chain of events which endangers national security, the life and health of persons, significantly damages the environment or causes extensive economic damage, and responding to which requires coordinated action of the Government of the Republic, government agencies, and local authorities.

213 § 26^{17}(4) of the Obligation to Leave and Prohibition on Entry Act establishes the procedure for use of firearms in case of mass disorders in an expulsion centre, and § 71(7) of the Imprisonment Act in case of mass disorders in a prison. Under § 58(1) clause 5 of the Border Guard Act, § 27(1) clause 6 of the Police Service Act, and § 139(1) clause 1 of the Imprisonment Act, public servants may be required to work overtime in connection with the need for preventing and terminating mass disorders.

214 See the European Court of Human Rights judgments of 27 November 2003 in case No. 65436/01 *Hénaf v France* para. 48; 14 November 2002 in case No. 67263/019 *Mouisel v France* par. 47; 16 December 1997 in case No. 152/1996771/972 *Raninen v Finland* par. 56.

Preconditions (legal bases) for using special equipment are established by § 14(6) of the Police Act. In connection with use of special equipment against participants in the April riots, clauses 4 and 6 are relevant. They establish that the police may use special equipment in performing their functions for combating mass disorders and group violations of public order and for detaining offenders, taking offenders to police or other premises and convoying offenders, protecting detainees, and against individuals detained or taken into custody if such individuals do not obey, or offer resistance to police officers or other persons performing their public duty in protecting public order or combating crime, or if sufficient reason exists to believe that they might escape, or harm other persons, the surroundings, or themselves.

The principle of proportionality in using special equipment arises from § 14(7) of the Police Act, emphasising that the police must consider the nature of each offence, offender, and situation before using special equipment. If special equipment is used, the police must avoid causing more harm to the health of individuals than is inevitable in the particular case. The principle of proportionality in using handcuffs also applies in the context of administrative procedure, as use of handcuffs constitutes an administrative measure subject to the Administrative Procedure Act, including the principle of proportionality under § 3(2) of the Act (administrative acts and measures must be appropriate, necessary, and proportionate to stated objectives). In case of administrative measures, additionally § 107(2) of the Act must be taken into consideration, i.e. an administrative authority at its discretion determines the manner, extent, time, and procedure for taking a measure and must observe the limits of the right of discretion and the principles of equal treatment and proportionality.

In assessing justification of duration of use of special equipment, the following considerations should be taken into account. The Police Act does not explicitly lay down the maximum time for using handcuffs or means of binding. Only in case of taking individuals to recover from intoxication (§ 15^5(2)), use of handcuffs or means of binding as a means of restraint is limited to one hour. The Draft Maintenance of Law and Order Act also envisages limiting the time for applying means of binding (§ 78(3) of the Draft Act).

The legal basis for use of some special equipment indirectly contains the duration of its application. For example, when sufficient reason exists to believe that an individual may escape (§ 14(6) clause 6 Police Act). Once the reason ceases to exist, use of special equipment must be stopped. In other words, in these cases the legal basis and justification for the duration coincide. Time limits for use of special equipment arise from the principle of proportionality under § 14(7) of the Police Act, § 3(3) and § 107(2) of the Administrative Procedure Act. The principle of minimal use of special equipment may be considered part of the principle of proportionality. This means special equipment should be applied only as long as necessary.

Under the Police Act, use of handcuffs or means of binding in police establishments or other places of detention[215] is also allowed against individuals who disobey or offer resistance to police officers, or if sufficient reason exists to believe that they might escape, or harm others, the surroundings, or themselves. If danger ceases to exist, use of special equipment becomes disproportionate and must be stopped. It is necessary to assess in each specific case the balance between security considerations and the rights of individuals.

The Chancellor of Justice reached the conclusion that currently no clear and consistent regulation exists concerning duration of use of special equipment.
(4.3) In his reply to the Chancellor's request for information, the National Police Commissioner affirmed that police officers protecting public order during the mass riots did not wear name tags because, due to the nature of the task, real danger existed to the life and health of police officers themselves and their family members.

Section 10 of the Constitution stipulates the principle of the state governed by the rule of law, under which state authority may not act arbitrarily in respect of individuals, and the exercise of power is limited by individual rights.[216] The principle of lawfulness of administration is established under the first sentence of § 3(1) of the Constitution as follows: state authority is exercised solely pursuant to the Constitution and laws in conformity with it. Exercising state authority within the meaning of § 3(1) includes primarily the activities of executive state power and local authorities if such activity restricts rights and freedoms of individuals.

Under the above provisions of the Constitution, arbitrary exercise of public authority must be avoided. When ensuring compliance with the law it is ascertained whether any of the actors on behalf of the public authority have violated the law. Considering the special role of the police in a state governed by the rule of law (in protecting individuals and public order), it is essential that police officers who fail to perform these tasks properly and violate rights of individuals should be identifiable.

Under Art 13 of the European Convention on Human Rights, everyone whose rights and freedoms as set forth in the Convention are violated must have an effective remedy before a national authority notwithstanding that the violation was committed by persons acting in an official capacity. The Supreme Court has also repeatedly stated that the right

215 Use of means of restraint, including handcuffs, in respect of individuals in custody pending trial and sentenced prisoners is regulated by the Imprisonment Act.

216 M. Ernits. *Op. cit.* § 10 comment 3.4.1.

to an effective remedy to protect oneself under § 13, 14, and 15 of the Constitution and Art 13 of the ECHR is an important subjective fundamental right of individuals.[217] A right without an accompanying effective mechanism for its judicial protection is a mere declaration lacking substance and meaning.

The European Court of Human Rights has linked the obligation of identifiability of officials to the right to an effective remedy under Art 13 of the ECHR. In a subsequent investigation of an incident involving use by the police of physical force (which may endanger the life of an individual), it must be possible to ascertain, in addition to factual circumstances, the responsible persons in order to be able to punish them if necessary. This is of primary importance for maintaining reliability of state authority and avoiding tolerance of any illegal activity, and for observing the principle of the rule of law.[218] The Court of Human Rights has also said that in case of alleged ill-treatment of an individual, investigation must be effective.[219] Effectiveness of investigation and protection of rights of an individual may be diminished if an individual does not know against which official to complain.

The Council of Europe has adopted a resolution concerning the role and competence of the police in society. Inter alia, the resolution says that each police officer is personally liable for their unlawful acts. It is also emphasised that legislation must provide legal guarantees and remedies against unlawful activities by the police.[220] The Dutch ombudsman, for example, has dealt with the issue of identification of police officers.[221]

Section 26 of the Police Service Act lays down the rules for police uniform. Under subsection 3, the procedure for provision and wearing of uniforms is established by the head of the Police Board, the head of the Security Police Board, or Rectors of institutions of applied higher education for public defence, as appropriate.

Section 30 of Government Regulation No. 160 of 13 July 2006 "Description of police uniform" lays down the requirements for the name tag on police uniform.[222]

Signs identifying a police officer, for example a name tag with the officer's name or personal number combination (the system used in Estonian prisons), are necessary under the principle of the rule of law for subsequent identification of an officer. The need for subsequent identification may arise, for example, when a supervisory authority receives a complaint against a police officer for excessive use of force.

The Chancellor expressed the view that the possibility to include a police officer's name or personal number combination in a complaint helps to verify quickly the presence of the relevant officer in the alleged situation and thus promptly initiate necessary procedural actions (e.g. collecting and analysing recordings from CCTV cameras near the presumed place of the incident). On that basis, the Chancellor concluded that in order to ensure prohibition of arbitrary exercise of state authority as required by the principle of the rule of law, and to effectively protect the rights of individuals it is necessary for police officers to wear identifying signs allowing their subsequent identification.

(5) The Chancellor reached the conclusion that, even in difficult times, the state authority is bound by constitutional principles, including the duty to observe fundamental rights. The Chancellor proposed to the Minister of Internal Affairs as follows:

1. When detaining individuals within administrative or offence proceedings, the police should observe the relevant legal basis. If necessary, a Draft Act should be drawn up establishing distinctions in the legal basis and general procedure for detention in cases of mass disorder. In addition, the Chancellor recommended revising the state of emergency response plan in respect of the basis of detaining individuals during mass disorder and crisis situations. Relevant in-service training for police officers should be organised.
2. To draw up a legislative amendment specifying the conditions for and duration of use of means of binding and handcuffs in detention within administrative procedure. The need for special provisions that could be useful during mass disorder should be analysed.
3. To draw up a legal act laying down the procedure for using name tags on police uniform and replacing them

217 See also Supreme Court *en banc*: 22 December 2000, No. 3-3-1-38-00, points 15 and 19; 17 March 2003, No. 3-1-3-10-02, points 17 and 18; 06 January 2004, No. 3-3-2-1-04, points 26 and 27; 28 April 2004, No. 3-3-1-69-03, par. 24; also Supreme Court Constitutional Review Chamber judgment of 25 March 2004, No. 3-4-1-1-04, par. 18.

218 E.g. the European Court of Human Rights judgment of 26 July 2005 in the case of *Şimşek et al v Turkey*: "The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. A requirement of promptness and reasonable expedition is implicit in this context (see Kelly and Others vs. the United Kingdom, no. 30054/96, §§ 96-97, 4 May 2001). In any event, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts (see, mutatis mutandis, *Hugh Jordan v the United Kingdom*, no. 24746/94, § 108, ECHR 2001-III)."

219 See the European Court of Human Rights judgment of 28 October 1998 in case No. 24760/94 *Assenov v Bulgaria.*

220 RESOLUTION 690 (1979) on the Declaration on the Police: "9. A police officer shall be personally liable for his own acts and for acts of commission or omission he has ordered and which are unlawful. /…/11. Legislation must provide for a system of legal guarantees and remedies against any damage resulting from police activities."
Available online at http:// assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta79/eres690.htm.

221 See *European Ombudsmen Newsletter.* Issue No. 8, April 2007.

222 The name tag to be worn on police uniform measures 30×90 mm, is blue (colour 18-4252 TP BLUE ASTER), with silver edges, and fastened with a 'velcro'-type strip. An officer's first name and surname are stitched to the name tag in silver block letters 10 mm high.

with an identifying number combination in case of necessity.

4. In ensuring public order during mass disorder and holding individuals in a temporary detention facility, to consider establishing a video recording obligation as far as possible until entry into force of the Maintenance of Law and Order Act.

The Minister of Internal Affairs in his reply to the Chancellor's proposals explained that the Ministry had prepared a draft amendment to Government Regulation No. 160 of 13 July 2006 "Description of police uniform", supplementing the description of elements of the uniform with an identifying sign. According to the Minister, the amendment had entered into effect on 08 November 2007. The procedure for wearing an identifying sign is established by the National Police Commissioner in an internal legal act.

The Ministry of Internal Affairs has also drafted amendments to the Police Act, distinguishing detention within administrative proceedings from detention within offence proceedings. According to the Minister, the amendment also regulates detention of individuals during mass disorder and the corresponding documentation of administrative detention. In addition, the Draft Act contains a chapter on the use of coercion, including the use of handcuffs and leg-cuffs.[223] The amendments specify the current regulatory provisions and eliminate shortcomings revealed as a result of analysis of events in spring 2007.

3. Publication of photographs of individuals on the police website http://tuvasta.politsei.ee

Cases No. 7-4/070704 and 7-4/070858

(1) On the basis of petitions, the Chancellor of Justice analysed publication of photographs of individuals on the police website http:/tuvasta.politsei.ee as well as the lawfulness of processing the complaints filed against publication.

(2) The website http://tuvata.politsei.ee was created on 29 April 2007 during major riots following displacement of the Bronze Soldier monument, and was used for posting photographs at the disposal of the police and taken during the riots. When the website was opened it contained an introductory sentence: "This website contains photographs of individuals who participated in acts of vandalism in Tallinn at the end of April".

Three petitioners contacted the Chancellor of Justice asking to assess the legality of publication of their photographs on the website. Two petitioners were dissatisfied with the activities of the police in dealing with their complaints against publication. Two petitioners considered it insulting that the police website labelled all individuals in the pictures as participants in acts of vandalism, although the website also included pictures of persons simply peacefully standing in the street and taken during the day.

The third petitioner, a picture of whose daughter had been published on the website, had sent several messages to the police through the website (on 08 May, 09 May, and 21 May 2007), informing the police that the petitioner knew the person in the picture and asking the police to contact them. On 08 May 2007, the petitioner filed a written application to the police, stating that the person in the picture was the petitioner's daughter. The petitioner asked the police to provide information on the person who had submitted the picture to the police as, in the petitioner's opinion, this constituted a false statement and damaged the reputation of their family and of the daughter. The application was registered on 08 May 2007, but the police had not replied by 20 June 2007 when the petitioner contacted the Chancellor of Justice. To verify the facts, the Chancellor contacted the Police Board.

According to the Police Board, the purpose of publishing the photographs was to identify individuals who had participated in committing offences and to catch individuals who had incited commission of acts of vandalism. The third purpose was to ascertain the truth within criminal proceedings related to the events. For this reason, it had been necessary for the police to publish photographs of individuals who had been peacefully standing in the streets. The Police Board explained that after opening of the website http://tuvasta.politsei.ee people started sending photographs and video materials to the police concerning the events of 26-28 April 2007. The material received was extremely voluminous, and all of it had to be reviewed in order to verify and resolve applications submitted by individuals. The Police Board explained that in the period from 27 April to 10 May 2007 the main duty of the police was to maintain public order and prevent new offences in the streets of Tallinn and other cities, so that a large number of police officers were relieved of their regular duties and were sent to the streets. Accordingly, the workload of police officers verifying and reviewing photographic and video materials was extremely heavy. The police received more than 1000 hints and tip-offs by e-mail, which helped to identify more than 180 individuals. On 10 May 2007, the text published on the website was revised.

The Police Board noted that according to information in the document register of the West Police Prefecture the police had on 05 June 2007 replied to the petitioner's written application of 08 May 2007. In the reply, it was explained to the petitioner that the information submitted by the petitioner had been forwarded to the Central Criminal Police which was also the administrator of the website http://tuvasta.politsei.ee. According to the document register of the Central Criminal Police, the application was registered on 06 June 2007 and a written reply to the petitioner had

223 Draft Act amending the Police Act and corresponding Acts, as at 01 October 2007, No. 222 Se, available online at http:// www.riigikogu.ee.

been sent on 05 July 2007. According to the Police Board, the petitioner had called the police before receiving the final reply and had talked with the police officer responsible for resolving the application. During the conversation, the officer had explained to the petitioner the reasons for publishing the photograph of the petitioner's daughter and affirmed that the publication definitely did not mean an accusation against the individual depicted in the picture.

(3) In this case, the main issue was whether the statement made on the website ("This website contains photographs of individuals who participated in acts of vandalism in Tallinn at the end of April") violated the rights of individuals and whether the applications submitted by petitioners had been investigated sufficiently quickly and effectively and in conformity with the principle of good administration and requirements of the Administrative Procedure Act.

(4.1) The Chancellor of Justice considered publication of the photographs of individuals lawful, first and foremost under § 39(3) of the Public Information Act, which states that if compliance with a restriction on access to information may endanger the life, health, or property of other persons, restricted information must be promptly disclosed. According to the Chancellor's assessment, in this context publication of photographs not depicting individuals committing acts of vandalism was in compliance with the principle of minimality under § 6 clause 3 of the Personal Data Protection Act.[224]

The Chancellor concluded that the introductory sentence posted on the website until 10 May 2007 and labelling all individuals in the pictures as participants in acts of vandalism was condemnable, and emphasised that in disclosing personal data on a website particular attention should be paid to the requirement of inviolability of private life under the Constitution and the fundamental right to protection of personal data under the European Union Charter of Fundamental Rights.

Section 26 of the Constitution protects everyone's right to the inviolability of private life. Section 19(1) of the Constitution establishes everyone's right to free self-realisation. In an information society, the right to informational self-determination and protection of personal data forms an integral part of fundamental rights. Art 68-II par. 1 of the EU Charter of Fundamental Rights[225] establishes the right to protection of personal data. According to subsection (2), personal data must be processed fairly for specified purposes and on the basis of consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

In addition to the volume of published information, it is also necessary to pay attention to the form of publishing, i.e. how data are presented, in what context they are placed, and what impression this leaves on the public as well as on individuals concerned. An act of vandalism is not a term used in penal law, but in common usage it has a clearly negative meaning.[226] Additionally, the principle of presumption of innocence must be observed, according to which no one may be considered guilty of an offence (in this case vandalism) until convicted by a court. The presumption of innocence is contained in § 22 of the Constitution and Art 6(2) of the ECHR. Paragraph 4.4 of the press code of ethics states that the press may not treat an individual as a criminal before a court judgment to this effect.[227] Branding individuals as participants in acts of vandalism even if they were merely in the streets but did not commit acts of vandalism or did not incite commission of such acts may restrict the opportunities of such individuals to self-realisation in different spheres of life. Even those who did participate in acts of vandalism or incited such acts can be labelled vandals only after conviction by a court. In this case, both petitioners found that the public authority had insulted them.

(4.2) The Supreme Court has derived the right to good administration from § 14 of the Constitution.[228] The right to

224 For more detail, see "Seisukoht Politseiametile seoses aprillirahutustes osalenud isikute fotode veebis avaldamiseõiguspärasusega, juuni 2007". [Opinion to the Police Board in connection with the lawfulness of online publication of photographs of individuals participating in the April riots] Available online at www.oiguskantsler.ee, under the section with opinions on protecting fundamental rights and freedoms.

225 The Charter of Fundamental Rights of the European Union is part of the Treaty Establishing a Constitution for Europe. The Riigikogu adopted the Act ratifying the Treaty Establishing a Constitution for Europe on 09 May 2006. The Supreme Court Constitutional Review Chamber in its judgment of 17 February 2004, No. 3-4-1-1-03 stated the following: "The Charter of Fundamental Rights of the European Union is not directly legally binding on Estonia but, as also expressed in the preamble to the Charter, it is based on constitutional traditions common to the Member States and the principles of democracy and the rule of law. The principles of democracy and the rule of law, as well as other general principles of law and fundamental values applicable in European legal space, also apply in Estonia." In this judgment the Supreme Court recognised that the right to good administration under the Charter also applies in Estonia, see footnote No. 2. [RKPJKo 17.02.2003, nr 3-4-1-1-03, 12 ja 16] Supreme Court Administrative Law Chamber judgment of 19 December 2006, No. 3-3-1-80-06: "Under Art 41(2) point a of the EU Charter of Fundamental Rights, the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken. The European Code of Good Administrative Behaviour, approved by the European Parliament on 06 September 2001, contains Art 16 on the right to be heard and make statements. Under Art 10 of the Code, the official shall, where necessary, advise the public on how a matter which comes within his or her remit is to be pursued and how to proceed in dealing with the matter. Although "the official" in the European Code of Good Administrative Behaviour refers to EU officials and servants, whenever possible the general principles laid down in the Code should also be observed by Estonian officials when applying EU law or Estonian law transposing EU law."

226 E.g. the dictionary *Eesti õigekeelsusõnaraamat* explains the meaning of the word as: barbaric destruction, breaking.

227 Available online at http://www.eall.ee/eetikakoodeks.html.

228 Supreme Court Constitutional Review Chamber judgment of 17 February 2003, No. 3-4-1-1-03, par. 12 and 16: "Although § 14 of the Constitution is worded objectively, it gives rise to certain subjective rights, including the general right to organisation and procedure [...] An analysis of principles recognised in European legal space leads to a conclusion that the Constitution gives rise to the right to good administration as one of the fundamental rights of individuals."

good administration includes several important sub-principles which administrative authorities must observe in their daily practice: expediency, transparency, inclusion and hearing of individuals, reasoning of decisions, courtesy and helpfulness, and speed of procedure.

Under § 6 of the Response to Memorandums and Requests for Explanations Act, a response to memorandums and requests for explanations must be provided within a maximum of thirty calendar days (or in case of necessity, the deadline may be extended up to three months by notifying the individual concerned). However, in this case, § 5(3) of the Act is relevant. Under this provision, if an addressee finds that they are not competent to provide the information or explanation requested, they should forward the request to a competent agency immediately but not later than within five working days from registration of the request, and they must inform the individual concerned according to the procedure under subsection 8.

When the West Police Prefecture found that they were not competent to deal with the petitioner's request, they should have forwarded the request to the Central Criminal Police within five working days and should have notified the petitioner accordingly. In this case, the deadline and the requirement of notification were not complied with.

However, the Chancellor of Justice understood and took into consideration the whole context of the case and the conditions under which the police were operating in this period. In the Chancellor's opinion, it was understandable in this situation that the police lacked sufficient resources to cope with all issues within prescribed deadlines. Thus, activities had to be prioritised.

According to the handbook on administrative procedure, exceeding statutory deadlines is not unlawful if the delay is caused by circumstances beyond the control of an agency, for example if the number and complexity of cases needing to be resolved is excessive in comparison with the number of officials available for dealing with them, or if a natural disaster has occurred.[229] However, delays due to unreasonable organisation of work, unnecessary bureaucratic formalities, or even malicious or corrupt motives should be distinguished from the above situations.[230] The Chancellor would consider delays in proceedings for these reasons a serious problem and has also previously emphasised the principle deriving from a judgment of the Supreme Court that restriction of fundamental rights must not be justified merely by reference to administrative and technical difficulties or to a burden on the state budget.[231]

The Chancellor considered it important and appropriate that when answering the petitioner's phone call the police had explained the situation and the circumstances causing delay with the response and the need to forward the application to the Central Criminal Police. It is important that individuals contacting the police in such extraordinary situations of high workload should feel that their concerns are not considered trivial but that the police are dealing with them with all the means available at the moment. It is important to applicants that they receive adequate information about the course of proceedings.

In view of all the above considerations, the Chancellor concluded that in the matter of the petition the statutory deadlines and the duty of notification under the Response to Memorandums and Requests for Explanations Act were violated. However, in this case such behaviour was understandable and justifiable, as it was due to the excessive police workload resulting from the April riots. Nevertheless, the Chancellor stressed that compliance with statutory deadlines and the duty of notification form part of the principle of good administration[232] which the police are required to observe in their work.

(5) On 07 June 2007, the Chancellor of Justice sent to the National Police Commissioner a recommendation for observing lawfulness and the principle of good administration. The Chancellor drew the attention of the Police Board to the fact that even in extreme situations the state authority must act lawfully and ensure protection of the rights of individuals, so as to maintain people's respect for the state. The Chancellor asked the Police Board to avoid repetition of similar incidents in the future. In addition, the Chancellor pointed out the need for training of officers: police officers must be able to recognise what data constitute personal data and be able to observe the requirements for processing personal data.

The Chancellor asked the National Police Commissioner to ensure police awareness of requirements under the Response to Memorandums and Requests for Explanations Act.

To comply with these recommendations, the Police Board invited an adviser to the Chancellor of Justice to provide training to police officers. During the training, law enforcement officers were explained of the essence of good admin-

229 *Ibid*, p. 123.

230 *Ibid*, p. 122.

231 Supreme Court Constitutional Review Chamber judgment of 21 January 2004, No. 3-4-1-7-03, par. 39: "Unequal treatment must not be justified by merely administrative or technical difficulties. Excessive burden on the state budget is an argument that may be taken into account in deciding the extent of social assistance, but it may not be used to justify unequal treatment of destitute individuals and families."

232 Supreme Court Constitutional Review Chamber judgment of 17 February 2003, No. 3-4-1-1-03, par. 12 and 16: "Although § 14 of the Constitution is worded objectively, it gives rise to certain subjective rights, including the general right to organisation and procedure [...] An analysis of principles recognised in European legal space leads to the conclusion that the Constitution gives rise to the right to good administration as one of the fundamental rights of individuals."

istration, requirements under the Administrative Procedure Act and the Response to Memorandums and Requests for Explanations Act. Opinions of the Chancellor were also made available on the Police Board intranet site where they are accessible to all police officers.

4. Activities of the police in registering public meetings

Case No. 7-4/071025

(1) Based on a petition from the non-profit Association for the Protection of Sexual Minorities, the Chancellor of Justice supervised police activities in connection with registering a procession during Tallinn Pride.

(2) On 19 March 2007, the organising committee of Tallinn Pride, a festival held in Tallinn for sexual minorities, asked the North Police Prefecture by e-mail for an explanation concerning an event planned for 11 August 2007. The request said: "Due to attacks last year, we need your assistance in preparing for this event. Considering last year's aggressive incidents, we have started preparations for the event earlier and we also plan to change the route of the procession and take other measures contributing to the safety of the event. As we can only take responsibility for behaviour of the people participating in the event, i.e. those marching in the procession, and there is no control over the activities of onlookers / city inhabitants, we definitely need state assistance and support." The e-mail contained a request for explanations from the police concerning various requirements and suggestions, and a desire to agree a meeting to discuss organising Tallinn Pride. The Police Prefecture did not reply to the letter.[233]

On 01 June 2007, the organising committee sent another e-mail, suggesting two possible routes for the procession. The organisers again asked for an opportunity to meet in order to discuss a possible plan of action. Again, the police prefecture failed to reply to the e-mail.

On 18 June 2007, the organisers re-sent the letter of 01 June 2007 in the form of a request for information, to which the North Police Prefecture replied on 22 June 2007: "[...] this public event (procession) cannot be held in the old town of Tallinn in 2007. First and foremost considering the earlier experience and potential risks to public order and safety of participants in connection with holding the event. At the same time, the event would disturb the constitutional right of other citizens to free movement in the narrow streets in the old town due to the large number of participants in the procession." The North Police Prefecture in its reply also expressed readiness to meet the organisers if they found another venue for organising the event.

On 29 June 2007, a representative of the Association for the Protection of Sexual Minorities petitioned the Chancellor of Justice, complaining against the activities of the North Police Prefecture in preparing the public assembly. The petitioner was of the opinion that the police had made unjustified demands in connection with organising Tallinn Pride as a public event. The police had also repeatedly failed to reply to requests of the organising committee to receive information and explanations for organising the assembly.

After contacting the Chancellor of Justice, on 02 July 2007, the organisers of Tallinn Pride filed with Tallinn City Administration a notice of public assembly for organising the procession on 11 August 2007 in the streets of the old town of Tallinn along the route produced in the notice. The relevant city administration official did not register the notice and requested prior approval by the police. On 03 July 2007, the organising committee filed a notice of public assembly for approval by the police.

The petitioner in explanations to the Chancellor claimed that at the reception in the North Police Prefecture a police officer had made a scornful remark: "So you are the ones organising this event of unsavoury reputation".

On 05 July 2007, the North Police Prefecture presented additional traffic safety requirements for organising the public event. Organisers were asked to produce an action plan for ensuring safety of participants and freedom of movement of other individuals.

To clarify the facts, the Chancellor of Justice submitted a request for information to the North Police Prefecture.

The North Police Prefecture in its reply explained that the e-mails sent by the petitioner on 19 March and 01 June 2007 were not registered in the document management system but had been forwarded to competent officials for resolving. The first e-mail did receive a reaction and the petitioner was contacted by telephone. The Police Prefecture admitted its shortcomings in replying to letters by the individuals concerned, justifying this partly by the fact that the police were very busy in that period. Particularly busy were officers in the downtown police department. As the time of the planned event was still far away, the prefecture considered it possible to postpone communication with the organisers.

233 According to the petitioner, a male police officer, who did not identify himself, had called in connection with the letter and asked whether the event had to take place in the old town and whether it was not possible to transfer it somewhere outside the old town. The caller had allegedly promised to call back after a meeting where the issue was to be discussed, but according to the petitioner had failed to do so.

Since the request for information received on 18 June 2007, the North Police Prefecture claims to have registered all requests and replied to them properly. According to the prefecture, in addition to two e-mails the organising committee had submitted several further requests for information, which were registered in the police information system and proper replies were provided.

On 13 July 2007, the North Police Prefecture organised a meeting with participation of representatives from the organising committee, the Tallinn Transport Board, and the security firm *K-Grupp*. At the meeting, it was explained to the organisers what they needed to take into account when organising such events, what the police requirements for the planned procession were based on, and that compliance with requirements was a precondition for the possibility to guarantee public order and safe conduct of the procession both for participants and onlookers.

Considering the nature of the event and the experience of previous years, it was emphasised that organisers were responsible for guaranteeing compliance of participants in the procession with requirements for behaviour in public places, including generally recognised moral and ethical norms. This is of primary importance for preventing and stopping conflicts between participants and onlookers.

The North Police Prefecture in its reply also noted that under the Public Assemblies Act (§ 11) organisers of a public assembly have the duty and responsibility to ensure safety of participants at the assembly. To ensure safety of an event of the size of a procession, organisers inevitably need to use services of a security firm. The police are required to ensure safety (including traffic safety) during a public assembly.

The North Police Prefecture explained application of the Public Assemblies Act as follows. The Act establishes the requirement of appointing a steward for the event and the responsibilities of the steward in connection with giving instructions to participants in a meeting for its peaceful and lawful conduct. However, stewards do not have rights comparable to security staff under the Security Act or police officers under the Police Act in maintaining law and order. Therefore, in case of public assemblies with a presumably high number of participants, or assemblies which obstruct movement of vehicles or pedestrians, or in case of which conflicts based on different beliefs, political views, freedoms, etc between participants and onlookers may be expected, in practice organisers are proposed to conclude a contract with a security firm for ensuring safety during the assembly.

As in this case it was necessary to change organisation of traffic due to the procession, the organiser was requested to produce a traffic scheme for approval by the police (§ 8(3) Public Assemblies Act). At the same time, if necessary the police are required to give guidelines to organisers for applying additional safety measures. Under § 11(2) clause 2 of the Public Assemblies Act, organisers of a public assembly must end the assembly if the events become violent and endanger public order or life or health of individuals. According to the prefecture, organisers were given guidelines how to receive assistance in preparing the traffic scheme.

In response to the question how the responsibility for safety of participants was divided between the organisers and the police (§ 11(1) clause 2 Public Assemblies Act, § 3 Police Act) and what the police were doing to ensure that participants were not endangered due to activities of hostile third parties as required by § 47 of the Constitution, the police prefecture replied as follows.

When planning its activities, the police include the relevant area in the route of a patrol team, involve a necessary number of police officers on the basis of a one-off order, or involve a larger number of officers by drawing up a plan for a police operation for performing targeted activities during a particular event.
In ensuring public order, the police proceeds from the functions imposed on it by the Police Act and other Acts, aiming to maintain law and order and protect lawful interests of individuals. The police plan their activities based on advance information and potential risks relating to an event. During Tallinn Pride processions, the police have every year sent considerably reinforced forces to the area of the event and have operated on the basis of a police operation plan. At the same time, the police impose pertinent requirements on persons who have relevant duties under the law.

Section 11(1) clause 2 of the Public Assemblies Act requires organisers of an event to ensure safety of participants and, if necessary, restrict dangerous areas with barriers. At a meeting with the members of the organising committee, the North Police Prefecture asked organisers to walk through the whole route of the procession together with the representatives of the security firm they intend to involve, and to assess all potential risks and plan the necessary activities for minimising the risks. Under § 9 of the Security Act, a security firm involved in ensuring public order in an event is required to draw up a security plan. Security firms have the knowledge and experience to do this. The involved security firm is also responsible for the adequacy of the suggested measures and of the plan.

If traffic needs to be reorganised in order to hold a public assembly, a traffic scheme indicating the relevant changes has always been requested from organisers. According to the police prefecture, traffic means both vehicles and pedestrians. Inevitably, ensuring fundamental rights of one person results in restricting someone else's rights to a lesser or greater extent. In such cases, the police prefecture has always considered it best to follow the principle that the requirements applied and imposed by the police should be suitable for their purpose and least restrictive of the rights of the general public in order to avoid errors of discretion.

The North Police Prefecture also explained that the planned procession was envisaged to pass through the streets of the old town during a period when the old town is very crowded. It should also be taken into account that in addition to recreational facilities these streets also include places where people live, to which access must be ensured at all times. The aim of the police is to ensure that organisers plan their event in a way which least disturbs regular daily life in the city and at the same time ensures safety of participants. The police prefecture explained to the organisers that fully occupying the streets, as had sometimes happened during previous years, had to be ruled out. Requirements for organising the procession and guidelines given to organisers must ensure a balance between different fundamental rights. The prefecture in its reply pointed out that at the time of contacting the Chancellor of Justice the organising committee had not completed planning the final route of the procession and therefore the police had been unable to provide a complete assessment of the risks or provide practical guidelines. The organisers submitted a traffic scheme for approval to the North Police Prefecture on 27 July 2007, and the police provided their assessment on 30 July 2007.

The North Police Prefecture in its reply summed up problems from previous years. Previously, bomb threats had been made during and at the place of the event. Considering the narrow streets of the old town, responding to bomb threats was difficult because the streets were completely congested during the procession and access by operational vehicles was not guaranteed.

According to the police, because of the procession several city inhabitants and visitors had contacted the police to express dissatisfaction that the procession hindered them reaching their destination. Individuals had also complained to the police about the behaviour and clothing of participants, which they found disturbing as contrary to generally recognised moral and ethical norms.

In reviewing notices of public assembly, Tallinn City Council regulation No. 43 of 25 August 2007 "Rules of public order and requirements for organising public assemblies in Tallinn" also have to be observed. Under § 22(3) of the regulation, if changes to organisation of traffic are needed, a traffic scheme approved by the North Police Prefecture and the Transport Board has to be presented to the City Administration together with a notice of assembly. A form of notice of public assembly has been approved as an appendix to the regulation. The form includes a line for approval of the North Police Prefecture. Therefore, according to the North Police Prefecture, in practice prior to submitting a notice of public assembly to Tallinn City Administration the required form together with a traffic scheme has to be presented for approval to the North Police Prefecture. The prefecture will approve the notice if the traffic scheme is appropriate. However, as the regulation also requires approval from the Tallinn Transport Board, which is competent to organise traffic in Tallinn, in practice police approval is given after approval by the Transport Board.

The North Police Prefecture also explained that the meeting organisers did not act consistently. Regardless of police explanations about necessary measures, they submitted several different notices of public assembly for organising one and the same event. They also failed to explain whether they wanted to use audio equipment, etc, because due to such elements the event might go beyond the notion of a public assembly so that its organisation would require a more stringent procedure under Tallinn City Council regulation No. 43 of 25 August 2005. On that basis, the police prefecture reached the conclusion that the organisers had no precise idea of their event and did not wish to appreciate the responsibility of organisers to ensure safety of participants.

The North Police Prefecture in its reply emphasised that after the meeting of 13 July 2007 the prefecture was prepared to hold another meeting and informed the organising committee about this. Exchange of information about organising the procession continued regularly after the meeting.
(3) In this case, it was important to answer the question whether the procession constituted a public assembly within the meaning of the Public Assemblies Act and whether the organisers were guaranteed all procedural rights.

(4.1) During Tallinn Pride, a festival organised in Tallinn for sexual minorities, a procession was planned with the aim to "express support for equal opportunities of individuals in society and equal treatment regardless of sex, age, special needs, religious conviction, race, or sexual orientation"[234]. Before the following legal analysis, it would be useful to explain the nature of the procession.

Unlike public events, organising a public assembly is regulated more specifically under the Public Assemblies Act. Regulatory provisions concerning organisation of public events are scattered in different special Acts (e.g. the Sports Act, the Roads Act, and the Traffic Act) and relevant regulations of local authorities play an important role. For example, Tallinn City Council regulation No. 43 of 25 August 2005 "Rules of public order and requirements for organising public assemblies in Tallinn" contains separate provisions on organising public events and public assemblies. With regard to public assemblies, the regulation mostly repeats the relevant provisions of the Public Assemblies Act.

Under § 2 of the Public Assemblies Act, a public assembly means a meeting, demonstration, rally, picket, religious

234 The aim was marked under notice of public assembly registration number 116 on the Tallinn city website on 11 August 2007. Available online at http://www.tallinn.ee/est/g3866/avalikud_yritused (08 August 2007).

event, procession, or other demonstration. As the Chancellor has stated earlier,[235] the definition of public assembly under the Act demonstrates the openness of the concept. This means that it is necessary to assess in each particular case whether an event constitutes a public assembly or not.

In theory, a public assembly is considered to be "[...] a gathering of two or more people with an aim which is not purely social, but is also carried by an idea or opinion common to the participants, which they wish to develop or mutually express, and the aspirations towards which connect the people through a certain internal bond."[236] In other words, a public assembly is characterised by multiplicity of participants, a common aim which is not purely social (e.g. a recreational concert, a gathering of people observing an accident), and a certain bond between the participants.

Considering the importance of fundamental rights in ensuring plurality of opinions, which is an inevitable characteristic of a democratic society, in addition to the above characteristics of a public meeting it is also necessary to take into account the purpose of the Public Assemblies Act and the meaning of the Act arising from this. Section 1 of the Public Assemblies Act establishes that the purpose of the Act is, first, to ensure the right of individuals to assemble peacefully and hold meetings in compliance with fundamental rights, freedoms, and duties of people and the principle of a democratic country governed by the rule of law, and, secondly, to impose restrictions on organising public assemblies which are necessary for guaranteeing national defence, public order, morality, traffic safety and safety of participants at the assembly, and to prevent the spread of infectious diseases.[237]

Both Tallinn City Administration and the North Police Prefecture treated the procession held during Tallinn Pride sexual minorities festival[238] as a public assembly under § 2 of the Public Assemblies Act.[239] The Chancellor of Justice concurs with this interpretation.

By treating the event as a public assembly, legal meaning can be attributed only to the characteristics of the concept of a public assembly and the purpose of the Act.

(4.2) The Supreme Court has derived the right to good administration from § 14 of the Constitution.[240] The right to good administration includes several important sub-principles which administrative authorities must observe in their daily practice: expediency, transparency, inclusion and hearing of individuals, reasoning of decisions, courtesy and helpfulness, speed of procedure, etc. In other words, an administrative authority must behave in a citizen-friendly manner in the widest sense.

The legislator in Estonia has included the most important principles of good administration in various pieces of legislation, most notably in the Administrative Procedure Act.

Section 47 of the Constitution establishes everyone's right, without prior permission, to assemble peacefully and to conduct meetings. The right to assemble and conduct meetings is directly related to § 45 of the Constitution which establishes freedom of expression – the right to freely disseminate ideas, opinions, beliefs, and other information. The right to assemble and conduct meetings enables exercise of freedom of expression. Similarly, Art 11 of the European Convention on Human Rights establishes everyone's right to freedom of peaceful assembly,[241] and Art 10 the right to freedom of expression. The corresponding articles in the International Covenant on Civil and Political Rights (ICCPR) are 21[242] and 19.

These fundamental rights – freedom of assembly and conduct of meetings, and freedom of expression – are considered a cornerstone of democracy, as they help to ensure plurality of opinions generally in resolving problems in society

235 On 07 October 2002 in the Riigikogu, to an interpellation by Riigikogu members A. Herkel and J. Leppik in connection with the case of Falun Gong.

236 B. Aaviksoo. Avaliku koosoleku mõistest sõnavabaduse valguses. [Concept of a public assembly in the light of freedom of speech] – *Juridica* 2004, p. 493. At the same place, see for a longer discussion of the characteristics of the concept of public assembly.

237 For a longer discussion see also B. Aaviksoo. Avaliku koosoleku mõistest sõnavabaduse valguses. [Concept of public assembly in the light of freedom of speech] – *Juridica* 2004, p. 493 ff.

238 As can be seen from the agenda of the event, the procession is only part of the festival: http://www.pride.ee/ (08 August 2007).

239 The European Court of Human Rights in its judgment of 03 May 2007 in the case of *Bączkowski and others v Poland* (par. 69) also established that the failure of Warsaw city authorities to register an assembly (procession) planned by the Foundation for Equality for 10-12 June 2005 with the aim of drawing society's attention to discrimination against minorities constituted a violation of freedom of assembly under Art 11 of the ECHR.

240 Supreme Court Constitutional Review Chamber judgment of 17 February 2003, No. 3-4-1-1-03, par. 12 and 16: "Although § 14 of the Constitution is worded objectively, it gives rise to certain subjective rights, including the general right to organisation and procedure [...] An analysis of principles recognised in European legal space leads to the conclusion that the Constitution gives rise to the right to good administration as one of the fundamental rights of individuals."

241 ECHR Art 11: "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, [...]. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

242 Art 21 of the Covenant: "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."

as well as in exercising political rights.[243]

The Constitution allows restricting the right of peaceful assembly and conduct of meetings in the cases and under the procedure provided by law to ensure national security, public order, morals, traffic safety, and the safety of participants at a meeting, or to prevent the spread of infectious disease. Freedom of expression may be restricted to protect public order, morals, and the rights and freedoms, health, honour and good name of others. Similar grounds for restriction exist under the ECHR and the ICCPR.

The European Court of Human Rights in its case-law has repeatedly stressed that freedom of assembly under Art 11 includes both a negative and positive duty for State parties.[244]

On the one hand, the state must refrain from interference with exercise of the right of assembly, including cases where participants express opinions which may annoy or give offence to individuals who hold opposite views. However, if every time the probability of tension in an exchange of ideas resulted in banning a meeting, this would obstruct members of society from listening to different opinions. On the other hand, the state must also take positive measures to protect, for example, a lawful demonstration from a hostile counter-demonstration, etc.[245] This means that the duty to ensure real and effective freedom of assembly may not be reduced to a mere duty of the state to refrain from interference. In some cases, the state may have a positive duty of action to ensure effective opportunities for exercising the fundamental right of assembly. The positive duty of the state is particularly important in case of individuals who belong to minorities or express unpopular views, as they are more vulnerable.[246]

As mentioned above, the fundamental right to good administration includes various sub-principles, among which one of the most important is cooperation with individuals. In a citizen-friendly state, an administrative authority is accessible to individuals; officials communicate with individuals and are happy to provide advice, because informed citizens are able to comply better with the requirements of the law, which in turn facilitates the work of officials.

Cooperation with individuals does not constitute merely a soft value, but is also established in the Administrative Procedure Act, which applies to processing notices of public assembly.[247]

Under § 36(1) of the Administrative Procedure Act, an administrative authority must explain the following to a participant in proceedings or to an individual who considers submission of an application, at the request of the individual:

1) the rights and duties of participants in proceedings in administrative procedure;
2) the term within which administrative proceedings are presumably conducted and any possibilities to expedite proceedings;
3) applications, evidence, and other documents to be filed in administrative proceedings;
4) what procedural acts must be performed by participants in the proceedings.

Under subsection 2, if, in order to issue an administrative act or take a measure which is applied for, it is necessary to issue another administrative act beforehand, the administrative authority must promptly explain the procedure for applying for the necessary administrative act and for review of the application, and other conditions for issue of the other administrative act.

The duty to explain must by no means be understood as a mere formality. The official here must assume the role of an instructor for citizens and, if necessary, should be able to explain the meaning and purpose of legally imposed restrictions in a manner understandable to an individual. The handbook on administrative procedure notes: "The duty on administrative authorities to explain is often also called the *duty of advising* or the *duty of care*, and in essence its main purpose is to ensure transparency of proceedings, sufficient and effective protection of rights of participants in proceedings and their equality of information concerning issues related to the proceedings. [...] In this legal relationship the administrative authority may be viewed as an "assistant to the citizen", whose duties related to office include not only formal issue of acts and conducting the inevitable prior proceedings, but also ensuring that individuals without knowledge of law and unskilled in bureaucracy are able effectively to participate in the proceedings. A positive

243 E.g. the European Court of Human Rights in its judgment of 17 February 2004 in the case of *Gorzelik and others v Poland*, par. 88-89: "In its case-law, the Court has on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association […] By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from "democratic society". Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context it has held that, although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."

244 For more detail, see also R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse. [Constitutionalism and the protection of fundamental rights and freedoms] Tallinn 2004, p. 565.

245 European Court of Human Rights judgment of 19 June 2006 in the case of *Öllinger v Austria*, par. 36-37.

246 European Court of Human Rights judgment of 03 May 2007 in the case of *Bączkowski and others v Poland*, par. 64.

247 § 1[1] of the Public Assemblies Act: "The provisions of the Administrative Procedure Act (RT I 2001, 58, 354) are applied, *mutatis mutandis*, to administrative proceedings under this Act."

outcome of proceedings includes an individual's satisfaction with the result and conduct of the proceedings, including the attitude of officials towards the individual."[248]

The Supreme Court has also noted: "Duties of the administrative authority include not only conducting formally inevitable proceedings for issuing acts but also ensuring that individuals without knowledge of law and unskilled in bureaucratic procedures could productively participate in the proceedings."[249]

The Chancellor of Justice expressed the hope that cooperation as a fundamental value[250] will not be limited only to cooperation with other administrative authorities, but that individuals outside the field of administration are also intended to be included. The North Police Prefecture in its reply explained that their insufficient response to the requests of Tallinn Pride organising committee was partly because during that period the police had to involve its entire staff in preparing and carrying out the police operation in connection with the bronze monument. Particularly occupied in that period were officers in the downtown police department. It was also possible to postpone communicating with organisers because the planned date of the event was still distant.

The petitioner contacted the police as early as 19 March 2007 when ample time remained until the planned event. If dealing with the issues raised in a person's application is time-consuming, it would be reasonable to give at least some feedback to the individual, so that they are aware that the authorities have received the application and are dealing with it at the first opportunity. The principles of good service also require that the individual is given the name and contact details of the official dealing with the application, so that in case of necessity the individual can directly contact the official and does not have to "trace" their application by using the prefecture's general phone numbers. That way the individual would feel a stronger connection to the state, which in turn would help to relieve their potential dissatisfaction.

This principle is also contained in the European Code of Good Administrative Behaviour.[251] The Supreme Court[252] has declared the Code binding only on those administrative authorities which apply EU law or Estonian law transposing EU law. However, the principles contained in the Code should serve as a model in organising the work of any public sector institution.

Additionally, the Chancellor of Justice emphasised in connection with responding to applications of individuals that according to the investigative principle under § 6 of the Administrative Procedure Act[253] the administrative authorities are required to ascertain the actual wish of the individual submitting an application and what legal norm would apply to it. Therefore, the Chancellor cannot agree with the North Police Prefecture's explanation that "they (the organisers of the assembly) also failed to explain whether they wanted to use audio equipment, etc, because due to such elements the event may go beyond the notion of a public assembly and its organisation would require a more stringent procedure under Tallinn City Council regulation No. 43 of 25 August 2005. On that basis, the police prefecture reached the conclusion that the organisers had no precise idea of their event and did not wish to appreciate the responsibility of organisers to ensure the safety of participants." Under § 6 of the Administrative Procedure Act, the police have a duty to ascertain such facts in order to implement the duty of explaining and advising under § 36.

(4.3) The practice of good administration requires registration of written applications of individuals. Such a formal requirement is not an end in itself but helps to ensure that the authorities actually deal with each application.

The requirement of registration is established in § 7 of the Response to Memorandums and Requests for Explanations Act. Under subsection 1, a state authority, local government agency or an agency of another legal person in public law, or a body of such authority or agency must register a memorandum or request for explanation and the response to it, indicating the manner in which the memorandum or request for explanation is presented and responded to, not later than on the working day following the date on which the memorandum or request for explanation was received or the response was given. Under subsection 2, the memorandum or request need not be registered if it was submitted orally and an oral response is given to it.

Under § 6 of the Response to Memorandums and Requests for Explanations Act, a response to a memorandum or

248 A. Aedmaa *et al.* Haldusmenetluse käsiraamat. [Handbook on administrative procedure] Tartu 2004, p. 157 ff.

249 Supreme Court Administrative Law Chamber judgment of 15 February 2005, No. 3-3-1-90-04, par. 16.

250 According to information received from the Police Board, the police itself considered cooperation as one of its fundamental values. At the time of resolving the case, the police website did not contain information about the police mission or fundamental values. Today, the police website lists the following fundamental values as the basis for police work: professionalism, honesty, humanity, and cooperation. Available online at http://www.politsei.ee/?id=1640.

251 http://www.ombudsman.europa.eu/code/pdf/et/code2005_et.pdf.

252 „Also under Art 10(3) of the European Code of Good Administrative Behaviour the official shall, where necessary, advise the public on how a matter which comes within his or her remit is to be pursued and how to proceed in dealing with the matter. Although "the official" in the European Code of Good Administrative Behaviour refers to EU officials and servants, whenever possible the general principles laid down in the Code should also be observed by Estonian officials when applying EU law or Estonian law transposing EU law." (Supreme Court Administrative Law Chamber judgment of 19 December 2006, No. 3-3-1-80-06, par. 20)

253 As § 14 of the Constitution gives rise to the right to good administration, applying the investigative principle in administrative procedure is also a fundamental right of individuals, regardless of the fact whether a special Act establishes this principle or not. Chancellor of Justice Annual Report 2004. Tallinn 2005, p. 197.

request for explanation is provided without undue delay but not later than within 30 calendar days after their date of registration. Under special circumstances, the term may be extended to up to two months depending on the complexity of the response. The person must be notified of extension of the term for response, and of the reasons for extension.

The organisers of Tallinn Pride contacted the police by e-mails of 19 March and 01 June 2007, asking for explanations. According to the police, the e-mails were not registered in the document management program but, nevertheless, were forwarded to competent officials.

The police prefecture emphasised that they did react to the first e-mail by speaking to the organisers by telephone. However, according to the petitioner, the police had only asked whether it was really necessary to hold the procession in the old town. During the telephone conversation, no explanations were given to help the organisers better achieve their objective.

Thus, the North Police Prefecture violated the duty of registration under § 7(1) and the duty of response under § 6 of the Response to Memorandums and Requests for Explanations Act.

(4.4) The Public Assemblies Act obliges an organiser of an assembly to appoint a steward (§ 8(1) clause 12) and the provisions of Chapter 3 "Requirements for holding a public meeting" (§ 11 and 12) establish the obligation of the organiser of an assembly and a steward to comply, inter alia, with the orders of the police. The organiser of a public assembly is also required to ensure peaceful conduct of the assembly and safety of participants by restricting dangerous areas with barriers, if necessary (§ 11(1) clause 1 and 2).

The North Police Prefecture in its reply explained that although the police have a duty to guarantee public order, other state agencies, private individuals and other parties, including the organiser and steward of a meeting, also have certain duties. Therefore, according to the police, organisers of assemblies have been advised to conclude a contract with a security firm for organising assemblies where a high number of participants is expected, or which obstruct movement of vehicles or pedestrians, or where conflicts may be expected based on different beliefs, political views, freedoms, etc between participants and onlookers. A security firm contracted to ensure public order is required to draw up a security plan, and is also responsible for the adequacy of the proposed measures and the plan.

In this case, it is important to answer the question whether the duty imposed by the Public Assemblies Act on organisers of an assembly to ensure peaceful conduct of the assembly and safety of participants entitles the police to request that organisers should contract a security firm, and what would be the consequence if the organisers do not comply with this request.

On the one hand, section 8(3) of the Public Assemblies Act imposes a duty that a traffic scheme of an assembly must be approved by the police. In essence, such approval constitutes a mandatory procedural step prior to the final result of the proceedings (i.e. registration). The Act does not oblige the police to deal with approval of issues relating to safety and security of public assemblies. Section 8(6) of the Public Assemblies Act does not include a possibility for not registering a public assembly if the police have not provided a positive evaluation of the safety and security of the planned event. In assessing the permissibility of a public assembly, the police are entitled to have a say only in issues relating to traffic organisation.

It is also necessary to take into account the importance of freedom of public assembly in a democratic society. Exercise of this fundamental right may not be made dependent on conditions which significantly hamper exercise of the right or render it practically impossible. The requirement to involve a security firm in organising a public assembly is definitely a significant obstacle, as it entails additional (possibly considerable) expense for the organiser.
On the other hand, § 47 of the Constitution allows restricting freedom of public assembly to protect public order and ensure safety of participants. This is also repeated in § 1 of the Public Assemblies Act under the purposes of the Act. Safety of participants, and thus protection of their life and health (§ 16 and 28 Constitution) are important constitutional values which may justify restricting freedom to conduct meetings. Under § 47 of the Constitution, a restriction must be established by law ("may be restricted in the cases and under the procedure provided by law").

Although the police have a general duty to guarantee public order (§ 3 Police Act), organisers of an assembly are also required to ensure the safety and peaceful conduct of an assembly as established under the Public Assemblies Act. According to the logic of the law, duties of organisers are only limited to participants.

It is also important to analyse the concept of participants. Within the meaning of § 47 of the Constitution and the Public Assemblies Act, a participant in an assembly is a person who actively wishes to express the ideology or mentality which the assembly is intended to express. Onlookers at an assembly may also gather purely out of curiosity. It would not be right to assume that all of them share the same ideology as the participants.

Therefore, the Chancellor of Justice concluded that the duties of the organiser cannot include responsibility for activities of onlookers. Yet, it has to be admitted that in practice drawing the line might be complicated in certain

cases. By interpreting the provisions of the Public Assemblies Act in combination, it may be concluded that primary responsibility for peaceful conduct and safety of participants lies with the organiser and the steward of the assembly, and should they not cope then with the police (e.g. § 11(1) clauses 1 and 2, § 12 clauses 2 and 3, § 14(2) clause 1 Public Assemblies Act). However, it should be underlined that duties of the organiser and the steward for peaceful conduct and safety of an assembly should be interpreted in narrower terms, considering the importance and purpose of freedom of expression and freedom of assembly under the Constitution, including the state's positive duties under the Constitution, and considering the real and legal possibilities of the organiser to ensure peaceful conduct and safety of the assembly.

Section 14(2) clause 1 of the Public Assemblies Act entitles the police to terminate an assembly, inter alia, for the reason that the assembly incites violation of public order (and the organisers have not terminated the assembly on a prior request by the police). If the police, when receiving notice of a planned assembly, reach a conclusion based on previous experience and risk assessment that the organiser and steward might not be able independently to ensure peaceful conduct of the assembly and safety of participants, it is fully justified that the police inform the organiser and suggest possible alternative solutions. Involving a security firm and drawing up a safety plan are among such alternatives, considering the professional specialisation of security firms, their special training, and the rights of security staff under the Security Act. This would constitute preventive action by the police and observance of the duty of explaining and advising according to the principle of good administration, without waiting for possible consequences which would allow serious interference in fundamental rights by the police through prohibiting or terminating the assembly.

Recommendations given by the police should be taken seriously, and in case of their justifiability the organisers should observe the recommendations. However, it has to be pointed out that the current law does not directly give a legal meaning within the approval procedure to prior assessment by the police concerning the threat of a planned assembly to public order and safety of participants. The previous negative experience of the police in connection with the safety and security of a planned assembly may be a basis for refusal to grant approval. Similarly, refusal may not be based on the organiser's failure to comply with a police request to involve a security firm in organising the assembly. In the opinion of the Chancellor of Justice, such requests by the police can only be seen as having an advisory character.

In the case of a prohibited public assembly (§ 3) or an assembly in a prohibited location (§ 5), because the assembly incites violation of public order or its location is dangerous for some reason, the Minister of Internal Affairs or the local police prefect may prohibit organising the assembly, informing the organisers about it within three days after registration of a notice. However, prohibiting an assembly for this reason should be a solution *ultima ratio* and be based on extremely serious reasons, because determination of "incites violation of public order" is always a hypothetical exercise. Section 3 of the Public Assemblies Act also links incitement to violation of public order to the purpose of the assembly, and not to (random) actions of onlookers which may grow into violation. The concept of a "dangerous location" under § 5 clause 6 of the Public Assemblies Act should be interpreted narrowly, i.e. it does not include arguments that a location is a street or other similar place where a number of people with different opinions may be present.

The Chancellor of Justice reached the opinion that the requirement of the police to involve a security firm was not unlawful considering the circumstances of the case. However, it did not have legally binding effect.

The Chancellor's opinion that ensuring public order and safety of participants are essential values and the right to hold public meetings may be restricted to protect them, is also supported by the Draft Maintenance of Law and Order Act, currently under deliberation by the Riigikogu,[254] which would repeal the current Public Assemblies Act. Regulatory provisions on public meetings were contained in § 58 ff of the Draft Act. Unlike the currently effective Act, the Draft Act regulates more specifically the use of assistance of security firms, and envisages the right of the police in certain cases to request that the number of stewards during a meeting should be increased or a steward be replaced by another person, etc.

According to the Draft Act, police instructions concerning safety and security are explicitly given a legal meaning. The police are given a right of discretion in making a relevant decision, although it is limited by a clause "to prevent and combat an apparent increased threat".

The European Court of Human Rights has also established a wide margin of discretion in this respect: Both Article 8 and Article 11 sometimes require positive measures to be taken, even in the sphere of relations between individuals, if need be. Therefore, it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully. However, as they cannot guarantee this absolutely, they have a wide discretion in the choice of the means to be used, and this is an obligation as to measures to be taken and not as to results to be achieved.[255]

254 Draft Maintenance of Law and Order Act (49 SE) as at 26 September 2007, available online at www.riigikogu.ee.

255 European Court of Human Rights judgment of 21 June 1988 in the case of *Platform "Ärtzte for das Leben" v Austria*, par. 32-34. See also European Court of Human Rights judgment of 02 October 2001 in the case of *Stankov and United Macedonian Organisation Ilinden v Bulgaria*.

However, it is not unequivocally clear where the duties of an organiser of an assembly in ensuring its peaceful conduct and safety end and the duties of the police begin. Lack of legal clarity in the current Public Assemblies Act is a contributing factor to this. Therefore, readiness to cooperate and goodwill between individuals and administrative authorities in the process of registration prior to organising an assembly is of particular importance. The police can do a lot through openness, helpfulness, and a friendly attitude.

(5) On that basis, the Chancellor proposed to the North Police Prefecture that it should explain to its police officers:

- the meaning, purpose, and content of the duty of informing and advising under § 36 of the Administrative Procedure Act, and
- the duty of registering and replying to requests and applications under § 6 and 7 of the Response to Memorandums and Requests for Explanations Act,

by using circulars, training, or other measures which the police prefecture considers suitable for this purpose.

The North Police Prefecture informed the Chancellor that they had explained the Chancellor's recommendations to its staff electronically through the intranet.

5. Health services in Narva police detention centre

Cases No. 7-4/070146 and 7-7/071415

(1) Several individuals detained in Narva police detention centre of the East Police Prefecture contacted the Chancellor of Justice, complaining about poor access to health care.

(2) On five workdays a week, a medical assistant with nursing qualifications and entered in the register of medical staff works in Narva police detention centre. She has no scheduled times of reception but receives individuals regularly on the basis of applications. She has no authority to write out prescriptions. Police officers working in the detention centre have only received first aid training in the police school. No regular in-service training is provided.

Narva hospital does not wish to provide services to detainees in Narva police detention centre because most of them are uninsured.

Sentenced and remand prisoners coming from prison are not given their medical card with them, so that the medical assistant has no information whether individuals have HIV or tuberculosis. The medical assistant would only obtain that information based on external symptoms or detainees' own statements. There is no money for radiological examination (to diagnose tuberculosis) or HIV tests.

HIV positive detainees who receive antiretroviral treatment are sometimes given drugs for ten days from the prison. After that, the police prefecture has to obtain drugs, but no financial resources exist for this. The prison does not give any drugs to detainees with tuberculosis when they are sent to the police detention centre from the prison.

During initial health examination of individuals admitted to the detention centre, the medical assistant checks for the existence of any injuries, scabies, lice, mycoses, and other similar problems, on the basis of external signs. The medical assistant's reception room lacks a bed for patients to lie on during the examination.

Detainees in Narva police detention centre contacted the Chancellor to draw attention to these shortcomings.

In order to collect information for resolving the case, the Chancellor made an inspection visit to Narva police detention centre.

During the visit, officers at the East Police Prefecture explained that the prefecture's budget for 2006 included 114 000 kroons for providing health services in the three police detention centres within its area of administration (i.e. 3500 kroons a month for each detention centre). Some of this money is used for primary hygiene articles (e.g. soap and toothbrush, sanitary pads for women) if detainees themselves do not have a possibility to obtain them. There is no money to pay for health care and expensive drugs.

(3) In the matter of the petition, it was necessary to answer the question whether detainees in Narva police detention centre were guaranteed their right to protection of health.

(4) Under § 28(1) of the Constitution, everyone has the right to protection of health. This means each individual's subjective right to receive assistance to protect their health under certain conditions. If an individual lacks means for treatment, does not have health insurance, and has no possibility to obtain the means from other sources, the state should not leave the individual without assistance. Means should be provided for buying treatment or treatment should be provided free of charge. The law must ensure the right to assistance in a way that does not depend on the

discretion of officials or budgetary resources.[256]

The Imprisonment Act establishes basic principles for providing health care and other health services. Under § 156(3) of the Imprisonment Act, the provisions of the Imprisonment Act concerning the imposition of custody pending trial (Chapter 5) and misdemeanour detention (Chapter 4) apply to detention of persons in police detention centres. In the execution of custody pending trial as well as detention, Chapter 2 of the Imprisonment Act must be applied (see § 86(3) and § 90(1) Imprisonment Act). Thus, Chapter 2 Division 5 (Living conditions and health care in prison) of the Imprisonment Act applies to the activities of police detention centres.[257]

Health care in police detention centres is part of the state health care system. Health care in detention centres is arranged on the basis of the Health Services Organisation Act. Provision of health services in police detention centres to sentenced prisoners, persons serving detention, and remand prisoners must be financed from the state budget through the Ministry of Internal Affairs (see § 49(1) and (2) Imprisonment Act).[258] In providing health services in a police detention centre, provisions of the Health Services Organisation Act regulating the provision of specialised medical care must be observed (see § 52(1) Imprisonment Act).

On the basis of § 49^1 of the Imprisonment Act, the Government adopted regulation No. 330 on 19 December 2003 "The extent, conditions, and procedure of financing from the state budget the provision of health services on the basis of the Imprisonment Act and procurement of medicines and medical devices needed for such provision". Section 4 of the Act emphasises once again that medicines and health services in police detention centres are financed from the state budget through police prefectures.

Based on § 2(2) of the Government regulation, persons detained in a police detention centre must be ensured access to all medicines the use of which is authorised in Estonia.[259] Health services and medical devices the availability of which must be ensured through the budget of a police prefecture to individuals detained in a police detention centre are listed in Appendix 1 Chapter 2 and Appendix 2 Chapter 2 of the regulation.

Individuals in Narva police detention centre are not guaranteed access to even the most elementary health services listed in the appendix to the regulation, such as reception by a doctor (Appendix 1 clause 1301) or hospital bed-day (clause 1304), let alone more expensive services, such as operations (Appendix 1 Chapter 2 Division 6) or medical devices (Appendix 2 Chapter 2). The police prefecture has not concluded a contract with Narva hospital to provide health services, and the hospital itself does not wish to service individuals detained in Narva police detention centre because the majority of them are uninsured. Thus, individuals detained in the police detention centre have almost no opportunity for an appointment with a doctor – only in the most serious cases is an ambulance called to the detention centre.

The choice of medicines available to individuals detained in Narva police detention centre is usually limited only to inexpensive over-the-counter medicines. The availability of prescription medicines is already exceptional because the medical assistant, who is the only health care worker making regular visits to the detention centre, is not authorised to write prescriptions. The possibility of an appointment with a doctor authorised to issue prescriptions would not save the situation because buying medicines would be impossible due to lack of money.

Lack of possibility of an appointment with a doctor at Narva police detention centre flagrantly contradicts § 52(2) of the Imprisonment Act, under which a doctor is required to supervise the state of prisoners' health on a constant basis.

Narva police detention centre does not comply with § 3(1) of the Minister of Social Affairs Regulation No. 115 of 30 October 2003 "The procedure for compulsory radiographic lung examination for persons serving detention, remand prisoners, and sentenced prisoners, and prison officers and guard and medical staff having direct contact with them", under which a radiographic lung examination is performed for the above detainees within the first ten working days as of admission of an individual to a police detention centre, except if less than one year has passed since the latest documented radiographic examination.

At the moment when the Chancellor received the petitions from individuals detained in Narva police detention centre, the above regulation on health services in detention centres had been in force for more than three years. The Ministry of Internal Affairs approved the above Government regulation without presenting any objections of

256 T. Annus. Kommentaarid §-le 28. – Justiitsministeerium. Eesti Vabariigipõhiseadus. Kommenteeritud väljaanne. [Comments on § 28. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition] Tallinn 2002, comment 9.2.3.

257 Chapter 4 of the Imprisonment Act "General conditions of imposition of detention and short-term imprisonment" and Chapter 5 "Imposition of custody pending trial" do not lay down any special conditions for health care in police detention centres.

258 The exact wording of § 49(2) of the Imprisonment Act is: "Provision of health services to prisoners are financed from the state budget though the Ministry of Justice." However, this provision needs to be interpreted systematically when applying it to police detention centres under § 86(3) and § 90(1) of the Imprisonment Act. Police detention centres are custodial institutions within the jurisdiction of police prefectures (§ 156(1) Imprisonment Act. The Police Board together with police prefectures are within the area of government of the Ministry of Internal Affairs (§ 10 and 11^1(2) Police Act). Each Ministry is responsible for the budgets of institutions within their area of government (see § 49(1) clause 9 Government of the Republic Act), so that health care costs originating in a police prefecture in connection with persons detained in a police detention centre must be financed through the Ministry of Internal Affairs.

259 See the explanatory memorandum to Government regulation No. 330 of 19 December 2003, p. 1.

principle.[260] In the opinion of the Chancellor of Justice, it is highly deplorable that during this time the East Police Prefecture, the Police Board, and the Ministry of Internal Affairs have been unable to ensure compliance with these norms in Narva police detention centre. The problem is exacerbated by the fact that individuals are detained for several months in Narva police detention centre.

In addition, in a police detention centre an increased risk exists of individuals being injured or developing a health problem which requires a quick response. No specially trained health care professional is always available in a police detention centre so that, under § 13(1) of the Minister of Internal Affairs Regulation No. 71 of 01 December 2000 "Internal rules of police detention centres", staff in police detention centres are required to provide first aid. Performing this duty presumes that staff have received relevant training. Definitely, skills and knowledge also need refreshing after a certain period. By analogy with the procedure established for companies,[261] the Chancellor is of the opinion that officers responsible for supervising detainees in police detention centres should be sent on first-aid in-service training at least every three years. The current level of training of officers in Narva police detention centre cannot be considered sufficient.

The Chancellor reached the conclusion that individuals detained in Narva police detention centre were not guaranteed the right to protection of health under § 28 of the Constitution.

(5) On 16 March 2007, the Chancellor of Justice proposed to the Minister of Internal Affairs as follows:

1. analyse how to find sufficient financial resources to ensure health care of individuals detained in Narva police detention centre on a level complying with the above requirements;
2. analyse what measures need to be taken to ensure smooth provision of health services in Narva police detention centre (e.g. applying for necessary permits, concluding contracts with health service providers, equipping a room suitable for providing general health services, first-aid training of officers);
3. after the analysis, immediately implement the necessary measures and allocate necessary financial resources to comply with health legislation in Narva police detention centre.

The Minister of Internal Affairs in his reply of 03 May 2007 explained that provision of health services on the level required by legislation was not ensured in any police detention centre in Estonia. The Ministry promised to prepare solutions to the problem by June 2007. However, after some enquiries the Minister of Internal Affairs in his letter of 23 October 2007 concluded that no quick solution to the problem was available. The 2008 budget for the area of administration of the Ministry of Internal Affairs includes about one million kroons for providing health services in police detention centres.

The Chancellor of Justice found that the allocated sum was not sufficient for resolving the problems. In addition, the Ministry of Internal Affairs had failed to prepare within reasonable time any other measures besides allocation of money to ensure provision of health services at the required level in police detention centres. Therefore, the Chancellor decided to convene a roundtable meeting of representatives from the Ministry of Internal Affairs, the Police Board, the Ministry of Social Affairs, and the Health Care Board in February 2008 in order to discuss possibilities for resolving the situation.

The following points were agreed at the roundtable:

1. The Ministry of Internal Affairs and the Health Care Board would cooperate to determine the extent and need for initial health examination in police detention centres.
2. The Ministry of Internal Affairs, the Ministry of Social Affairs, the Health Care Board, and the Health Protection Inspectorate would cooperate to draw up a list of health services needed in police detention centres.
3. The Health Care Board and the Ministry of Internal Affairs would map the current problems in health care at police detention centres (including time of initial health examination).
4. The Ministry of Social Affairs would analyse and find opportunities for legalising independent nursing care in police detention centres.
5. The Ministry of Internal Affairs and the Ministry of Justice would look for opportunities for joint procurement of medicines.
6. The Ministry of Social Affairs and the Ministry of Internal Affairs would cooperate to ensure access of police detention centres to state databases containing information on tuberculosis, HIV, and drug addiction.

Under the leadership of the Ministry of Internal Affairs, on 10 April 2008 a working group was formed comprising specialists from the Health Care Board, the Health Protection Inspectorate, the Ministry of Social Affairs, and the Police Board, with the task of outlining problem areas, analysing and proposing solutions for providing better health services in police detention centres.

One possible solution under consideration is the possibility to transfer provision of health services in police detention centres to the Ministry of Justice. Health care workers in Ministry of Justice prison hospitals could be assigned

260 See the "Õigusaktide eelnõude elektrooniline kooskõlastamise süsteem e-õigus" [Electronic e-justice system for coordination of approving draft legislation], available online at http://eoigus.just.ee.

261 Minister of Social Affairs Regulation No. 80 of 14 December 2000 "The procedure for occupational health and safety training", § 3(3).

to work in a police detention centre. It would be reasonable to consider the possibility that larger police detention centres have a permanent health care worker and in smaller detention centres the service is provided on a contractual basis. In case of this solution, it is not necessary to authorise police detention centres to provide health services and find additional resources for ensuring access to databases and maintaining and preserving health declarations. Prison hospital already has these opportunities.

Amending the Health Services Organisation Act and the Minister of Social Affairs Regulation No. 11 of 10 January 2002 "List of independently provided nursing services" would enable authorising police detention centres to provide health services (as an independent nursing service). To provide health services in police detention centres, it is not strictly necessary to use doctors: the competence of nurses would be sufficient. This authorisation could be granted to larger police detention centres with a capacity of fifty or more detainees. In smaller police detention centres, it would be possible to provide health services by concluding a contract with a local hospital or family doctor. However, the Ministry of Social Affairs would prefer using staff from a prison hospital or providing the service on the basis of a contract with a local hospital or family doctor. The Ministry of Social Affairs and the Ministry of Internal Affairs have started contemplating possible amendments to legislation.

The working group found that, as a precondition for initial health examination, a health declaration needs to be introduced in police detention centres. Upon admission to a detention centre, detainees would fill out the declaration and thereby confirm their state of health. In addition to general health problems, the health declaration would also include potential health problems which may prove dangerous and need special treatment and care.

Joint procurement of medicines by the Ministry of Internal Affairs and the Ministry of Justice is possible. To do this, it would be necessary to know what kinds of medicines are needed. A more precise list would be established in amendments to Government Regulation No. 330 "The extent, conditions, and procedure for financing from the state budget the provision of health services on the basis of the Imprisonment Act and procurement of medicines and medical devices needed for such provision". Once the regulation is amended, officials of ministries would start dealing again with the possibility of organising joint procurement of medicines. The Ministry of Internal Affairs working plan for the second half of 2008 takes account of the need to implement the above activities.

The Ministry of Social Affairs has envisaged dealing with the issue of organising health services in police detention centres in 2009.

6. Placement of remand prisoners in police detention centres

Case No. 7-4/070176

(1) The Chancellor of Justice was contacted by a remand prisoner complaining that he had been placed in Kohtla-Järve police detention centre.

(2) The petitioner was remanded in custody on 13 December 2005. Since then, he has been in Tallinn Prison, except the period of 08 February to 01 March 2006 when he stayed in Tartu Prison, and 16 May to 16 June 2006 when he was first placed in Tallinn police detention centre of the North Police Prefecture (16 May to 06 June 2006) and then in Kohtla-Järve police detention centre of the East Police Prefecture (06-16 June 2006). In the period 06 to 16 June 2006, 47-53 detainees were staying in Kohtla-Järve police detention centre at one time.

At the moment of placement in Kohtla-Järve police detention centre, the petitioner was the accused in criminal proceedings conducted in Liivalaia courthouse of Harju County Court. In addition, the petitioner was involved in another criminal case which was at the pre-trial stage and during the investigation of which he was transferred to different police detention centres.

During his stay in Tallinn police detention centre, only one procedural act was performed: on 05 June 2006, the petitioner was interrogated as a witness. On the same day, the North Police Prefecture filed a request with Harju County Court to transfer the petitioner to Kohtla-Järve police detention centre for performing procedural acts. In the period 06-16 June 2006, when the petitioner was in Kohtla-Järve police detention centre of the East Police Prefecture, no procedural acts were performed in respect of his criminal case.

On that basis, the petitioner contacted the Chancellor of Justice.

To obtain information for resolving the petition, the Chancellor contacted the North Police Prefecture, the Police Board, and the North District Prosecutor's Office.

According to the Police Board reply, the petitioner's transfer to Tallinn police detention centre and later to Kohtla-Järve police detention centre was due to the need to "avoid possible influence by cellmates or leaking of information about criminal procedural or surveillance measures".

(3) In the matter of the petition, the Chancellor verified whether the principle of ensuring fundamental rights had

been complied with in the petitioner's placement in Kohtla-Järve police detention centre.

(4) Under § 90(2) of the Imprisonment Act, custody pending trial takes place in blocks designated for custody pending trial in maximum-security prisons or in police detention centres. Considering the limited possibilities of police detention centres for long-term detention of individuals, usually remand prisoners are placed in blocks for custody pending trial in prisons. In certain cases, a remand prisoner is placed temporarily in a police detention centre (e.g. for hearing of their criminal matter in a courthouse located several hours' drive from the prison).

Transfer of a remand prisoner from prison to a police detention centre involves burdensome consequences for the prisoner: due to limited infrastructure of police detention centres, remand prisoners are not guaranteed the same possibilities as in prison (problems might include, e.g., use of a library, meetings with individuals at liberty, and satisfaction of religious needs). It should also be considered that in practice the conditions of detention in many Estonian police detention centres do not comply with legislation, for example provision of health services to the required extent is not guaranteed.[262] Therefore, the regime of detention is somewhat stricter in police detention centres as compared to prisons, and the rights of remand prisoners are restricted more extensively.

However, at the time of the events raised in the petition the legislation did not provide clearly when and how a remand prisoner may be transferred from a prison to a police detention centre. Section 92 of the Imprisonment Act only stipulated that the authority that receives a remand prisoner is required to inform the investigative body, or the court if the court is conducting proceedings in the criminal matter, of the transfer of a remand prisoner. In addition, under § 102(1) of the Imprisonment Act, in order to secure the proceedings, the body conducting the proceedings (the investigator or the court) may request the prison director to ensure complete isolation of a remand prisoner from other remand prisoners or prohibit a remand prisoner from using personal clothes or belongings. [263] By the time of resolving the petition, the provisions regulating transfer of remand prisoners to another custodial institution had been amended and supplemented. However, a legal assessment in the petitioned matter had to be given based on the provisions valid at the time of the relevant events.

In the opinion of the Chancellor of Justice, then, as well as under the amended provisions, a wide discretion exists in deciding transfer of remand prisoners. Nevertheless, neither then nor now could a decision of transfer be arbitrary but should comply with general principles of restricting fundamental rights. Transfer must comply with formal requirements, i.e. rules of competence, procedure, and form, and the principles of restrictions imposed by law. The preconditions for substantive lawfulness of interference with fundamental rights during criminal procedural steps include proportionality with the intended objective.[264] By no means may criminal proceedings violate the prohibition of torture and cruel or inhuman treatment under Art 3 of the ECHR and § 18 of the Constitution. Section 9(3) of the Code of Criminal Procedure also emphasises that investigative bodies, Prosecutors' Offices, and courts must treat participants in proceedings without defamation or degradation of their dignity.

Section 90(2) of the Imprisonment Act may be considered as the legal basis for the petitioner's transfer. This provision allows placing remand prisoners both in prison and in a police detention centre. However, the Act did not specify the cases when a remand prisoner could be transferred from one custodial institution to another. Similarly, neither the Imprisonment Act nor any other Act specified who was competent to decide a remand prisoner's transfer from prison to a police detention centre, and no court authorisation was needed for the decision. Asking for authorisation may have been established practice but the law did not stipulate an obligation to issue authorisation in writing (e.g. as a court ruling), let alone an obligation to verify a request for transfer or to provide reasoning for a decision based on it. As the transfer took place on the initiative of police officers conducting the criminal proceedings, the Chancellor reached the opinion that the main responsibility for the lawfulness of the transfer lay with the police.

The Chancellor of Justice and the CPT have found on several inspection visits that conditions in Kohtla-Järve police detention centre are inhuman and degrading. The cells are in an extremely unsanitary condition. There are no windows providing natural light. The toilet is not separated from the rest of the cell, so that detainees have to attend to their bodily needs in view of all the cellmates. The detention centre lacks an exercise yard and detainees stay in inhuman conditions twenty-four hours. The situation becomes extremely unbearable when the detention centre is overcrowded.[265]

262 See Erik Kalda. Õiguskantsler pole rahul arstiabiga arestimajades. [Chancellor of Justice not satisfied with health care in police detention centres] Postimees, 24 April 2007 (Available online at www.postimees.ee). Kadri Ibrus. Arestimajadel tuleb suvest anda paremat arstiabi. [Police detention centres required to provide better health care as of summer] Eesti Päevaleht, 13 March 2007 (Available online at www.epl.ee).

263 Version of § 102(1) of the Imprisonment Act valid until 01 February 2007: "If there is sufficient reason to suspect that a remand prisoner may significantly damage conduct of the criminal proceedings with their behaviour, the prison director at the request of an investigator or court may apply additional measures in respect of the remand prisoner. These are:
1) complete isolation from other remand prisoners;
2) prohibition of using personal clothes or personal belongings."

264 Supreme Court Criminal Law Chamber judgment of 20 February 2007, No. 3-1-1-99-06, par. 22: "In principle, penal law regulation must comply with the principle of proportionality. This means in case of any provisions of penal law it is possible to raise an issue of appropriateness, necessity, and moderation of interference with fundamental rights which the relevant provision allows."

265 See also e.g. 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 September 2003 (available online at www.cpt.coe.int), Chancellor of Justice Report 2005 (available online at www.oiguskantsler.ee), pp. 74-79.

In the period from 06 to 16 June 2006 when the petitioner was placed in Kohtla-Järve police detention centre, 47-53 detainees were in the detention centre at one time. Based on the required minimum floor space for remand and sentenced prisoners (2.5 m^2 per person), Kohtla-Järve police detention centre has a maximum capacity of 32 people. Thus, in this period the detention centre was overcrowded.

In view of these circumstances, the Chancellor of Justice found that the petitioner had been treated in an inhuman and degrading manner during detention (just like all the other individuals detained in the same police detention centre).

According to the reply from the Police Board, the petitioner's transfer to Tallinn police detention centre and later to Kohtla-Järve police detention centre were due to the need to "avoid possible influence by cellmates or leaking of information about criminal procedural or surveillance measures".

During his stay in Kohtla-Järve police detention centre, no procedural acts were performed in respect of the petitioner's criminal case, and neither the criminal court proceedings nor the pre-trial criminal proceedings in the petitioner's case were related to Ida-Viru County. At the time of the transfer, the petitioner's status was not as a suspect in a criminal case. The Police Board and the North Police Prefecture stressed that the petitioner was interrogated as a witness in Tallinn police detention centre. Thus, the Chancellor reached the conclusion that the justification for the transfer given by the Police Board was questionable.

Even if it was indeed necessary to isolate the petitioner from his cellmates in order to secure criminal proceedings, the principle of proportionality should have been observed in applying the necessary measures. Inter alia, this means that the least burdensome measure from all available alternatives has to be applied in respect of the individual.[266] The petitioner could have been isolated from cellmates by transfer within the prison (under § 90(5) of the Imprisonment Act a prison is required to take all measures to rule out communication between remand prisoners placed in different cells, and under § 102 the body conducting the proceedings could request a remand prisoner's complete isolation from other remand prisoners). It would also have been conceivable to place the petitioner in Tartu Prison or in a police detention centre where the conditions of detention are not inhuman.

The Chancellor of Justice deplores the view expressed in the reply by the North Police Prefecture that transfer of a remand prisoner to a police detention centre could depend only on the needs of the criminal proceedings and related surveillance activities and would not depend on the occupancy of a particular detention centre. The European Court of Human Rights has repeatedly emphasised that prohibition of torture and inhuman treatment under § 3 of the ECHR values one of the fundamental principles in a democratic society. This includes a complete prohibition of torture and inhuman or degrading treatment or punishment, regardless of the situation or behaviour of the victim of such treatment.[267] Accordingly, placing an individual in detention under inhuman conditions cannot be justified by the needs of criminal proceedings. The police must refrain as much as possible from transfer of individuals to detention centres with unacceptable conditions.

On that basis, the Chancellor concluded that by transferring the petitioner to Kohtla-Järve police detention centre, the North Police Prefecture as initiator of the move did not comply with the principle of guaranteeing fundamental rights under § 9(3) of the Code of Criminal Procedure and § 14 of the Constitution.

(5) The unfortunate situation where transfer of remand prisoners was insufficiently regulated in legislation has now been eliminated. Section 143^1(1) of the Code of Criminal Procedure, which entered into effect on 01 February 2007, lays down a basis for transfer of a remand prisoner (including from prison to a police detention centre) as a measure for securing criminal proceedings if sufficient reason exists to believe that a suspect or accused who has been remanded in custody may damage criminal proceedings by their behaviour. The transfer is decided by a court or a Prosecutor's Office in a ruling. However, the Code of Criminal Procedure regulates transfer only in respect of those individuals in pre-trial detention or serving a sentence or detention who are suspects or accused in another criminal matter. Remand prisoners with the status of a witness cannot be transferred from prison to a police detention centre on the basis of that provision.

The new version of § 90(1) of the Imprisonment Act, which entered into effect on 01 February 2007, also enables transfer of remand prisoners from one prison to another under § 19(1) of the Imprisonment Act. Thus, in case of necessity a remand prisoner with the status of a witness may also be transferred from one prison to another for reasons of security. The procedure for deciding transfer under § 19(1) of the Imprisonment Act is regulated in detail in Chapter 6 of the Minister of Justice Regulation No. 72 of 30 November 2000 "Internal prison rules". Under § 20 of the regulation, transfer of a remand prisoner may also be requested by a judge, prosecutor, or investigator dealing

266 Supreme Court Constitutional Review Chamber judgment of 06 March 2002, par. 15: "The principle of proportionality arises from the second sentence of § 11 of the Constitution, according to which restrictions on rights and freedoms must be necessary in a democratic society. The Chamber reviews compatibility with the principle of proportionality on three levels – firstly, the suitability of a measure, then necessity and, if necessary, proportionality in the narrower sense (i.e. moderateness) is reviewed. [...] A measure is necessary if it is not possible to achieve an objective by some other measure which is less burdensome on an individual but which is at least as effective as the former. It is also important to consider how much different measures burden third parties, as well as differences of expenditure for the state."

267 See e.g. European Court of Human Rights judgment of 06 April 2000 in case No. 26772/95 *Labita v Italy.*

with the criminal proceedings in the relevant case. Granting the request is decided by the Ministry of Justice (§ 13 of the regulation).

For better monitoring of compliance with fundamental rights of remand prisoners, the Chancellor of Justice proposed to the Police Board to provide instructions to criminal investigation departments of police prefectures that the above procedures should be strictly observed when deciding transfer of remand prisoners, and that no requests would be made to the Prosecutor's Office and courts for purposes of securing criminal proceedings under § 143^1(1) of the Code of Criminal Procedure for transfer of remand prisoners from prison to a police detention centre with inhuman conditions of detention (first and foremost Narva and Kohtla-Järve police detention centres).

The Chancellor also asked the Police Board to explain his opinion to senior officers in criminal investigation departments and draw their attention to the duty under § 9(3) of the Code of Criminal Procedure to avoid defamation or degradation of dignity of individuals. Additionally, the Chancellor informed the Prosecutor's Office and the courts about his opinion in the matter of the petition.

The Police Board forwarded the Chancellor's opinion to the Central Criminal Police and police prefectures to be observed in criminal proceedings.

7. Inspection visit to the Citizenship and Migration Board expulsion centre

Case No. 7-7/070123

(1) The Chancellor of Justice with his advisers carried out inspection visits to the Citizenship and Migration Board expulsion centre on 04 April and 04 May 2007 due to problems repeatedly raised in petitions received by the Chancellor.

The expulsion centre is a structural unit of the Citizenship and Migration Board under the area of government of the Ministry of Internal Affairs. The expulsion centre is located in Harku.

On 23 February 2007, there were ten persons subject to expulsion in the centre (nine men, one woman).

The Chancellor also organised an inspection visit to the expulsion centre in 2004 when he raised various problems and made proposals for changing the conditions of detention of persons to be expelled.

(2) The Chancellor verified whether rights of persons to be expelled were ensured in the expulsion centre and whether restrictions imposed were necessary and reasonable.

(3.1) Inspection revealed that one of the main problems was the very long period of stay in the expulsion centre and all related problems arising from this.

Under § 23(1) of the Obligation to Leave and Prohibition on Entry Act, if it is not possible to complete expulsion within the term prescribed in the Act, the individual to be expelled is placed in an expulsion centre until expulsion, but for not longer than two months, at the request of the government authority which applied for or which is enforcing the expulsion and on the basis of a judgment of an administrative court judge.

Under § 25 of the Obligation to Leave and Prohibition on Entry Act, if it is impossible to enforce expulsion within the term of detention in an expulsion centre, an administrative court may, at the request of a competent official of the Citizenship and Migration Board, extend the term of detention in the expulsion centre by up to two months at a time until expulsion is enforced or until the alien is released under § 24(2) or (3) of the Act.

Under these legal norms, placement in an expulsion centre is presumed to be for a short time.

In the Chancellor's opinion, the real situation does not comply with this principle, as some individuals spend years in the expulsion centre.

Under § 25 of the Obligation to Leave and Prohibition on Entry Act, the court may in practice infinitely extend the term of stay in an expulsion centre, whereas the decision is completely subject to judicial discretion without any binding substantive law conditions.

In this context, a judgment of the Supreme Court could be quoted: "The Chamber notes that detention of an individual in an expulsion centre without prospect of expulsion can and must be also assessed through the angle of § 20(2) clause 4 of the Constitution and Art 5.1(f) of the European Convention on Human Rights which explicitly guarantee protection of physical liberty against arbitrary detention for purposes of expulsion from a country."[268]

268 Supreme Court Administrative Law Chamber judgment of 16 October 2006, No. 3-3-1-53-06, par. 13.

The Chancellor considers it necessary that the state should introduce changes in the accommodation and stay of individuals in the expulsion centre. For example, half-hour visits might be justified in case of short-term stay in the expulsion centre, while during a long-term stay the adequacy of their duration is questionable.

The Chancellor made a comparison with prison and found that conditions for long-term stay in the expulsion centre may not be stricter than in prison. Justified distinctions may of course be made.

(3.2) The inspection revealed that still problems existed with organising medical care in the expulsion centre.

Following the 2004 inspection visit, the Chancellor made, inter alia, the following proposals for organising medical care:

- based on the recommendation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), a professionally qualified medical nurse should be constantly present in the expulsion centre;
- access to the services of a psychiatrist and psychologist is extremely important for individuals staying in the expulsion centre;
- access to dental treatment, a gynaecologist, and services of other medical specialists must be ensured.

During the inspection visit on 04 April 2007, the Chancellor was pleased to see that in the main the proposals had been complied with. However, he also pointed out some shortcomings.

Section 28 of the Constitution establishes everyone's right to the protection of health. This involves a positive duty of action for the state to create all conditions for real access to health services for all inhabitants.

The inspection visit revealed that the expulsion centre still did not ensure permanent nursing services. In the Chancellor's opinion it is important that any health services should be provided by professionally trained medical workers and not by staff of the expulsion centre (who are Citizenship and Migration Board officials and security firm employees). Necessary activities include determining the required quantity of medicines, dispensing them to individuals, providing specific medical assistance if necessary, preparing and preserving documents containing health data, etc.

The head of the expulsion centre explained that they had been looking for a provider of the nursing service since 2004 but, as no-one was interested, all attempts to find a service provider had been unsuccessful. The question was not of money or working conditions, but unwillingness of potential service providers to come and stay permanently in the expulsion centre to provide the service.

The Health Services Organisation Act establishes the possibility of providing nursing care either together with a family doctor, medical specialist, or dentist, or as an independent service. Under § 24 of the Act, nursing care means outpatient or in-patient health services provided by nurses and midwives together with family doctors, medical specialists, or dentists, or independently. Under § 25, companies, foundations, or sole proprietors holding a corresponding operating licence may provide nursing care independently. In Estonia, very many nursing care providers operating as sole proprietors and providers of nursing care have no obligation to operate everywhere.

Following the visit to the expulsion centre, the Chancellor reached the opinion that the state's political choices relating to organisation of health care (nursing care service as a state activity or private business) may not result in reduced access to health care or even impossibility of access. Regardless of the legal form of health service providers, health care must be ensured according to need and not be dependent on subjective wishes of service providers.

The Chancellor sent a memorandum to the Minister of Social Affairs.

Under the Personal Data Protection Act, data relating to health of individuals are considered sensitive personal data. Under § 5, processing such data (meaning collecting, recording, organising, storing, altering, granting access, consulting, retrieving, using, transmitting, cross-using, combining, blocking, erasing or destroying, or several of these operations regardless of how they are performed or the means used) is subject to strict security requirements to protect them against involuntary or unauthorised alteration, disclosure, or destruction.

The inspection visit revealed that files on the health of persons to be expelled were kept in the doctor's office but in an unlocked drawer.

Guidelines for registering processing of sensitive personal data are available on the website of the Data Protection Inspectorate.[269] The guidelines contain precise requirements for offices (windows, doors, locking of drawers), access to data (prior registration of the right to process personal data), keeping and destroying documents, etc.

The Chancellor of Justice found that documents in the expulsion centre were not kept in compliance with the requirements of the Personal Data Protection Act, and proposed to change the conditions to ensure better protection of data. During the inspection visit, the Chancellor noticed that in the doctor's office the medicines were in a locked cup-

269 http://www.dp.gov.ee/index.php?id=199.

board but the keys were in the door, and in the staff room various medicines (including antidepressants) were simply lying on the table.

Under § 3(3) of the Medicinal Products Act, the provisions of the Act apply to handling of medicinal products by government agencies, whereas the provisions related to supervision also apply unless otherwise established by legislation concerning such government agencies. The Obligation to Leave and Prohibition on Entry Act does not establish any distinctions from the provisions of the Medicinal Products Act. Thus, the Medicinal Products Act and its requirements are compulsory for the expulsion centre.

The requirements for storing medicines are established by the Minister of Social Affairs Regulation No. 19 of 17 February 2005 "The conditions and procedure for storage and transport of medicinal products".

The Chancellor proposed to ensure that storing of medicines and dispensing them to individuals detained in the expulsion centre should comply with requirements. The Chancellor also found that the problem could be resolved if the expulsion centre had a permanent nurse. Then all the medicines would be in one place and within the responsibility of one competent person.

(3.3) The inspection visit revealed problems in connection with delegating an administrative function (maintaining order) to a security firm.

Several petitions received by the Chancellor described excessive use of force by staff of the security firm. Both written petitions and interviews with individuals detained in the expulsion centre displayed negative and reluctant feelings towards the security staff, and a more favourable and accepting attitude to instructions given by officials of the expulsion centre.

Based on the Obligation to Leave and Prohibition on Entry Act[270] and work instructions of security staff (as at 12 December 2006), in certain cases staff of the security firm have equal competence with officials of the expulsion centre, including competence to interfere extensively with fundamental rights and freedoms of persons to be expelled.

Conversations with the head of the expulsion centre revealed that officials and security staff had received different training. Moreover, in-service training of staff does not take place in parallel, but training and preparation of officials is ensured by the Citizenship and Migration Board and training of security staff by the security firm.

The Chancellor found that it is essential to ensure an equal standard of training to security staff and officials.

The head explained that a new administrative agreement was to be concluded in 2008 and the Chancellor proposed that the new agreement should take into account that staff of the security firm working in the expulsion centre should have equal training with officials.

(3.4) Inspection revealed that individuals in the expulsion centre had problems using Estonian in official communication.

Mainly, persons to be expelled submit their applications to the expulsion centre and to the Chancellor of Justice in their native language (mostly in Russian). The expulsion centre replies to the applications in Estonian. The head of the centre explained that, if necessary, the reply is translated orally to a language which the individual concerned understands. This is a conscious choice in order to avoid unreasonable increase in the volume of translations into foreign languages, which might start hampering normal functioning of the expulsion centre.

Based on his practical experience, the Chancellor proposed changing the practice and, in accordance with the principle of reasonableness, translate all replies in writing into a language which the applicant understands.

Under the Language Act, administrative authorities have been left discretion ("has the right to request", "may") in deciding admissibility of requests and applications made in a foreign language. The Language Act does not establish any special norms for administrative authorities in respect of written replies provided to individuals, including in respect of translation of replies (except § 10 of the Language Act, which lays down replying in the language of a national minority alongside the Estonian language, but this provision has no relevance to this case). Thus, the general presumption is that replies are drawn up in Estonian.

Section 4 of the Administrative Procedure Act regulates exercise of the right of discretion by administrative authorities. Under § 4(2), the right of discretion is exercised in accordance with the limits of authorisation, the purpose of

270 "§ 26^{20}. Performance of functions of expulsion centre
(1) The Citizenship and Migration Board may transfer performance of functions of an expulsion centre and of officials of an expulsion centre on the basis of a contract under public law. The functions of the head of an expulsion centre may not be transferred.
[...]
(4) Functions transferred on the basis of a contract under public law are accompanied by the rights, obligations and liability laid down in this Act."

discretion and the general principles of law, taking into account relevant facts and considering legitimate interests. Under § 5(1), an administrative authority determines the form of procedural acts and other details of administrative procedure on the basis of the right of discretion unless otherwise provided by an Act or regulation. Under § 5(2), administrative procedure must be purposeful, efficient and straightforward and conducted without undue delay, avoiding superfluous costs and inconvenience to the individuals concerned.

Arising from the principle of good administration under § 14 of the Constitution, which requires administrative authorities to behave in a citizen-friendly manner in the widest sense, administrative authorities are not completely free in choosing Estonian as the language of communication but must take into account the circumstances of a specific case.

Ensuring written translation of a document which seriously interferes with fundamental rights is essential from the point of view of the right of appeal. Understanding the document enables individuals to make a reasoned decision whether to have recourse to a body of administrative challenge or to a court.

The Chancellor admitted that ensuring translation every time would entail a significant budgetary burden for the administrative body. Therefore, in assessing the duty of translating replies, the issue of what kind and how important the rights of the individual are in a specific case may be of decisive importance in addition to the above considerations. The more important it is to submit an application and understand the detention authority's reply to it in terms of protection of fundamental rights and freedoms, the more stringent the approach to refusal to accept an application in another language and refusal to translate by an administrative authority.

The Chancellor concluded that restriction of fundamental rights must not be justified by reference to administrative and technical difficulties or to a burden on the state budget.[271] Moreover, it would be possible to use various measures to reduce costs of translating applications and individual replies, including:

- making available legal acts (e.g. laws, internal rules) in foreign languages;
- as a number of replies are actually standard answers in standard situations, letter templates could be translated and then filled out depending on the facts of a specific case;
- partial translation of longer replies and oral translation of simpler replies.

(3.5) During the inspection visit, the Chancellor discovered that the small observation window in the door of the isolation room, intended for constant supervision, also enabled a view of the toilet in the room.

Under § 26 of the Constitution, everyone has the right to inviolability of private life. Its scope of protection primarily includes physical and mental inviolability, personal identity, and the intimate sphere. Physical and mental inviolability can also be interfered with by surveillance of an individual.[272]
The CPT also pointed out this issue in its recommendations, finding it to be inhuman if individuals had to relieve themselves in view of cellmates.[273]

The Chancellor asked to consider the possibility of changing the furnishing in the isolation room, so as to ensure better respect for the privacy of individuals. One option would be to erect a low barrier around the so-called hygiene corner.

(3.6) During the inspection visit, persons to be expelled raised the issue of unreasonable arrangement of visits.

Under § 26^{10}(4) of the Obligation to Leave and Prohibition on Entry Act, persons to be expelled may be visited under the procedure, at the times and in rooms prescribed by the internal rules of the expulsion centre. The duration of visits is determined by the head of the expulsion centre and will not exceed three hours.

Under § 23 of internal rules of the expulsion centre, visits take place on Tuesdays and Thursdays from 10.00 to 13.00 and from 14.00 to 16.00. These times lead to the conclusion that the choice of time for visits was not based on the wishes of persons to be expelled or visitors (who may also work), but on the working hours of officials.

During the inspection visit on 04 April 2007, it was found that persons to be expelled could have visits with individuals from outside the expulsion centre only half an hour at a time. Exceptions are meetings with consular officials, defence counsel, or a minister of religion.

The Chancellor found that in the case of this issue it was necessary to bear in mind the existing practice where persons to be expelled stayed in the expulsion centre not for a short period but for a very long time. Therefore, the current time limit on visits might not conform to the Constitution.

Administrative difficulties may not justify such an extensive restriction of enjoyment of human rights and in ensuring

271 Supreme Court Constitutional Review Chamber judgment of 21 January 2004, No. 3-4-1-7-03, par. 39: "Unequal treatment must not be justified by merely administrative or technical difficulties. Excessive burden on the state budget is an argument that may be taken into account in deciding the extent of social assistance, but it may not be used to justify unequal treatment of destitute individuals and families."

272 U. Lõhmus. Kommentaarid §-le 26. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments on § 26. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition] Tallinn 2002, § 26 comment 8-8.1.

273 Available online at http:/www.cpt.coe.int/documents/est/2005-06-inf-eng.pdf. (26 April 2007).

detention in line with human dignity. The rights of persons to be expelled and their visitors would be better ensured if visits were also possible on weekends (outside working time) and for longer than half an hour at a time.

The Chancellor noted once again that in his opinion conditions in the expulsion centre must not be more burdensome than in prison where both short-term and long-term visits are allowed. The Chancellor asked that the current regulation on visits be changed.

(3.7) During the inspection, advisers to the Chancellor of Justice discovered that confidential interviews between the Chancellor and persons to be expelled could be fully heard in the neighbouring room intended for visual observation of visits. The Chancellor concluded that similarly all conversations that persons to be expelled have in the visiting room can be heard.

The Chancellor found this to be a serious violation of the right to confidentiality of information and privacy of both the persons to be expelled and their visitors.

The Chancellor asked that at the first opportunity the glass window separating the visiting room from the observation room be modified, so as to ensure the rights of persons to be expelled and their visitors to confidentiality of information exchange and rule out the opportunity of others to listen in to conversations. Exceptional possibility for surveillance of information is justified only in case of existence of a justified suspicion of security risk.

(3.8) Inspection revealed several shortcomings in the information document "Rights and duties of persons to be expelled".

Duties of persons to be expelled include the following: "upon instruction of an official, a person to be expelled is obliged to clean the territory of the expulsion centre and the rooms and items in common use by persons to be expelled". This is called compulsory work.

Under the first sentence of § 3(1) of the Constitution, state authority is exercised solely pursuant to the Constitution and laws in conformity with it. This constitutes the requirement of legality of state authority. Under § 29(2) of the Constitution, no one may be compelled to perform work or service against their free will, except service in the Defence Forces or alternative service, work to prevent the spread of infectious disease, work in the case of a natural disaster or a catastrophe, and work which a convict must perform on the basis of and under the procedure established by law.

If an individual is required to do work against their free will, this amounts to forced or compulsory work. Section 29(2) of the Constitution establishes a fundamental right (obligation) which may be subject to qualified restrictions by law, laying down an exhaustive substantive list of cases where involuntary work may be lawful and permissible. The prohibition of forced and compulsory work under § 29(2) matches Art 4(2) of the ECHR, as well as Art 1(2) of the European Social Charter, Art 8(3) of the ICCPR, and ILO Convention No. 105 Concerning the Abolition of Forced Labour.

In respect of this issue, the Chancellor considered it important to note that in the context of work he did not have in mind taking care of personal hygiene and one's living space, which would be reasonable and lawful to require from persons to be expelled.

The Chancellor found that the above duty did not conform to the Constitution and asked it to be deleted from the information document.

Clause 24 of the rights of persons to be expelled included information for recourse to the administrative court by reference to § 9(1) of the Code of Administrative Procedure.

The Chancellor proposed adding to the list § 9(3) of the Code of Administrative Procedure: "After pre-trial proceedings, an action may be filed with an administrative court within thirty days after the date on which the individual was notified of the judgment on the whole or partial dismissal of the application included in the action in the pre-trial proceedings."

(4) Following the inspection visit, the Chancellor sent memorandums to the Citizenship and Migration Board and the Minister of Social Affairs.

With regard to the situation described in point 3.1, the Director General of the Citizenship and Migration Board explained that the duration of detention of individuals in the expulsion centre was different in each case and depended on specific circumstances. If an individual to be expelled cooperated with the Citizenship and Migration Board (e.g. by providing correct personal data in case of absence of identity documents), the expulsion proceedings could be conducted considerably quicker and no need existed for long-term stay in the expulsion centre. Some third countries require from the Citizenship and Migration Board that individuals to be expelled should fill out and sign various forms and questionnaires. Without cooperation and assistance from the individuals themselves, expulsion to

such countries is significantly hampered. Individuals to be expelled often conceal their real personal data and origin. Therefore, release of an individual from the expulsion centre depends on their own will and readiness to cooperate.

The Director General also noted that the speed and effectiveness of expulsion were greatly dependent on relations with the receiving country's representation in Estonia – communication is particularly time-consuming if the receiving country does not have representation in Estonia and the country's representation closest to Estonia needs to be contacted through the Ministry of Foreign Affairs.

It is also important to note the Director General's remark that the average time of detention in the expulsion centre was 110 days (four months). According to the Director General, this time is completely reasonable and does not exceed the six months recommended by the Chancellor of Justice. Unfortunately, not in all cases is it possible to complete expulsion proceedings within six months, mostly due to unwillingness of some individuals to assist in their expulsion.

Finally with regard to this issue, the Director General affirmed that the Citizenship and Migration Board was doing everything possible to avoid detention of individuals in the expulsion centre for an unreasonable length of time. As was mentioned, the period of detention also depends on the speed of work of embassies of people's country of origin and willingness to cooperate by the individuals to be expelled. If circumstances appear which rule out expulsion of an individual and the expulsion can be considered as having no prospects, the individual is released from the expulsion centre.

With regard to organisation of medical care described in point 3.2, the Director General replied that efforts continue to find a medical nurse for the expulsion centre.

A contract for providing services of a psychiatrist and psychologist was concluded in May 2007.

The remark made by the Chancellor concerning health cards and access to medicines was resolved and both are now kept in a locked metal cupboard.

The Director General also informed the Chancellor that the Citizenship and Migration Board would forward the Chancellor's proposal concerning compulsory health examination to the Ministry of Internal Affairs for amending the Obligation to Leave and Prohibition on Entry Act.

With regard to the issue of a permanent medical nurse in the expulsion centre, the Minister of Social Affairs noted that shortage of health care workers was a nationwide problem and not only specific for the expulsion centre. As finding an effective solution within current legislation might not be possible, it has to be admitted that it is not within the Ministry's power to force health workers to work in one or another institution.

With regard to the issue of transfer of administrative duties to a security firm as described in point 3.3, the Director General explained that the current contract with the security firm for providing manned guard service would expire in March 2008. When concluding a contract with a firm that wins the new competition, the Chancellor's proposals would be taken into account and security staff will be required to have equal training with officials.

With regard to the issue of using languages described in point 3.4, the Director General replied that decisions, correspondence and other similar documents concerning individuals to be expelled are translated into a language understandable to them according to the language proficiency of officials of the expulsion centre, if the individual to be expelled so wishes. In addition, prior to adoption of a decision by the head of the expulsion centre, officials of the expulsion centre explain to the individuals concerned the content of the decision and the right of appeal against a decision or measure taken by the Citizenship and Migration Board. Translation of the reasoning contained in decisions imposing a burden is done in the expulsion centre. The Director General considered it necessary to note that the courts provide an official translation of their judgment to individuals to be expelled if they so request. The Director General also explained that usually individuals to be expelled have a defence counsel who ensures understanding of decisions and other documents and the protection of the rights of an individual. Finally, the Director General said that in the future the Citizenship and Migration Board would translate letters addressed to individuals to be expelled, within the possibilities available.

With regard to the observation window in the door of the isolation room described in point 3.5, the Director General explained that the issue was being resolved, and a partition would also be erected in front of the toilet to ensure privacy.

With regard to the issue of visits in point 3.6, the Director General explained that based on the established practice arising from the wishes of individuals to be expelled, the duration of a visit is usually one hour. Very rarely would an individual wish to have a visit lasting for three hours. If necessary, a visit may last up to three hours. Enabling visits at weekends or after 17.00 would require availability of additional staff in the expulsion centre, but the Citizenship and Migration Board has no financial resources for this.

With regard to listening in to confidential conversations described in point 3.7, the Director General explained that

the problem was being resolved and a sound-proof window would be installed in the room.

With regard to shortcomings described in point 3.8, the Director General affirmed that the Chancellor's remarks would be taken into account and the document would be amended.

8. Inspection visits to police detention centres of the South Police Prefecture and the West Police Prefecture

Case No. 7-7/071415

(1) Advisers to the Chancellor of Justice conducted inspection visits to Põlva, Võru, and Valga police detention centres under the South Police Prefecture on 22 August 2007, and to Kärdla and Kuressaare police detention centres under the West Police Prefecture on 29 August 2007.

(2) Advisers to the Chancellor verified whether fundamental rights and freedoms of individuals were guaranteed in these police detention centres.

(3.1) Inspection revealed that Kuressaare police detention centre was in an extremely unsanitary condition. In addition to a powerful urine stench in the corridor, the air was stale. The ventilation system did not work, and a door to the corridor cannot be opened. In the washing room, which detainees can use once a week for 15 minutes, the floor was filthy and covered in black dust.

The detention centre contains four cells with two beds in each cell; and, in addition, a sobering-up cell with no bed or bunk-bed (with only a structure of wooden boards on the floor).

The cells have no artificial light sufficient for reading, the windows are walled up, and there are no cupboards, table, or chairs. The function of a hygiene corner and toilet is served by a plastic bucket in the corner, which detainees themselves empty once or twice a day.

Under § 3 of the ECHR and § 18 of the Constitution, conditions in a detention facility may not be inhuman or degrading. According to the case-law of the European Court of Human Rights,[274] treatment of detainees can be considered degrading if the suffering and humiliation caused to them exceed the level normally associated with legally-imposed medical treatment or punishment. In assessing the conditions of detention, the combined effect of the circumstances must be taken into account, such as furnishing of the cells, hygiene condition, and duration of placement in the detention facility.

Kuressaare police detention centre fails to comply with several elementary conditions of detention. Inter alia, none of the cells have a window required under § 45(1) of the Imprisonment Act and detainees have no opportunity for spending one hour a day outside in the fresh air (§ 55(2) and § 93(5) Imprisonment Act)[275]. Detainees have no free access to a toilet, and a bucket in the cell is used to attend to bodily needs.[276] Additionally, the cell has no isolated space where a detainee could go while attending to bodily needs.

Based on the occupancy table in Kuressaare police detention centre, 79 individuals were detained there in the period from January till June 2007, and the number of so-called person-days was 915. These numbers lead to the conclusion that there were periods when several detainees needed to be placed in one cell.[277] Each detainee spent on average 11.6 days in the detention centre.

According to the Chancellor's assessment, the conditions in Kuressaare police detention centre are comparable to the conditions at Narva and Kohtla-Järve, which the CPT has repeatedly severely criticised.[278] Although during the inspection visit and based on documents submitted to the Chancellor no overpopulation in Kuressaare police detention centre was ascertained, its living conditions are partly catastrophic. In a country governed by the rule of law and respecting human dignity, it is unacceptable to have a situation where people must attend to their most elementary needs under such conditions, in particular considering that detainees do not stay alone in a cell. Absence of a window

274 See e.g. European Court of Human Rights judgment of 08 November 2005 in case No. 64812/01 *Alver v Estonia*.

275 Under § 156(3) of the Imprisonment Act, the provisions of the Imprisonment Act concerning imposition of custody pending trial (Chapter 5) and misdemeanour detention (Chapter 4) apply to detention of persons in police detention centres. Under § 86(3) of the Imprisonment Act, provisions in Chapters 1, 2, and 7 and in § 109 extend to execution of misdemeanour detention with specifications set out in the Chapter regulating execution of misdemeanour detention. Under § 90(1) of the Imprisonment Act, the provisions of Chapters 1, 2, 6, and 7 of the Imprisonment Act together with the specifications under Chapter 5 apply to staying in custody pending trial.

276 § 45(1) of the Imprisonment Act: "The cell of a prisoner must meet the general requirements established for dwellings on the basis of the Building Act which ensures air flow and circulation, light and temperature in the cell which is necessary for living." Clause 9 of Government Regulation No. 38 of 26 January 1999 "Approval of requirements for dwellings": "A dwelling must be equipped with a toilet or, in its absence, a possibility must exist to use a toilet in the same building or in the service area of the building."

277 By dividing the number of person-days (915) by the number of calendar days (181) during the reviewed period, the result is 5.06. Thus, on average five detainees were staying in the detention centre at one time and they had to be accommodated in four cells.

278 See e.g. 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 September 2003 (available online at www.cpt.coe.int).

in a cell has a psychologically depressing effect on individuals. Moreover, the monotonous regime and the fact that detainees stay inside the cell 24 hours contribute to the degrading effect of living conditions.

Therefore, the Chancellor of Justice concluded that detention of individuals in Kuressaare police detention centre constitutes inhuman and degrading treatment in conflict with the Constitution and the European Convention on Human Rights. Already in 2004, the Chancellor proposed to the West Police Prefect to take measures to ensure compliance of living conditions in the cells with norms. However, the proposals have not been implemented.

According to information received from the Minister of Internal Affairs, a contract has been concluded with the State Real Estate Company for building a new Kuressaare police station together with a detention centre with a capacity of six persons. The latest deadline for completion of the building is 30 June 2009. Building a new detention centre is to be welcomed but it is impermissible to wait so long to deal with the above-described serious problems.

The European Court of Human Rights has repeatedly emphasised that prohibition of torture and inhuman treatment under Art 3 of the ECHR values one of the fundamental principles in a democratic society. This includes a complete prohibition of torture and inhuman or degrading treatment or punishment, regardless of the situation or behaviour of the victim of such treatment.[279] The Supreme Court has also underlined that "human dignity is a basis for all fundamental rights and the purpose of protection of fundamental rights and freedoms. The requirement of treatment in line with human dignity also extends to detainees."[280]

Therefore, the Chancellor reached the opinion that in parallel with improving inhuman conditions of detention the police must also avoid as far as possible placing individuals in police detention centres with unacceptable conditions. Even if this causes additional escort costs, the state (the police) is required to cover them.

(3.2) It was found that in the inspected police detention centres, upon admission individuals were interviewed about their state of health by officials without special medical knowledge who happen to be on duty at the time of admission. The same officials also conduct initial superficial visual health examination (based on visible injuries).

Section 6(3) of the Minister of Internal Affairs Regulation No. 71 of 01 December 2000 "Internal rules of police detention centres" establishes that individuals to be admitted to a detention centre are questioned about their state of health and a health examination is performed. Under § 14(1) of the Imprisonment Act, health examination must be performed by a doctor.

International standards on treatment of detainees also require that health examination must be performed by qualified health workers: under CPT standards, every newly-arrived detainee must be interviewed and examined by a doctor as soon as possible. Exceptions are cases when an interview and examination must be performed on the day of arrival, in particular in a pre-trial detention facility. An examination may be performed by a nurse who reports to the doctor.[281] The European Prison Rules[282] also establish that medical examination of a prisoner must be performed as soon as possible after admission (point 16. a). To do this, a medical practitioner or a qualified nurse reporting to such a medical practitioner will see the prisoner (point 42.1). Any visible injuries and complaints about prior ill-treatment and any information about the prisoner's health are recorded immediately in the personal register (points 15.1 e and f).

Proper medical examination of an individual upon placement in a police detention centre acquires particular relevance in cases where an individual claims that police officers have used violence against them or they suffered health damage for some other reason while staying in the detention centre. According to the opinion of the European Court of Human Rights, the burden of proof in such cases lies with the state: if an individual has injuries at the time of release, the state is required to provide an adequate explanation as to how the injuries were caused. If the state fails to provide such an explanation, a violation of Art 3 of the ECHR may arise.[283]

(3.3) Inspection revealed several violations in Kärdla police detention centre, which in combination may have a negative effect on the situation of detainees.

The toilet and hygiene corner were not isolated from the rest of the cell. In Kärdla police detention centre, cells have video surveillance, and use of the toilet can also be observed by surveillance officers in addition to cellmates. The Chancellor found that lack of an opportunity to use the toilet in privacy was an inadmissible interference with the right to private life (§ 26 Constitution). The CPT has also criticised toilets not isolated by a partition.[284]

279 See European Court of Human Rights judgment of 06 April 2000 in case No. 26772/95 *Labita v Italy*.

280 Supreme Court Administrative Law Chamber judgment of 22 March 2006, No. 3-3-1-2-06.

281 CPT Standards, Council of Europe document No. CPT/Inf/E (2002) 1, p. 27.
Available online at http://www.cpt.coe.int/lang/est/est-standards-s.pdf.

282 Council of Europe Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (available online at http://www.coe.ee/).

283 European Court of Human Rights judgment of 28 July 1999 in case No. 25803/94 *Selmouni v France*, par. 87: "The Court considers that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention […]."

284 See reference 5, p. 26.

The detention centre contained no cupboard for keeping clothes of detainees. Clothes were kept either on the floor in the corridor or on hangers suspended from the bars.

Individuals detained in the police detention centre did not have an opportunity to use the telephone. The law lays down a reservation for use of the telephone, according to which the right to use the telephone exists only in case of existence of the necessary technical facilities. Thus, a detainee may not request an opportunity to use the telephone if the detention centre does not have a telephone. However, the reservation imposed under § 28(1) and § 96(1) of the Imprisonment Act does not justify inaction of the police prefecture in creating the necessary technical facilities. The telephone is the most widely used means of communication nowadays, and without it communication with close relatives and friends, state agencies, and defence counsel is significantly hampered. Under § 14 of the Constitution, the guarantee of rights and freedoms is the duty of the legislative, executive, and judicial powers, and of local authorities. By interpreting § 28(1) and § 96(1) of the Imprisonment Act in the light of § 14 the Constitution, the Chancellor reached the conclusion that the police prefecture was required to look for opportunities to create technical possibilities for using the telephone.

The exercise yard offers no place to take shelter from the rain. Resolving this problem is not technically complicated or costly, and it would ensure better possibilities for detainees for enjoyment of their right to a one-hour walk outside in the fresh air (§ 55(2) and § 93(5) Imprisonment Act) even in poor weather.

The police detention centre has no separate visiting room. Detainees meet their visitors either in the room for procedural measures or in the office of the head of the police station.

The office of the surveillance officer did not have a window and ventilation was insufficient. The Chancellor concluded that the working conditions of police officers in the detention centre were not satisfactory either.

(4) As a result of the inspection visit, the Chancellor of Justice made proposals to the West and South police prefects for improving compliance with the rights of detainees in police detention centres.

The situation of detainees was the worst in Kuressaare police detention centre. On that basis, the Chancellor proposed to the West police prefect to refrain from placing individuals in Kuressaare police detention centre. However, the Chancellor also found that if it was necessary due to important criminal procedural needs a detainee could stay in Kuressaare police detention centre but only while it was strictly necessary. In other cases, individuals should be placed in other police detention centres under the West Police Prefecture. It is advisable to reach a situation where individuals do not spend more than 48 hours in Kuressaare police detention centre and only one individual is placed in each cell.

Additionally, the Chancellor proposed to the West police prefect to take measures to eliminate shortcomings found in Kärdla police detention centre.

Provision of health services in police detention centres is in general a problematic issue. The Chancellor has earlier proposed to the Minister of Internal Affairs to take measures for improving the situation in all police prefectures. Unfortunately, no significant positive changes could be seen during the inspection visits. At the same time, police prefectures themselves could resolve some problems, such as performing the initial health examination. The Chancellor proposed to the South and West police prefects to arrange initial health examination of admitted individuals by qualified medical staff in the inspected police detention centres. For this, the Chancellor advised cooperation with local hospitals and family doctors.

The West police prefect replied that eliminating the shortcomings found in Kuressaare police detention centre would take place from resources allocated for operating the prefecture. The Police Board is investing resources first and foremost in constructing a new building. According to the prefecture, eliminating shortcomings which require reconstruction (building new toilets and upgrading lighting) would be very complicated as the current building is under heritage protection. The West police prefect considered the duration of stay in Kuressaare police detention centre to be satisfactory and did not mention any measures for reducing it.

Most of the shortcomings found in Kärdla police detention centre were quickly eliminated. Curtains were installed in the cells to ensure privacy while using the toilet, and a portable payphone was procured which detainees can use.

Neither prefect in their reply mentioned specific measures taken to ensure initial health examination in police detention centres. The South police prefect promised actively to look for solutions in cooperation with Tartu Prison, the Police Board, Tartu University Clinic, and family doctors in different counties. The West police prefect referred to the fact that the problem was being dealt with on the level of the Police Board. The Chancellor then again decided to focus on resolving problems of health care in police detention centres on the national level, and invited representatives from the Ministry of Internal Affairs, the Ministry of Social Affairs, the Police Board, and the Health Care Board to a joint meeting to discuss measures for ensuring initial health examination in all police detention centres in Estonia.

9. Inspection visit to the North Police Department of the North Police Prefecture

Case No. 7-7/071756

(1) Advisers to the Chancellor of Justice conducted an inspection visit to the North Police Department of the North Police Prefecture on 24 and 28 November 2007. The North Police Department is one of the last unrenovated police buildings in the service area of the North Police Prefecture, also housing five detention cells.

(2) Advisers to the Chancellor verified whether the North Police Department ensured fundamental rights and freedoms of individuals.

(3.1) Inspection revealed several serious shortcomings in living conditions in the police department. The situation was the worst in detention cells and in some office rooms.

According to the Ministry of Internal Affairs development plan,[285] a new police building should be constructed by 2009. During inspection, it was found that completion of the new building had been delayed. According to the initial plan, construction should have started in autumn 2007 but, as explained by the senior superintendent of the police department, at the end of 2007 it had been said that work would start in spring 2008.

The North Police Department has five cells intended for detaining individuals. All cells are on the ground floor. One cell measures 3.7 × 1.5 m and four cells measure 1.3 × 0.8 m. Sanitary repairs were carried out in the cells and in offices on the ground floor in 2006.

Requirements for detention facilities in police establishments are laid down in the Minister of Internal Affairs Regulation No. 71 of 01 December 2000 "Internal rules of police detention centres", adopted under § 156(5) of the Imprisonment Act. The Imprisonment Act also includes a separate chapter on custody pending trial, which applies directly to police detention centres providing custody pending trial. For example, under § 90(1) of the Imprisonment Act, the provisions of Chapters 1, 2, and 7 of the Act together with the specifications in Chapter 5 apply to remaining in custody pending trial. Under § 90(4), cells where persons in custody are lodged must comply with the conditions in subsection 45 (1) of the Act and ensure constant visual or electronic surveillance of persons in custody.[286] Based on the above, the requirements established for prisons must be applied to daily living conditions in police detention centres (considering the distinct features of detention centres).

At the end of 2007, the cells lacked windows required under § 45(1) of the Imprisonment Act and no hygiene corner. Detainees who wish to use the toilet must signal this to a staff member supervising the detention cells and who, in case of necessity, would call the police patrol serving the area, because only one staff member is in the detention centre at night and for security reasons is not allowed to open the cells while alone.

Inspection revealed that the floor area of small cells was 1.04 m^2 and therefore even average-sized detainees cannot sleep in the cell. Three small cells have a bench about 1 m long which can only be used for sitting. One cell has no furniture, including no seating. Despite the new ventilation system installed during the latest repairs and which allegedly was working at full capacity during the inspection visit, and despite the fact that cells are cleaned every day as the senior superintendent claimed, the air in the cells and their immediate vicinity was unbearably stale. The Chancellor has seen similar conditions in police detention centres in eastern Estonia and in Kuressaare.[287]

The Chancellor reached the opinion that detaining individuals in these conditions violates human dignity and in certain cases may lead to treatment amounting to degradation or torture. Under § 3 of the ECHR and § 18 of the Constitution, living conditions in a detention facility may not be degrading to human dignity. According to the case-law of the European Court of Human Rights,[288] treatment of prisoners can be considered degrading if the suffering and humiliation caused to them exceed the level normally associated with legally-imposed medical treatment or punishment. In assessing the conditions of detention, the combined effect of the circumstances must be taken into account, e.g. furnishing of the cells, their hygiene situation, and duration of an individual's placement in the detention facility. The Supreme Court has emphasised that human dignity is a basis for all fundamental rights and the purpose of protection of fundamental rights and freedoms, and the requirement of treatment in line with human dignity also extends to detainees.[289]

Generally recognised conditions for prisons in Europe are laid down in the Council of Europe Committee of Ministers recommendation Rec(2006)2 on European Prison Rules.[290] Under point 10.1, the European Prison Rules

285 Available online at http://www.siseministeerium.ee/17410.

286 § 45(1) of the Imprisonment Act: "The cell of a prisoner must meet the general requirements established for dwellings on the basis of the Building Act which ensures air flow and circulation, light and temperature in the cell which is necessary for living. A cell must have a window and artificial lighting which ensures sufficient lighting of the room. The Minister of Justice establishes the size of cells and the list of items belonging to the furnishings of the cell in internal rules of prisons."

287 Chancellor of Justice letter of 14 November 2007 No. 7-7/071415/00707664.

288 E.g. European Court of Human Rights judgment of 08 November 2005 in the case of *Alver v Estonia*.

289 Supreme Court Administrative Law Chamber judgment of 22 March 2006, No. 3-3-1-2-06.

290 Available online at http://www.coe.ee/?op=body&id=452.

apply to persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following conviction. Under point 10.3 b, the Rules also apply to persons who have been remanded in custody by a judicial authority or deprived of their liberty following conviction and who may, for any reason, be detained elsewhere. The Chancellor of Justice noted that in police detention centres in Estonia remand and sentenced prisoners are regularly held in addition to individuals serving detention, so that this recommendation also applies to police detention centres. In the preamble to the European Prison Rules, it is emphasised that enforcement of custodial sentences and the treatment of prisoners necessitate taking account of the requirements of safety, security and discipline while also ensuring prison conditions which do not infringe human dignity. Under point 18.1, the accommodation provided for prisoners must respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to lighting, heating and ventilation.

The Chancellor noted that much needs to be done to improve conditions in detention cells in the North Police Department. The Chancellor also found that it would be possible to take immediate measures to take care of primary minimal needs to make detention cells in the North Police Department suitable for holding individuals. The Chancellor noted that in the larger detention cell a hygiene corner (with a toilet and a sink) should immediately be installed. Building it would not require excessive resources, as the water and sewer line already exist in the building.

In the Chancellor's opinion the current arrangement concerning the use of the toilet by detainees is not reasonable. Calling a patrol team to the police department so as to take a detainee to the toilet significantly reduces the safety of the patrolled area as it hampers performance of the patrol's main function. This solution also involves delay for the individual concerned, which in the worst case may endanger the individual's health.

The Chancellor also found that staff offices were also in poor condition in addition to detention cells. Unrenovated office rooms may lead to employee dissatisfaction and induce staff to leave work and new potential employees to prefer other police departments as a workplace. This police department is one of the last unrenovated buildings in the North Police Prefecture, and thus has the worst working conditions.

(3.2) The inspection visit revealed that intoxicated persons are often placed in detention cells in order to ensure general safety of the area. Another major category of detainees are those suspected of committing an offence. The journal of detainees showed that 7-8 individuals at a time were kept in the larger cell and 1-2 individuals in the smaller cells. Inspection also revealed that cases had occurred where significantly more people had been placed in the cells.

The floor area of the larger cell is 5.55 m^2 and of the smaller cells 1.04 m^2. Under § 6(6) of the Minister of Justice Regulation No. 72 of 30 November 2000 "Internal prison rules", the floor area for each person in a cell must be at least 2.5 m^2. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) considers 4 m^2 per prisoner as acceptable.[291] The Minister of Internal Affairs Regulation No. 71 of 01 December 2000 "Internal rules of police detention centres" does not explicitly regulate the size of required floor space per person in a cell, but previously the Chancellor has expressed the view that, by analogy, § 6(6) of internal prison rules also applies to cells in police detention centres.

Considering the relatively large service area of the police department and in view of the very small size of the detention cells, the Chancellor concluded that the number of persons to be placed per cell must be laid down unequivocally. No more than three persons at a time may be placed in the large cell, and even that could only take place when a hygiene corner is installed in the cell. The four smaller cells may be used for detaining people until completion of the new police building only if no more than one individual at a time is placed in a cell. Individuals must not be held in a cell for more than one hour at a time, as it is not possible to lay down in the cell, there is no hygiene corner, and visual monitoring of individuals is complicated (the cells are not within the field of vision of the duty officer). Only detainees waiting for transport may be temporarily placed in the small cells.

Occupancy of detention cells will be affected in the future by a decrease in the number of officers in the premises at Erika 15 in connection with moving the criminal investigation service. Therefore, detention cells in the North Police Department will be no longer used to detain individuals apprehended on suspicion of committing a criminal offence. Only individuals brought for sobering up or individuals detained within misdemeanour proceedings will be held in the cells.

Occupancy of the police detention centre can be reduced if individuals detained in the street and having a place of residence are transported home and not brought to the police department. Under § 15^2(7) of the Police Act, if the identity of an intoxicated person found in a public place is established and the person resides in the same settlement unit or city district, the person may be taken home to the care of an adult family member provided that the person does not exhibit signs of aggressive behaviour. This provision gives police officers discretion to decide between taking a person to their place of residence or to the police department. The Chancellor reached the conclusion that § 15^2(7) of the Police Act should be interpreted so that all individuals meeting the conditions set out in it should always be taken to their place of residence and not to the police department. The Chancellor also noted that, for example, the

291 Available online at http://www.cpt.coe.int/estonian.htm.

South Police Prefecture proceeds from such interpretation in their activity.[292]

(4) Following the inspection visit, the Chancellor contacted the North Police Prefect with proposals for improving protection of the rights of individuals detained in the North Police Department.

The Chancellor proposed drawing up a plan to establish use of the cells according to the above-mentioned principles: to lay down a fixed procedure for detaining individuals in the cells so as to subsequently enable ascertaining occupancy of the cells.

The North Police Prefect in his reply explained that they had analysed the Chancellor's proposals and started implementing them within available possibilities.

The prefect noted that the buildings of the North Police Prefecture are managed by the State Real Estate Company, which carries out all sanitary repairs and reconstruction work in the buildings. In a letter of 17 January 2008, the North Police Prefecture submitted their request for building a hygiene corner in the detention centre.

The prefect in his reply affirmed that the Chancellor's proposal not to place more individuals in cells than permitted by law would be complied with. The prefect considered it necessary to note that unfortunately situations frequently arose where cells became overcrowded but then they would look for possibilities to transfer individuals to other police departments or detention centres.

The prefect affirmed that criminal police officers of the North Police Department are housed in other police departments and thus occupancy of the cells in the North Police Department has decreased. According to the prefect, as the number of cells is small, then in accordance with the Chancellor's proposal and § 15^2(7) of the Police Act intoxicated individuals would be taken to their place of residence whenever possible.

With regard to the Chancellor's proposal to establish a fixed unequivocal procedure for using cells so as to enable an overview of occupancy trends, two parallel alternatives have been introduced. The first option involves entering information on individuals placed in cells in the police detention centre's book of work records according to the established procedure. In the second option, the same data are once again entered in the police information system KAIRI. According to the prefect, in both cases it is possible to see how long an individual stayed in a cell and how many other people were in the cell.

10. Inspection visit to Pärnu police detention centre

Case No. 7-7/070589

(1) On 22 May 2007, advisers to the Chancellor of Justice conducted an own-initiative visit to the detention centre of the West Police Prefecture law enforcement department.

(2) Advisers to the Chancellor verified whether the rights of detainees were ensured.

(3) Inspection revealed that at night only one member of staff was supervising detainees and the person has no keys to the cells and cannot open the doors even in case of urgency. In order to open a cell door, they would have to call the duty officer whom it would take some time to reach the detention centre. The night-time officer is locked into the corridor of the detention centre and can only exit the corridor with the help of the duty officer, who would unlock the door from the outside. It is questionable whether such work arrangement ensures sufficient security of detainees and staff. For example, it is not clear how rapid evacuation could be carried out in case of fire or how staff could quickly intervene in case of an act of violence in a cell.

During conversations with the staff, it was explained that, if necessary, the police patrol would be called in to help. However, the function of a police patrol is to maintain public order and not to deal with supervising individuals detained in the detention centre. To ensure security of detainees, the prefecture should find, or if necessary request from a higher-level government agency, sufficient resources (both people and money) to ensure 24-hour security of detainees and staff.

(3.2) Inspection revealed that in case of illness or vacation of the medical worker, they are not replaced. Under § 6(3) of the Minister of Internal Affairs Regulation No. 71 of 01 December 2000 "Internal rules of police detention centres", an individual admitted to a police detention centre is interviewed about their state of health, and a health examination is performed. If the medical worker of the detention centre is on vacation, no interview or medical

292 Clause 8 of the "Guidelines for taking individuals for sobering up and the process of sobering up in the South Police Prefecture", approved by South Police Prefect directive No. 88 of 21 August 2006, establishes that in deciding to take an individual for sobering up, the possibility of taking the individual to their home to the care of an adult family member should always be given preference.

examination takes place. In the absence of the medical worker, provision of medical assistance under § 13 of "Internal rules of police detention centres" is hampered. The detention centre must find a replacement for the medical worker during their vacation, because medical assistance must be guaranteed on the level required by legislation.

(3.3) Inspection revealed that medical assistance to detainees as well as officers and staff was financed from the same budget line. Therefore, situations had arisen where it was impossible to buy necessary medicines for detainees. Conversations with the staff of the detention centre revealed that situations had occurred where the person in charge of supervising the purposefulness of using funds for medical assistance (the so-called cost manager) had refused to allocate money for necessary medicines.

Distribution of budgetary resources within the police prefecture is the duty of the prefect.[293] In distributing budgetary resources, the prefect has to take into account that all obligations imposed by legislation should be fulfilled. The staff should not face a dilemma whether to finance medical assistance and buy hygiene articles for detainees or for staff. It is inadmissible that necessity of providing medical assistance is decided by a cost manager, who is a person without medical training. To avoid such situations, it would be necessary to finance medical services to detainees and staff from different budget lines. Financing of medical services must be organised so as to ensure medical assistance to both detainees and staff to the extent required by legislation.

(3.4) The detention centre complies with the minimum requirement under its internal rules in ensuring taking care of personal hygiene. During conversations with staff and detainees it was confirmed that it was possible to wash once a week.[294] The daily schedule established under § 12(1) of internal rules of police detention centres did not include the time or duration of using the shower.

Council of Europe Committee of Ministers recommendation Rec(2006)2 on European Prison Rules[295] emphasises in its preamble that enforcement of custodial sentences and treatment of prisoners necessitate taking account of the requirements of safety, security, and discipline while also ensuring prison conditions which do not infringe human dignity. Rules applicable to sentenced prisoners must also apply to persons serving detention and to remand prisoners.[296] Under point 18.1 of European Prison Rules, accommodation provided for prisoners should respect human dignity and, as far as possible, privacy, and meet requirements of health and hygiene, lighting, heating, and ventilation.[297]

Human dignity includes compliance with hygiene requirements. Human dignity is linked to all fundamental rights of individuals and is the purpose of protection of fundamental rights and freedoms, which must be respected and protected.[298] The right to treatment in line with human dignity extends to everyone, including detainees. Thus, the detention centre should focus, inter alia, on ensuring sufficient opportunities for detainees to take care of personal hygiene.

Most people would consider it normal to have a shower daily or every other day. Internal rules of the detention centre include an obligation to enable detainees to use a shower at least once a week, but it should be pointed out that this is a minimum requirement.

The Chancellor admits that personal hygiene habits of detainees are definitely not similar. The detention centre, however, should proceed from the principle of human dignity and guarantee a frequency of opportunities corresponding to the personal needs of detainees. The detention centre should find additional resources to enable detainees to take better care of personal hygiene. The relevant procedure needs to be laid down and the duration and time of using the shower included in the daily schedule of the detention centre.

(3.5) Detainees are forced to wash and dry their clothes in the cell. As cells have no hot water, detainees ask for water from the staff. Drying laundry takes place mostly on lines attached to furnishings in the cell. However, as ropes and lines are prohibited in the detention centre, they are confiscated during searches. Therefore, detainees produce new lines from any suitable material, such as bed linen. The detention centre should find opportunities reasonably enabling detainees to dry their laundry (e.g. a drying rack attached to the wall of the cell, which can be folded away to save space when not in use).

(3.6) The shower room does not meet hygiene requirements. Its walls and ceiling are covered in mould, and paint is peeling off the ceiling. Under § 11(1) of internal rules for police detention centres, cells and other rooms must be cleaned daily and, if necessary, disinfectants should be used. The mould in the ceiling and on the walls of the shower room leads to the suspicion that the room has not been properly cleaned or no disinfectants have been used. Under

293 Under § 8(1) clause 6 of the "Statutes of the West Police Prefecture", approved by the Minister of Internal Affairs Regulation No. 100 of 24 November 2003, the police prefect ensures drawing up a draft budget of the prefecture and is responsible for precise and purpose-oriented use of the budget.

294 Under § 11(2) of internal rules of police detention centres, detainees are given an opportunity to use a sauna, shower, or bath once a week.

295 Available online at http://www.coe.int.

296 Under point 10.1 of Council of Europe Committee of Ministers recommendation Rec(2006)2 on European Prison Rules, these rules apply to persons who have been remanded in custody or who have been deprived of their liberty following conviction.

297 upreme Court Administrative Law Chamber judgment of 22 March 2006, No. 3-3-1-2-06.

298 Art 1 of the Charter of Fundamental Rights of the European Union, judgment of the European Court of Justice of 09 October 2001 in case No. C-377/98 *The Netherlands v the European Parliament and Council*.

§ 28 of the Constitution, everyone has the right to protection of health. This also includes the requirement that individuals should be guaranteed a healthy life environment. A shower room where mould covers the walls and the ceiling, and where peeling paint is falling from the ceiling, is dangerous to the health of people using it. The detention centre must take all necessary measures to eliminate risk to health.

(3.7) Under § 11(1) of internal rules for police detention centres, cells and other rooms must be cleaned daily and, if necessary, disinfectants should be used. In case of pediculosis (infestation with head or body lice), sanitary procedures need to be carried out. Conversations with the staff revealed that no necessary cleansing materials existed for disinfecting the cells or clothes. Similarly, no cleansing materials existed for combating head lice. The detention centre needs to procure the necessary resources to comply with requirements imposed by legislation.

(3.8) Inspection revealed that hot meals for detainees were provided only once a day, at lunch. In the mornings and evenings, detainees are given warm sweet tea. Lunch consists of two courses and includes four slices or brown bread and a loaf of white bread, which is intended to last for the supper on the same evening and for the breakfast the following morning. The staff justified providing meals only once a day by explaining that if food was distributed more frequently much of it would be left over because many detainees do not wish to eat in the mornings or evenings. Under § 3(6) of the Minister of Social Affairs Regulation No. 150 of 31 December 2002 "Dietary norms in custodial institutions", detainees are to be provided food meeting their dietary norms in three parts, at least three times a day at fixed times.[299] The daily dietary norm must cover dietary needs for normal bodily functioning of detainees (§ 1(2) of the regulation).

The Chancellor admits that eating habits of detainees may differ. However, this must not lead to a situation where all detainees are deprived of the possibility for breakfast and supper. Detainees who wish to have breakfast or supper, or both, in addition to lunch, must be guaranteed this opportunity.

(3.9) While touring the detention centre, advisers to the Chancellor discovered a cell that did not meet legal requirements (the so-called special room). The cell did not have proper lighting, seating, water, or toilet. According to the staff, individuals were placed in the cell only in exceptional cases and for a short period (up to three hours). The Chancellor is of the opinion that enclosing individuals in such a cell even for a few moments amounts to degradation of human dignity. Tallinn Administrative Court in one of its judgments has also analysed detention in a similar cell, and concluded the following: "[I]n the opinion of the court, a person's detention [...] in a dark room [...] where it is not possible to sit, drink water, or use the toilet, is manifestly disproportionate to the objective sought. [...] The court agrees with the applicant that placement in such a room [...] is degrading to human dignity."[300] To stop inhuman and degrading treatment of individuals in the future, the Chancellor proposed removing the door from the room, in order to avoid using the room for detention.

(3.10) The detention centre also had metal isolation cupboards which did not meet the requirements for cells. Unlike the special room, isolation cupboards are so small that if the door is closed it would not be possible to sit even if seating existed. No ventilation or lighting exists in the cupboards. The staff denied using isolation cupboards for detaining people. However, to eliminate all suspicion, it is necessary to remove these cupboards or make them impossible for holding people. Murru Prison, for example, modified similar cupboards by installing shelves.

(4) Following the inspection visit, the Chancellor proposed to the detention centre as follows:

- Draw up the draft budget so as to enable financing of medical services for detainees and staff from different budget lines, and to implement such a financing arrangement.
- Ensure sufficient use of the shower for detainees based on a schedule and display it in the daily schedule of the detention centre. Clean the ceiling and walls of the shower room with disinfectant.
- Find reasonable possibilities for detainees to dry their laundry, and ensure sufficient access to disinfectants for complying with obligations imposed by legislation.
- Comply with requirements imposed by law in providing meals to detainees.
- Remove the door of the special room and render isolation cupboards unsuitable for holding people (by either dismantling them or installing shelves in the cupboards).

The Police Board itself replied to the Chancellor's proposals because resolving the problems detected upon inspection does not depend only on the possibilities of the police prefecture.

The National Police Commissioner noted that as of the following year expenses for medical assistance and hygiene articles for detainees would be shown on a separate budget line, and the Chancellor's proposals would be taken into account in drawing up a new daily schedule for the detention centre. Doors of the special room and isolation cupboards would be removed immediately.

299 Under § 1(1) of the dietary norms regulation, the regulation lays down daily dietary norms for meals provided in custodial institutions to sentenced and remand prisoners and persons serving detention. The term "prisoner" in the regulation includes sentenced and remand prisoners and persons serving detention.

300 See also Tallinn Administrative Court judgment of 10 November 2004 in case No. 3-1889/2004.

VIII AREA OF GOVERNMENT OF THE MINISTRY OF SOCIAL AFFAIRS

1. General outline

The area of government of the Ministry of Social Affairs includes preparing and implementing plans for resolving national social problems; protecting public health and providing health care; organising policies relating to employment, the labour market and occupational environment, social security, social insurance, and social welfare; promoting and coordinating gender equality; and drawing up corresponding draft legislation. The area of government of the Ministry of Social Affairs includes the following agencies: the State Agency of Medicines, the Social Insurance Board, the Labour Market Board, the Health Care Board, the Health Protection Inspectorate, and the Labour Inspectorate.

Of the total number of petitions submitted to the Chancellor of Justice during the reporting year, 104 pertained to the area of government of the Ministry of Social Affairs. Of these, 41 directly concerned the Ministry of Social affairs, 37 petitions pertained to the activities of the Social Insurance Board, and the remaining 26 petitions were linked to other agencies in the area of government of the Ministry of Social Affairs.

As regards the Ministry of Social Affairs, it must be noted that proceedings carried out there tend to take excessive time. The Chancellor faces this problem in connection with practically all requests for information sent to the Minister of Social Affairs. As a rule, in 2007 replies to the Chancellor's requests for information arrived within two to three months, but cases occurred where the reply to a request for information was only sent after six months and following repeated reminders. These delays may result in failure to protect the interests of individuals who have petitioned the Chancellor. Individuals have repeatedly petitioned the Chancellor due to unreasonable delays in the work of the Ministry of Social Affairs and the agencies within the Ministry's area of government. A particularly striking example is a petition to the Chancellor by Viljandi Hospital Foundation in connection with the funding of 24-hour emergency psychiatric care. In this case, the petitioner had already submitted a financing application to the Ministry of Social Affairs in 2005, but had not received a substantial reply by the time of contacting the Chancellor. A solution to the petitioner's problem was only found after the Chancellor intervened and held discussions with Ministry of Social Affairs officials. A length of proceedings of two years without doubt fails to comply with good administrative practice. Hopefully, the administrative practices of the Ministry of Social Affairs will change significantly in 2008 and the Response to Memorandums and Requests for Explanations Act as well as the practice of good administration will be followed.

The outline of the area of government of the Ministry of Social Affairs is divided into three parts: social policy issues, health policy issues, and employment policy issues.

1.1. Social policy issues

Social policy issues can, in turn, be provisionally divided into two categories: social welfare and social insurance. The report first focuses on social welfare issues, and then social insurance issues will be considered.

As in the previous two Annual Reports, this year, too, with regard to the area of social welfare the issue of social welfare reform planned by the Ministry of Social Affairs must be mentioned. The existing system of welfare benefits has not yet been reorganised, despite the duty of the state to guarantee that persons who are unable to provide for their own subsistence can live a dignified life. The main problem relates to the fact that the methodology used for calculating the subsistence level fails sufficiently to take account of the increase in the cost of living. Thus, for example, the 2007 subsistence level was calculated on the basis of the Statistics Estonia minimum means of subsistence data for 2005. The methodology for calculating the subsistence level is inappropriate.[301]

Although every year the Chancellor of Justice has expressed hope that the Minister of Social Affairs would correct the methodology for calculating the subsistence level, in order to ensure coverage of costs vital for leading a dignified life, this has not yet happened. Developing a new methodology for calculating the subsistence level is foreseen in the 2008 work programme of the Ministry of Social Affairs. Thus, again we can only hope for the system of welfare benefits to be finally reorganised.

It is pertinent to touch upon the rules governing the organisation, provision, application, and funding of the publicly funded rehabilitation services considered in the previous reporting period. Whereas in the previous report the Chancellor was able to express doubt, on the basis of information received over the second half of 2006[302], that the rules had not been given due prior consideration, the results of the Chancellor's own-initiative proceedings in 2007

301 See the Chancellor of Justice Annual Report 2003–2004. Tallinn 2004, p. 32 *ff*.

302 M. Kamps. Erivajadustega inimeste rehabilitatsioonisüsteem pole jätkusuutlik [The system for rehabilitation of persons with special needs is not sustainable], available online at http://www.postimees.ee (11 December 2006); A. Alas. Riigikontroll: erivajadustega inimeste rehabilitatsioonisüsteem pole jätkusuutlik [National Audit Office: the system for rehabilitation of persons with special needs is not sustainable] available online at http://www.epl.ee (11 December 2006); K. Ibrus. Tasuta rehabilitatsiooniravi tuleb kohati pikalt oodata [Waiting periods for free rehabilitation treatment can be long] available online at http://www.epl.ee (27 April 2006).

compelled the Chancellor to conclude that the provisions of the Social Welfare Act did not guarantee availability of the services. Although the Chancellor advised the Minister of Social Affairs to make publicly funded rehabilitation services available within a reasonable time and to ensure availability of services, the Minister of Social Affairs substantially failed to follow the recommendations.

The existing system of special welfare services also needs consideration. Already in 2004 the Chancellor proposed to the Minister of Social Affairs to align the Minister of Social Affairs Regulation No. 4 of 03 January 2002 "Obligatory requirements applicable to social welfare institutions and social welfare services" with the Constitution and other laws, as the Minister had exceeded the delegating norm when issuing the regulation. The Minister of Social Affairs agreed with the Chancellor and promised to bring the regulation into line with the Constitution and other laws through the Social Welfare Act entering into force in 2006. The regulation was not aligned with the Constitution and other laws by the time promised. Subsequently, the Minister of Social Affairs promised to ensure conformity with the Constitution and other laws with the Act amending the Social Welfare Act entering into force in 2007. This promise was not honoured either. The above regulation of the Minister of Social Affairs became invalid only on 14 January 2008, when the Minister of Social Affairs adopted Regulation No. 5 of 09 January 2008 "Obligatory requirements applicable to social welfare services provided to persons with special mental needs and the procedure for providing the services".

The reporting period is characterised by an increase in the number of complaints as well as in the number of violations found concerning activities of local authorities in the area of social welfare. Complaints are still submitted concerning the activities of the Social Insurance Board, but the number of violations has decreased.

Complaints against the activities of local authorities and established violations mainly concerned issues related to compliance with the principle of equal treatment upon granting and paying social welfare benefits, to ensuring the possibility of a dignified life to individuals in need of care, and to the practice of good administration in general.

Public authorities must take into account that prior to making any decision which may result in unequal treatment of individuals in a similar situation, it must be considered whether a relevant and reasonable cause exists for unequal treatment.

Unfortunately, inspection visits and petition-based proceedings carried out by the Chancellor of Justice demonstrate that all too often supervised agencies fail to ensure treatment in line with human dignity to individuals in need of care.[303] Individuals under care are often not seen as human beings but are treated like objects. Aa Care Home, for example, kept its voluntary residents in locked premises without having a legal basis for this. The premises were dirty, dark, smelling of urine, sweat, filth, and cigarette smoke, as well as being overcrowded.

The activities of Aa Care Home clearly pinpoint the shortfalls in the correctness and fairness of decisions taken in social welfare. Human dignity as a notion of being a human being cannot be elaborated as a single clear-cut norm for public servants. Decisions by public servants which hurt someone's human dignity speak of the particular public servant's values, attitudes, consideration, and kindness. These mainly cognitive qualities cannot be learned, but awareness of them can be increased. It is worthwhile for public servants to ask themselves for whom and why they work in the social welfare system and what is expected of them.

Similarly to the previous reporting period, it must be noted that recent years have seen a growing number of cases where the Chancellor of Justice established a violation of the practice of good administration. It can be concluded from the proceedings carried out by the Chancellor that major problems exist in local authorities in connection with observing good administrative practices.

Violations of practice of good administration occurred in Rõngu Rural Municipality Administration, Rägavere Rural Municipality Administration, and Võnnu Rural Municipality Administration during the reporting period. Based on cases relating to the activities of these rural municipality administrations in responding to applications for social welfare, the Chancellor was able to draw a general conclusion of rural municipality administrations failing to follow the rules of administrative procedure.

It can be claimed, based on cases relating to these rural municipality administrations, that social rights of individuals are often not properly ensured. Examples include individuals not being served administrative acts which concern them or the act not outlining the reasons behind refusal to provide assistance; or lack of true references to possibilities for challenge so that individuals are unable to defend their rights. It is very difficult for individuals to defend themselves if decisions are passed in absentia, clarifications of decisions are provided by phone or by incomprehensibly worded letters.

The administrative capacity of local authorities needs to be enhanced for them to be able to act correctly in administrative proceedings. Public servants must receive training, and the effectiveness of the organisational side of proceedings must be increased.

303 Court cases have already occurred due to involuntary committal to care homes. In 2007, for example, a respective complaint by A. S. reached the Supreme Court. (Supreme Court Civil Law Chamber ruling of 02 March 2007, No. 3-2-1-145-06.)

With regard to the area of social insurance, it must be noted, similarly to the previous reporting period, that no significant reforms were carried out in 2007. Neither the occupational accident insurance nor the occupational illness insurance scheme has been reformed.[304]

At the beginning of 2006, the Chancellor of Justice delivered a speech to the Riigikogu on compensating the difference between parental benefit and maternity benefit. The Chancellor asked the Riigikogu to present a reasonable and relevant justification of why parents of a child under the age of two and a half are treated unequally upon the birth of their next child as regards compensation for the difference between parental benefit and maternity benefit depending on the amount of parental benefit paid to them upon the birth of the next child. The respective debates took place in the Riigikogu Social Affairs Committee in 2006 and 2007 as well as at the beginning of 2008. At the beginning of 2008, the Ministry of Social Affairs found, during yet another debate in the Riigikogu Social Affairs Committee, that a reasonable and relevant justification for not offering compensation to certain parents for the difference between parental benefit and maternity benefit is the higher parental benefit received upon the birth of the next child. The Riigikogu Social Affairs Committee subsequently informed the Chancellor of Justice that compensation for the difference between parental benefit and maternity benefit is not provided to parents who receive a higher parental benefit in connection with the birth of their next child compared to parental benefit received in connection with their previous child because they receive a higher parental benefit in connection with the birth of the next child. It took the Riigikogu two and a half years to find justification for rules which the Riigikogu itself had passed.

As regards resolving social insurance issues, the Chancellor of Justice found a small number of violations. In the case of violations to which the Chancellor drew the attention of the Social Insurance Board during petition-based proceedings or own-initiative proceedings, reactions by the Social Insurance Board deserve recognition. More specifically, the Social Insurance Board admitted its errors in all cases and took relevant steps to remedy the violations. For example, payment of a pension not received by an individual was made *a posteriori*.

1.2. Health policy issues

The year 2007 was significant in the area of health policy. Two important projects were completed – the Health Information System and the National Health Development Plan. Implementing both projects should considerably improve provision of health services.

Upon implementing the Health Information System, consumption of healthcare services will become considerably simpler and more transparent for patients. Launching of the Digital Registration system will enable individuals who have access to IT infrastructure to make appointments for necessary healthcare services at a convenient time and without an intermediary. Also the possibility to order a message to a mobile phone reminding of an appointment for a healthcare service may, perhaps, help to keep waiting periods under control. The Digital Prescription will allow more flexible ways of receiving medications. In certain cases, a repeat visit to a doctor is not necessary for extending a prescription. When a request for a new prescription has been received, the healthcare employee issues a repeat prescription electronically. Prescription medications can be purchased from a pharmacy by presenting a personal identification document. Without doubt, the most significant element of the Health Information System will be the Electronic Health Card. This will make it possible for the first time ever to receive from a single source all information on available healthcare services. Also a right to forbid access by third parties to certain health data will be created. The above is an example of implementation of the right to informational self-determination. Yet ethical aspects must be observed with due care when launching such an extensive information system, and effective control must be ensured to protect sensitive personal data contained in the system against unjustified processing.

Completion of the National Health Development discussion paper should mean a long-awaited change of direction on the Estonian health landscape. Since this project constitutes a consensus document based on extensive involvement of stakeholders, it may ensure more successful achievement of objectives than versions of the development plan drafted over previous years. Thus far, development of national health has been based on isolated activities, focusing only on certain risk factors or diagnoses (for example, prevention of cardiovascular diseases or screening for cervical cancer). A starting point has been lacking for activities in the form of a common vision for development of national health as well as a clear idea of the desired results. The fact that the document does not focus narrowly on healthcare, but applies a multi-sectoral approach, must be seen as the main advantage of the National Health Development Plan. Since each activity in its own area has an impact on a person's health, it is important to set development goals at all levels. After adoption of the National Health Development Plan, it will finally be possible to set defined general objectives and respective sub-objectives as the starting point for different activities. This will increase sustainability of all activities in the area of health and provide a stable foundation for planning.

Yet not all developments in the field of health policy in 2007 were positive. Areas still exist where nothing changed in 2007 or over previous years. Provision of psychiatric care has featured as a problem for years.[305] The Chancellor of Justice has repeatedly drawn the attention of the Minister of Social Affairs to the fact that the existing Mental Health

304 See the Chancellor of Justice Annual Report 2006. Tallinn 2007, page 311.

305 See e.g. Chancellor of Justice Annual Report 2006. Tallinn 2007, p. 45 *ff*.

Act is not sufficiently regulatory and has become obsolete. The Ministry again failed to reorganise regulation of the respective area in 2007.

In 2007, the Chancellor made four inspection visits to institutions providing psychiatric care: the Tartu University Hospital Foundation, Kuressaare Hospital Foundation, Pärnu Hospital Foundation, and Narva Hospital Foundation. Problems outlined as a result of the inspection visits reoccurred at each service provider. This demonstrates that changing the practices of single service providers in certain sections of work will not suffice to ensure protection of fundamental rights of individuals. Instead, an exhaustive and rules-based services provision standard in the form of a new Mental Health Act must be prepared. One widespread problem was application of means of restraint. This measure, which restricts fundamental rights of individuals most strongly, is only regulated by one provision in the Mental Health Act, namely § 14, which sets out the bases for applying means of restraint and the manners of restraint. The main problems linked to application of means of restraint are absence of a register of application of means of restraint, participation of security employees in restraint, non-compliance of the restraint room with required conditions, isolation of individuals in their dwellings, lack of training in non-physical restraint, and failure to hold a post-restraint debriefing.

In its 8th[306] and 6th[307] General Report, the Council of Europe's European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has set out very clear conditions for placement of individuals in psychiatric establishments. These requirements also apply to psychiatric care provided in Estonia. We can only hope that 2008 will indeed see the initiation of work on preparing a new Mental Health Act and that the new legislation will also be based on relevant international requirements, among other sources, allowing individuals to exercise their fundamental rights and freedoms as widely as possible.

In 2008, the Health Information System awaits implementation, the National Health Development Plan is expected to be approved, and the new Mental Health Act needs to be drafted. Despite the resources spent on launching such extensive programmes, the level of protection of interests of individuals must not decrease. As a backdrop to each and every legislative act or activity it is important to keep sight of the individual, who is, after all, the bearer of fundamental rights.

1.3. Employment policy issues

The area of employment policy includes matters related to employment, the labour market, the occupational environment, and preparation of rules governing individual and collective employment relations.

The Government Work Programme for 2007-2011, prepared after the XI elections to the Riigikogu, prioritises modernisation and increased flexibility of the labour market. The plan includes preparing a new Draft Employment Contracts Act, which will become a part of the Civil Code. All the more significant amendments will be introduced in cooperation with social partners.

In 2007, the Ministry of Social Affairs and the Ministry of Justice jointly prepared a new Draft Employment Contracts Act, which was presented to the general public in January 2008. The Chancellor of Justice is pleased that the reform of individual employment law has been launched and wishes to point out that the new Act must certainly take into account requirements arising from the Constitution as well as from international law, including from the new Revised European Social Charter. In order for the new Act to take account of the needs of both sides of industry, representatives of employers and employees must be included in the reform process and their justified comments and proposals have to be considered.

In the 2006 Annual Report, the Chancellor of Justice pointed out that, additionally to individual employment law, reforms are also necessary in collective employment law. The respective reforms have not been initiated.

The Chancellor is particularly concerned about the present state of the Estonian rules on strikes. The Chancellor has in 2005, 2006, and 2007 pointed out to the Minister of Social Affairs and to the Riigikogu that the current rules on sympathy strikes as well as on public sector strikes contravene the Constitution. In its 2006 conclusions on Estonia's national report, the European Committee of Social Rights, which is the body responsible for monitoring compliance with the Revised European Social Charter, also pointed out the fact that public servants' right to strike has been restricted too extensively in Estonia.[308]

The Ministry of Social Affairs already admitted in 2005 that problems existed in the rules on sympathy strikes. The Riigikogu admitted in spring 2006 that public servants' right to strike had been unconstitutionally restricted.[309]

306 8th General Report on the CPT's activities (CPT/Inf (98) 12). Available online at http:// www.cpt.coe.int/en/annual/rep-08.htm.

307 16th General Report on the CPT's activities (CPT/Inf (2006) 35). Available online at http:// www.cpt.coe.int/en/annual/rep-16.pdf.

308 The Revised European Social Charter. Conclusions by the European Committee of Social Rights (2006). Available online at http://www.coe.int/t/e/human_rights/esc/3_reporting_procedure/.

309 Minutes No. 19 of the 14 March 2006 joint meeting of the Riigikogu Social Affairs Committee and the Constitutional Committee, and the 19 September 2007 transcript of XI Riigikogu 2nd session, both available online at www.riigikogu.ee.

Nevertheless, regulatory provisions have not been aligned with the Constitution and international law. Amending regulatory provisions pertaining to strikes in the public sector has partly been postponed on the grounds that a larger-scale public service reform, which will include alignment with the Constitution of regulatory provisions on public servants' right to strike, is about to be initiated. However, it must be noted that as at June 2008 public service reform had not yet started: even no new Draft Public Service Act has been prepared.[310]

The Chancellor of Justice finds that both regulatory provisions on public servants' right to strike as well as regulatory provisions on sympathy strikes must be aligned with the Constitution immediately and any delays in resolving an unconstitutional situation are non-permissible.

It must be noted here that the right of salaried employees to take joint measures for achieving their work-related rights is important, as collective action yields more effective results in achieving lawful objectives than action by single individuals.[311] As a rule, peaceful means, such as negotiations, consultations and agreements, are used for achieving work-related rights and interests. The right to strike is foreseen for extreme cases when people performing work have not reached their lawful and justified work-related positions by peaceful means. It must be noted here that mere existence of a possibility to strike usually guarantees the actual and effective functioning of other, peaceful collective measures.

In the Chancellor's opinion, it is also important to note that on a European level the need to pay more attention to the social facet of society and to people's right to fight for their work-related rights is increasingly stressed. The European Court of Justice has found that employees' right to fight collectively for their rights and interests, including by way of striking, is a recognised fundamental right in the legal order of the European Union, facilitating social development of societies.[312] The Chancellor finds that the message of the Court of Justice is significant and demonstrates that on a pan-European level the need to recognise the right of salaried employees to use different means in fighting for their rights and interests is seen as essential in ensuring social cohesion of societies and welfare of the population. The Estonian government should make itself aware of this as well.

In addition, it is important to note that an effective and efficient system for resolving labour disputes must be put in place in Estonia.

2. Involuntary confinement in Aa Care Home (OÜ Häckes)

Case No. 7-6/070274

(1) Based on a petition by an individual involuntarily confined in Aa Care Home, the Chancellor of Justice verified the practices of the care home in preventing individuals from leaving.

(2) In spring 2004, the petitioner submitted to Tallinn City Centre Administration an application for placement under care. By its decision of 27 September 2004, the Tallinn Social Welfare and Healthcare Department placed the petitioner in Aa Care Home, where the petitioner stayed starting from 09 July 2004.

On 19 February 2007, the petitioner filed a complaint with the Chancellor of Justice, stating that they were in confinement in the social welfare institution against their will and that despite repeatedly addressing the agency which had placed them under care, the staff of the care home had not let them leave the social welfare institution.

The Chancellor of Justice sent a request for information to the provider of the care service, the Chairman of the Management Board of OÜ Häcke.

From the documents forwarded by the Chairman of the Management Board of OÜ Häcke, it was apparent that the petitioner was staying under care in the care home at their own request. The Chairman of the Management Board explained that the petitioner was staying in the secure unit of the care home because outside the unit they disturb the peace of the care home. The Chairman of the Management Board also specified that since all customers stay at the care home on the basis of a placement letter by the local authority of their place of residence, the care home does not have the right to allow the customer to leave without authorisation, unless the customer can present a place of accommodation where they will be staying. Additionally, the Chairman of the Management Board admitted that the petitioner may leave the social welfare institution, provided that the local authority which placed them under care (Tallinn Social Welfare and Healthcare Department) grants its consent.

The Chancellor of Justice addressed the Head of Tallinn Social Welfare and Healthcare Department for further clarification of the circumstances.

310 As at 01 June 2008.

311 T. Novitz. International and European Protection of the Right to Strike. Oxford 2003, pp. 6, 67.

312 Judgment of 18 December 2007 of the European Court of Justice in case No. C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, par. 91, 103–105; judgment of 11 December 2007 of the European Court of Justice in case No. C-438/05, *International Transport Workers Association and others v Viking Line ABP, OÜ Viking Line Eesti*, par. 44, 77–79.

The Head of Tallinn Social Welfare and Healthcare Department explained that bases for terminating the care home service include violation of the internal rules of the care home, the free will and wish of the individual concerned. The Head of the Department affirmed to the Chancellor that it was not necessary to request additional consent from the local authority.

(3) The main question in the petitioned matter was whether refusal to terminate the care service provided to the petitioner was lawful.

(4) Pursuant to the procedure set out in the Social Welfare Act, care in a social welfare institution may take place on the basis of an individual's will (voluntarily) or against an individual's will (involuntarily). As a rule, social welfare services, including the care service, are provided on the basis of a request by an individual. The conditions upon which an individual may be placed under care in a social welfare institution are in § 19 of the Social Welfare Act. Under this provision, an individual is placed in a social welfare institution without their consent or the consent of their legal representative upon the existence of the following circumstances:

1) the individual has a severe mental disorder which restricts their ability to understand or control their behaviour;
2) if upon failure to place the individual in a social welfare institution the person poses a danger to himself or herself or to others;
3) application of earlier measures has not been sufficient or use of other measures is not possible.

Imposing care in a social welfare institution against the individual's will is only justified in case of simultaneous presence of the listed circumstances and the need to impose care against the will of the individual has been decided by a court.

The rights of individuals staying in social welfare institutions may only be restricted to the extent and in the manner established by law. The respective rules are based on § 20 of the Social Welfare Act and the Minister of Social Affairs Regulation No. 82 of 30 May 2002 "The procedure for applying restrictions in a social welfare institution", adopted under § 20 of the Social Welfare Act. In the petitioned matter, the provisions regulating restriction of an individual's freedom of movement are of principal importance.

Under § 20(1) clause 1 of the Social Welfare Act, an individual's freedom of movement in a social welfare institution may be restricted only so far as this is necessary to prevent leaving a person without supervision and to protect the rights and freedoms of others. Under § 5 of the Minister of Social Affairs Regulation No. 82 of 30 May 2002, individuals placed under involuntary care on the basis of a court decision may stay outside the social welfare institution only if accompanied by a staff member of the institution. Staff of the social welfare institution ensure prevention of leaving other individuals without supervision.

By interpreting the norms in combination, it becomes apparent that the objective of a restriction of freedom of movement in a social welfare institution is to protect individuals under care from potential harm caused by other individuals under care. The second objective is to protect individuals under care from external risks. But in this regard the permitted extent of restriction of freedom of movement varies. Freedom of movement may be restricted further in the case of individuals who have been placed in the social welfare institution on the basis of a court decision and may thus only exit the social welfare institution together with a member of staff of the institution. The respective restriction has not been imposed on individuals who stay at the institution at their own request. Thus, only individuals placed in a social welfare institution on the basis of a court decision are prohibited from leaving the institution. If an individual stays in a social welfare institution on the basis of an expression of their own will, restriction of their freedom of movement and provision of the service without the individual's consent is not justified. Termination of a care service cannot be refused on the grounds that the individual concerned does not have a place of residence outside the social welfare institution or refuses to say where they would be staying.

Having assessed the circumstances related to restricting the petitioner's freedom of movement, the Chancellor of Justice concluded that the social welfare institution did not have a legal basis for restricting the petitioner's freedom of movement. Only a court may evaluate the need for involuntary care of an individual. Since a court judgment had not been made in respect of the petitioner to place the petitioner under involuntary care in a social welfare institution, the care service could only be provided in the case of the individual's valid consent. Since the petitioner repeatedly expressed the wish to terminate the provision of the care service, the care home lacked the petitioner's consent for further care.

(5) The Chancellor of Justice proposed to OÜ Häcke to comply with the principles of lawfulness and good administration. As a result of the proceedings, OÜ Häcke terminated provision of the care service to the petitioner. The care home also amended its internal rules so that, as a precondition for terminating the care service, an individual no longer needs to request the consent of the agency which placed them under care.

3. Extension of insurance cover for non-residents by the Estonian Health Insurance Fund

Case No. 6-3/070081

(1) Based on a petition, the Chancellor initiated supervisory proceedings concerning the matter of whether possession of a personal identification code as a compulsory precondition for extension of health insurance coverage is lawful.

(2) Section 12(1) clause 5 of the Minister of Social Affairs Regulation No. 101 of 18 August 2004 "List of documents and the data contained therein necessary for creating, terminating, and suspending insurance coverage by the Estonian Health Insurance Fund" states as follows:

"12. List of insurable persons
(1) The list of insurable persons must contain the following data:

[…]

5) personal identification code of the insurable person;"

The Chancellor of Justice was petitioned by a foreign national who drew the Chancellor's attention to the matter. The petitioner claims that the time of creating health insurance coverage in Estonia for Estonian citizens and citizens of other European Union Member States is different, since the employer must include in the list submitted to the Estonian Health Insurance Fund, which is necessary to create health insurance, the personal identification codes of employees in addition to their names. If a permanent resident of Estonia and an individual from another EU Member State commence work with the same employer on the same date it is not possible to ensure health insurance coverage from the same date for individuals who commenced work simultaneously. The reason is that upon starting work an individual from another EU Member State may lack an Estonian personal identification code. The issue of a personal identification code by the Citizenship and Migration Board may take up to one month. Yet the fact that insurance coverage is not created due to lack of a personal identification code does not waive the employer's obligation to pay social tax for the employee.

The Chancellor of Justice submitted a request for information to the Minister of Social Affairs.

The Minister replied that it was possible for a citizen of an EU Member State who commences work in Estonia and simultaneously applies for a personal identification code via different procedures, as well as for the employer of this employee, to apply for health insurance coverage for the individual. An individual who does not have a personal identification code, will be entered in the Health Insurance Database without an Estonian personal identification code provided that the conditions for creation of health insurance coverage set out under the Health Insurance Act are met and social tax is paid for the individual or by the individual on the basis and under the procedure provided by law or provided that the competent authority of the individual's country of residence has confirmed the fact that the person is insured. According to the Minister of Social Affairs, it only takes the Estonian Health Insurance Fund a couple of days to obtain from the competent authority of another EU Member State confirmation of whether the person is insured, and in the final stage the procedure does not lead to different treatment between permanent residents of Estonia and employees from another EU Member State. It is true, however, that if an individual from another EU Member State who commences work in Estonia has not previously enjoyed health insurance coverage in their country of residence, the individual's health insurance in Estonia can be created only if the individual has an Estonian personal identification code or if the individual has paid social tax or if social tax has been paid for the individual. Upon receipt of social tax, the individual without the Estonian personal identification code will be entered in the Health Insurance Database and their data will be processed manually. The Minister added that it was not possible for the Estonian Health Insurance Fund to issue European Health Insurance Cards to individuals who have been entered in the Health Insurance Database but who do not have an Estonian personal identification code, since the card is a document issued on behalf of the state to prove health insurance coverage and by which the state assumes financial commitments. To summarise, the Minister admitted the occurrence of unequal treatment and justified it by the fact that the common basis for national IT solutions developed by the Ministry of Economic Affairs and Communications and the Ministry of Internal Affairs is use of the Estonian personal identification code in all domestic databases. All state registers, including the Health Insurance Database maintained by the Estonian Health Insurance Fund, are based on use of the Estonian personal identification code. It is impossible not to use the Estonian personal identification code in the Health Insurance Database since this would not comply with the information technology standard developed and used in Estonia.

(3) The principal legal issue in the case was whether the fundamental right to equality was guaranteed in creating insurance cover for non-residents by the Estonian Health Insurance Fund.

(4) Matters related to solidarity-based health insurance are regulated by the Health Insurance Act. Under § 5(1) of the Health Insurance Act, an insured person is a permanent resident of Estonia, an individual living in Estonia on

the basis of a temporary residence permit or a right of residence, for whom the payer of social tax is liable to pay social tax or who pays social tax for himself or herself to the extent, by the deadlines and pursuant to the procedure provided by law, as well as an individual having equal status to these individuals. Among others, an individual who has been employed on the basis of a fixed-term employment contract exceeding one month or on the basis of an employment contract for an unspecified term, is also, irrespective of their citizenship, considered to be an insured person for whom the payer of social tax is liable to pay social tax. Under § 6(1) of the Health Insurance Act, insurance cover for these individuals is created upon expiry of a fourteen-day waiting period, calculated from commencing work or entering into service, if the employer submits the documents necessary for making the insurance cover entry into the Health Insurance Database within seven calendar days from the time the individual commenced work or entered into service. Should the employer submit the necessary documents after expiry of the seven-day period, insurance cover is created from the moment of making the insurance cover entry in the Health Insurance Database, but not before the waiting period of fourteen days, calculated from commencing work or entering into service, has passed. The Minister of Social Affairs establishes by regulation the list of documents and the data contained therein necessary for creating, terminating, and suspending insurance coverage.

The Minister of Social Affairs enacted the Regulation on 18 August 2004. Under § 4 of the regulation, the document to be submitted for creation of insurance cover for persons mentioned under § 5(2) clauses 1–6 of the Health Insurance Act is the list of insurable persons. Compulsory data to be contained in the list of insurable persons are specified under § 12 of the regulation. Under § 12(1) clause 5 of the regulation, the list submitted to the Estonian Health Insurance Fund must also contain, among other data, the personal identification code of the insurable person.

Under § 50(2) of the Population Register Act, a personal identification code is formed, inter alia, to a citizen of the European Union, of a member state of the European Economic Area or of the Swiss Confederation upon first registration of their residence in Estonia. The procedure for forming and issuing personal identification codes is regulated in more detail in the Minister of Regional Affairs Regulation No. 4 of 07 January 2005. Under the regulation, if an individual has not previously been issued a personal identification code, the Citizenship and Migration Board will issue it upon issuing an identification document, during processing a residence permit or right of residence application, or during another procedure provided by law. For issuing a personal identification code to a citizen of the European Union whose place of residence is registered in Estonia for the first time and who has not previously been issued a personal identification code, the individual must personally apply in writing to the competent agency of the local authority of their place of residence, after which the local authority will process the issue of a personal identification code according to the same procedure as the Citizenship and Migration Board. Thus, the issue of a personal identification code to a citizen of another EU Member State may indeed take up to one month.

Section 28(1) of the Constitution lays down everyone's right to protection of health as an important fundamental social right. To guarantee the right to protection of health, the state has the duty to take active measures and create a health insurance system. However, in the process of creating and regulating a health insurance system, § 12 of the Constitution, which establishes the fundamental right to equality, must also be observed. Section 12 of the Constitution, under which everyone is equal before the law, constitutes a general fundamental right to equality. In addition to equality in applying law, the fundamental right to equality also extends also to equality in law-making.[313] Thus, implementing legislation may not automatically lead to unequal arbitrary treatment of two equal groups of individuals. Also, the state may not cause unequal arbitrary treatment of individuals when creating mechanisms for performing its different tasks. Nor can unequal treatment be justified by difficulties of a merely administrative or technical nature.[314]

Under § 9(1) of the Constitution, the rights, freedoms, and duties of each and every person, as set out in the Constitution, are equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia. Yet, under the Health Insurance Act, for individuals having an Estonian personal identification code the right to health insurance cover is created after a fourteen-day waiting period calculated from commencing of work or entry into service and prior to actual payment of social tax. Individuals who do not have an Estonian personal identification code and are not insured in their previous country of residence do not have this right. Neither is a European Health Insurance Card issued to individuals not having an Estonian personal identification code if these individuals actually have health insurance coverage and have been entered in the Health Insurance Database maintained by the Estonian Health Insurance Fund.

To summarise, it can be concluded that the current system where an individual can be entered in the Health Insurance Database only if they have an Estonian personal identification code or, alternatively, following payment of social tax, does not allow equal treatment of individuals having an Estonian personal identification code and individuals not having the identification code upon making health insurance coverage available or upon issuing European Health Insurance Cards.

The Chancellor of Justice reached the conclusion that the current Health Insurance Database system, which is im-

313 M. Ernits. Kommentaarid §-le 12. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne [Comments on § 12 – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition]. Tallinn 2002, § 12 comment 1, 6.2.

314 Supreme Court Constitutional Review Chamber ruling of 21 January 2004, No. 3-4-1-7-03, par. 39.

peratively based on the personal identification code, does not conform to the requirement of equal treatment of each and every individual under § 12 of the Constitution.

(5) The Chancellor of Justice sent a memorandum to the Minister of Social Affairs, asking the Minister to create, in cooperation with the Minister of Internal Affairs, information technology solutions which would allow equal treatment of individuals who have an Estonian personal identification code and individuals who have not been issued an Estonian personal identification code in creating health insurance cover and issue of European Health Insurance Cards. The Chancellor also asked the Minister to amend the legislation regulating these issues so as to preclude unequal treatment of individuals in creating health insurance cover.

The Chancellor informed the petitioner of the results of the proceedings and of the proposal submitted to the Minister of Social Affairs.

The Minister of Social Affairs amended Regulation No. 101 of 18 August 2004 "List of documents and the data contained therein necessary for creating, terminating, and suspending insurance coverage by the Estonian Health Insurance Fund". The version of the Regulation in force from 21 September 2007 takes into account the circumstances outlined in the Chancellor's proposal.

4. Inspection visit to Aa Care Home (OÜ Häcke)

Case No. 7-9/071015

(1) On 18 June 2007, the Chancellor of Justice conducted an unannounced own-initiative inspection visit to Aa Care Home, and on 02 August 2007 another own-initiative planned inspection visit to the same institution. During both visits, the Chancellor verified the guarantee of fundamental rights and freedoms at the institution.

Aa Care Home is a general care home where care services are provided by OÜ Häcke (Chairman of the Management Board Mr. Ilmar Köök). According to the Chairman of the Management Board, 182 customers were staying at the care home at the time of the inspection visit. According to the Commercial Register, the activities of OÜ Häcke include care of the elderly and social services.

(2) The Chancellor of Justice verified whether restricting individuals' freedom of movement in the secure unit of the care home was lawful, whether placing customers in an isolation room was carried out in compliance with requirements, and whether the isolation room itself complied with requirements. The Chancellor also verified whether placement of individuals with special mental needs to the general care home was carried out in accordance with fundamental rights, whether rehabilitation services were available, and whether the County Governor had carried out the required control over the quality of care services.

(3.1) Possibilities of imposing restrictions in a social welfare institution are established under § 20 of the Social Welfare Act and the procedure for applying the restrictions has been established by a Minister of Social Affairs Regulation. The restrictions include restricting freedom of movement and segregation from other individuals in care.

Individuals may only be segregated from other individuals in a social welfare institution in case of occurrence of the circumstances mentioned under § 4 of the Minister of Social Affairs Regulation No. 82 of 30 May 2002 "The procedure for applying restrictions in a social welfare institution" (the 'procedure for applying restrictions'). Under § 4(1) of the procedure for applying restrictions, an individual staying in a social welfare institution may be segregated in case of suspicion of occurrence of circumstances under § 11(1) of the Mental Health Act or in case of violations of public order, if segregation is the only way to avoid the individual directly and seriously endangering themselves or other individuals or their property.

Section 11(1) regulates providing involuntary emergency psychiatric care. The provision states that an individual is admitted to a psychiatric department of a hospital for emergency psychiatric care without the consent of the person or their legal representative, or treatment of an individual is continued regardless of their wishes, only if all of the following circumstances exist:

1) the individual has a severe mental disorder which restricts their ability to understand or control their behaviour;
2) without in-patient treatment, the individual endangers the life, health, or safety of themselves or others due to a mental disorder; and
3) other psychiatric care is not sufficient.

Additionally, § 4(1) of the procedure for applying restrictions lays down that isolation of an individual is allowed in a social welfare institution until the arrival of an ambulance crew or the police.

In each case of isolation, the need for isolation must be justified by a decision signed by the head of the social welfare institution or their deputy. The decision must be justified and the presence of a direct and serious risk must be con-

sidered on each occasion. Section 4(2) of the procedure for applying restrictions also establishes a requirement whereby an isolated individual must be kept under continuous supervision of a social welfare institution staff member.

During both visits, the Chancellor of Justice studied the justifications of isolation decisions and, on the basis of evidence reviewed, concluded that several justifications set out in isolation decisions did not comply with the requirements under § 4 of the procedure for applying restrictions. References to the facts that a client was intoxicated, ran naked along the corridor, urinated in public, etc., cannot be considered sufficient justifications. Isolation of an individual for these reasons is not permitted, since it is not uniformly clear how any of these activities causes a direct and serious risk to the life, health, or safety of the individual or a risk of violence towards other individuals or their property. Similarly, isolation for the purposes of sobering up or for other disciplinary or preventive purposes is not permitted. Isolation can only be applied as a measure of last resort and upon the presence of a serious risk. The procedure for placement in an isolation room must be transparent and verifiable and the supervisory body must be able to evaluate in retrospect whether each isolation decision was duly reasoned.

Upon isolation, continuous supervision of an isolated person, including both visual monitoring of the individual as well as creation of a similar possibility for the individual (i.e. the individual must also see that they are being supervised), must be guaranteed. The isolated person must have the possibility to notify a social welfare worker of their needs either through a window or, in extreme cases, by using an alarm switch.

Requirements for the isolation room of a school for pupils in need of special treatment due to behavioural problems and for its furnishings are established by the Minister of Social Affairs Regulation No. 33 of 08 February 2002 "Health and safety requirements for the isolation room and its furnishing". Section 7 of internal prison rules lays down requirements for the furnishing of rooms, cells, and punishment cells. These also apply to an isolated locked cell used in prisons on a similar basis as an isolation room.

The first inspection revealed serious shortfalls with regard to the requirements applicable to rooms. The room could not be monitored, lighting was insufficient, and the general sanitary condition of the room was extremely poor. By the time of the second inspection, the sanitary conditions of the isolation room had been improved considerably, a window had also been installed on both doors (a double door) as well as an alarm switch enabling the isolated individual to switch on a red alarm lamp in the corridor.

Despite the improvements, the isolation room in Aa Care Home was still non-compliant. Two beds had been placed in the room, leading to the conclusion that if necessary more than one individual is placed in the room. Simultaneous placing of several individuals in the same isolation room is not permitted as such practice contravenes the purpose of isolation. The purpose of isolation is to isolate a dangerous individual from other individuals staying in the institution and this objective cannot be obtained by locking several dangerous individuals in one room.

On that basis, the Chancellor recommended Aa Care Home to bring its practice of placement in the isolation room into line with the Minister of Social Affairs Regulation No. 82 of 30 May 2002 "The procedure for applying restrictions in a social welfare institution" and the requirements applicable to isolation rooms, contained the Minister of Social Affairs Regulation No. 33 of 08 February 2002 "Health and safety requirements for the isolation room and its furnishing".

(3.2) According to the internal rules of Aa Care Home, the ground floor of the institution houses a secure unit. In essence, this is a closed unit with the rooms having iron doors that can be locked from the outside. During the first unannounced inspection visit, 15-20 individuals were under care in the unit, the door leading to the unit was closed during the entire visit and the doors to several rooms were closed too. A client of the care home who clearly exhibited special mental needs was on a rampage behind one of the closed doors which did not enable monitoring, as well as in the unit corridor later.

A 24-hour secure unit, where care home clients with an increased danger level are placed temporarily until the danger has passed, has been created by the Annex of 15 July 2002 to the Internal Rules of Aa Care Home. Reference has been made to the Minister of Social Affairs Regulation No. 4 of 03 January 2002 "Obligatory requirements applicable to social welfare institutions and social welfare services" as the legal basis for creation of the unit. During the inspection visit, individuals receiving care voluntarily as well as individuals receiving care on the basis of a court decision were staying in the secure unit.

Section 5 of the Minister of Social Affairs Regulation No. 82 of 30 May 2002 "The procedure for applying restrictions in a social welfare institution" lays down the basis and the procedure for imposing restrictions on freedom of movement. Under § 5(1) of the procedure, freedom to move freely may be restricted in respect of individuals who have been placed under involuntary care on the basis of a court decision under § 19 of the Social Welfare Act or if restrictions are necessary to prevent leaving an individual without supervision. Under § 5(2), persons who have been placed under involuntary care on the basis of a court decision may stay outside the social welfare institution only if accompanied by a staff member of the institution; and under subsection (3), restriction of movement of other individuals in a social welfare institution to prevent leaving an individual without supervision is ensured by supervision by the social welfare institution staff.

Restricting the freedom of movement of individuals staying in the care home voluntarily by locking them in rooms or in a separate part of the premises is unlawful. Under the current legal order, social welfare institutions are not entitled to establish any supplementary grounds to restrict movement in addition to those specified under § 20 of the Social Welfare Act and under the Minister of Social Affairs Regulation. Yet the annex to the Internal Rules of Aa Care Home establishes a possibility of temporary placement of clients with an increased danger level in the secure unit until the danger has passed. If it is necessary to restrict movement in order to prevent leaving an individual without supervision, this can only be done along with supervision by a social welfare institution staff member, following § 5(2) of the procedure for applying restrictions. Prevention of leaving an individual without supervision by locking the individual in a closed room is not permitted.

Since Aa Care home is not entitled to establish additional restrictions of movement, the Annex to the internal rules of Aa Care Home contravenes § 20 of the Social Welfare Act and § 5 of the procedure for applying restrictions.

Movement may be restricted in cases where an individual has been placed in involuntary care on the basis of a court decision under § 19 of the Social Welfare Act. In such cases, an individual may only stay outside the social welfare institution if accompanied by a staff member of the institution. Under § 5(4) of the procedure for applying restrictions, the requirements established for 24-hour secure care services by the Minister of Social Affairs Regulation No. 5 of 09 January 2008 of "Obligatory requirements applicable to social welfare services provided to persons with special mental needs and the procedure for providing the services" have to be followed when applying restriction of movement.

Inspection revealed that Aa Care Home did not meet the requirements established for special care services and thus the rights of individuals in involuntary care were not guaranteed.

The Chancellor proposed to Aa Care Home immediately to stop unlawful restriction of individuals' freedom of movement and to bring the internal rules of Aa Care Home into line with legislation in force.

The Chancellor of Justice also proposed to Aa Care Home to grant individuals staying in the care home on the basis of a court decision access to conditions arising from the requirements established for 24-hour secure care services. Should creating the respective conditions prove impossible, Aa Care Home is not entitled to admit clients placed under involuntary care.

(3.3) According to its statutes, Aa Care Home provides only general care services and lacks facilities for providing special care services. However, medical examination records revealed that several of the care home's clients had been placed in special care by medical specialists, yet the local authority as the individual's guardian had ignored the medical prescription and placed the individual in a general care institution.

The situation described seriously endangers the process of guaranteeing fundamental rights and freedoms of individuals. As individuals placed in special care are usually unable to be responsible for their actions and may pose a danger to themselves and to others, they need the care of specially trained staff. It is inadmissible to have a situation where local authorities, due to a shortage of places in special care institutions, send individuals under their guardianship to general care institutions which lack the conditions and skills for caring for special mental needs. This practice leads to a situation where a general care home, unable to handle difficult clients, is forced to unlawfully restrict their movement in order to avoid danger.

Organising special care is a task of the state, so that the state must guarantee a sufficient number of special care service places. Each person who has been diagnosed with a serious or chronic mental disorder and who meets the criteria in Annex 1 to the Minister of Social Affairs Regulation No. 5 of 09 January 2008 "Obligatory requirements applicable to social welfare services provided to persons with special mental needs and the procedure for providing the services", must upon need be guaranteed a place immediately with a social welfare institution providing the service is prescribed to them by a doctor.

On that basis, the Chancellor of Justice proposed to Aa Care Home that in the future they should refuse to provide general care services to individuals who have been prescribed another type of care services, for the provision of which the conditions do not exist in Aa Care Home.

(4) Following the inspection visit, the Chancellor of Justice made proposals and recommendations to the Chairman of the Management Board of OÜ Häcke for guaranteeing fundamental rights of individuals. The Chancellor performed a follow-up inspection after six months to verify compliance with the recommendations and proposals.

By the time of the follow-up inspection, Aa Care Home had taken measures for following all the Chancellor's recommendations and proposals. Inter alia, the isolation room had been made compliant, internal documentation had been aligned with legislation in force, and rehabilitation programmes had been requested for over half the individuals in need of rehabilitation.

5. Inspection visit to sole proprietor Tamara Luigas Home of Compassion for Children with Disabilities

Case No. 7-9/071517

(1) On 27 November 2007, the Chancellor of Justice conducted an own-initiative inspection visit to sole proprietor Tamara Luigas Home of Compassion for Children with Disabilities to verify guarantees of fundamental rights and freedoms.

At the time of the inspection visit, 21 individuals with special needs were staying at the Home of Compassion, of whom 18 were under 24-hour care and 3 under day-care. 17 individuals had profound disability and 4 severe disability. Seven individuals had multiple disability. The age of individuals under care was 11-30 years, of whom 12 were adults (i.e. over 18 years old).

The Home of Compassion was founded in 1994 as Kohtla-Järve City municipal institution (Home of Compassion and School for Children with Disabilities). The legal status changed in 1999 when the institution became sole proprietor Tamara Zimina (now Luigas) Home of Compassion for Children with Disabilities. The activity description entered in the Commercial Register is "care of children and young people with severe and profound mental disability, teaching skills of self-service and developing intellect".

Individuals staying at the Home of Compassion are referred by guardianship authorities (mostly Kohtla-Järve City) who finance the care service from their budgets. Kohtla-Järve City has concluded a general cooperation agreement and individual financing agreements in respect of each child with Tamara Luigas as sole proprietor.

(2) The Chancellor verified whether children were ensured a care service corresponding to their age, whether rehabilitation service was available to children, and whether in its activities the institution followed the requirements imposed by legislation.

(3.1) The replies by the Home of Compassion to a preliminary questionnaire prior to the inspection visit showed that out of 21 individuals under care, nine were children (minors). When looking at the files of individuals under care, it was found that out of nine children only four were without parental care and thus entitled to state-provided substitute home service under § 15^2(1) of the Social Welfare Act.

Section 18(1) of the Social Welfare Act contains an exhaustive list of social welfare institutions. Under this provision, 24-hour care of children may take place in a substitute home, a residential educational institution, or a youth home (children over the age of 15), and temporary 24-hour care may be provided in a shelter. Additionally, § 18(1) mentions support homes as institutions providing daytime or periodic 24-hour care for disabled persons who live at home. Also special care homes exist for living, care, and rehabilitation of persons with severe mental disabilities.

The Home of Compassion does not classify under any of the above institutions. Based on the age of individuals under care, the Home of Compassion cannot be considered a child care institution, as the majority of individuals under care are adults and would need service in special social welfare institutions. However, the Ministry of Social Affairs has not established more specific requirements for (children's) social welfare institutions, and therefore determination of the type of the institution is difficult.

Under the Social Welfare Act (§ 18(2) and (3)), in general 24-hour social welfare institutions are separate for children, the elderly, persons of unsound mind, adults with mental disabilities, and other socially incapable persons. If necessary, a rural municipality council or city council may establish mixed-care 24-hour social welfare institutions, where separate departments are provided for persons in need of different care.

Due to significant age differences of individuals under care, the Home of Compassion has not been able to guarantee developing activities to all individuals corresponding to their age, health, and level of development. The current premises of the Home of Compassion do not enable creation of two separate departments for children and adults.

On that basis, the Chancellor proposed to sole proprietor Tamara Luigas to bring the institution's activities into line with § 18(2) of the Social Welfare Act, so as to ensure a care service corresponding to the age and situation of individuals under care.

The Chancellor recommended Ida-Viru County Governor to assist and support Tamara Luigas in reorganising the Home of Compassion for Children with Disabilities, based on development perspectives for social welfare services in the county.

The Chancellor also recommended the Minister of Social Affairs to draft provisions regulating the activities of different social welfare institutions in order to specify the aims of different types of institutions, the content of their activities, and general requirements for services provided.

(3.2) Individuals under care at the Home of Compassion are all persons entitled to state-funded rehabilitation services under § 11^2(1) of the Social Welfare Act. Replies by the Home of Compassion to the preliminary questionnaire prior to the inspection visit demonstrated that rehabilitation plans had been made only for four individuals under care. Inspection also revealed that access to rehabilitation services had not been arranged and in practice no rehabilitation services were provided to individuals under care.

On that basis, the Chancellor proposed to sole proprietor Tamara Luigas to arrange immediate access to the services indicated in the rehabilitation plan to all individuals under care.

(4) Following the inspection visit, the Chancellor made a recommendation to sole proprietor Tamara Luigas, the Ida-Viru County Governor, and the Minister of Social Affairs for guaranteeing fundamental rights of individuals. The Chancellor will conduct a follow-up inspection in six months to verify compliance with the proposals and recommendations.

6. Inspection visit to psychiatric clinic of Tartu University Hospital Foundation

Case No. 7-9/070049

(1) On 21 February 2007, the Chancellor of Justice conducted an own-initiative inspection visit to the psychiatric clinic of Tartu University Hospital Foundation.

Since 1999, the clinic operates as a structural unit of Tartu University Hospital Foundation. The main aims of the clinic are ensuring psychiatric care, research-based undergraduate and post-graduate training in psychiatry and clinical psychology, in-service training, and profession-oriented scientific fundamental and applied research based on specialised departments. The clinic has three departments: acute psychiatry, psychiatry, and a children's department. Services are mainly provided to inhabitants from southern Estonia, and child psychiatry services also to inhabitants from East-Viru County.

The psychiatric clinic has 90 in-patient beds. The acute department has 38 beds, of which eight are in the acute psychiatry ward and five in the observation ward. The psychiatric department has 36 beds, of which six are in the eating disorders centre, six in observation wards, and two in sleep research wards. The children's department has 16 beds, of which ten are in the children's ward block and six in young people's ward block. The young people's ward block has two separate wards for rehabilitation treatment of juvenile drug addicts. All departments have a video monitoring system.

The clinic has 127.5 staff positions, of which on average 118.19 were filled in 2006 (23.27 doctors, 46.29 nurses or assistant nurses, 30.35 caregivers, and 17.83 support staff). In 2006, the number of in-patient treatment cases was 1846, the average duration of treatment was 14.6 days. The number of cases of involuntary treatment was 668, the average duration of treatment was 20.3 days, of which 16.1 days were connected with involuntary treatment.

(2) During the inspection, the Chancellor, fulfilling in parallel his function as the national preventive mechanism under Art 3 of the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel or Degrading Treatment or Punishment, verified whether fundamental rights and freedoms of patients were guaranteed during treatment.

(3.1) The preliminary questionnaire filled out prior to inspection as well as conversations in the clinic on 21 February 2007 revealed that according to the definition of means of restraint laid down in the in-house administrative act "Internal rules of the psychiatric department" only physical restraint is used as a means of restraint. Isolation in a special room is not used as a means of restraint in the clinic. Additionally, clause 3.9 of the in-house administrative act "In-patient treatment regimes in the psychiatric clinic" establishes that applying means of restraint is only allowed in conditions of the third treatment regime.

Under § 20(1) of the Constitution, everyone has the right to liberty and security of the person. A person may be deprived of liberty only in cases and according to the procedure prescribed by law. The procedure for applying means of restraint is established by the Mental Health Act. Under § 14 of the Act, means of restraint are used with regard to persons with mental disorders in the circumstances provided under § 11(1) of the Act if an immediate danger exists of bodily harm to themselves or violence toward other persons and other measures for eliminating danger have been insufficient. Isolation and physical restraint are used as means of restraint. Isolation means placing a person in an isolation room and confining them in that room under supervision of medical staff. Physical restraint means use of mechanical means (straps, special clothing) in order to restrict the liberty of movement of a person in an isolation room under supervision of medical staff.

In-house administrative acts of the clinic revealed that use of means of restraint was permitted even when no legal basis existed under the Mental Health Act. For example, under clause 2.5 of the "Internal rules of the psychiatry

clinic", patients subject to the third treatment regime are only allowed to exit the observation ward with permission of the doctor providing treatment and accompanied by care staff. The same regulation is also contained in clause 3.6 of "In-patient treatment regimes in the psychiatric clinic". Restriction of freedom of movement essentially amounts to long-term isolation which, however, according to internal rules, is not preceded by application of means of restraint.

Under clause 1.4 of "In-patient treatment regimes in the psychiatric clinic", in case of being subject to the first treatment regime (i.e. voluntary treatment) patients are entitled to move around outside the grounds of the department with written permission of the doctor providing treatment. This amounts to restriction of freedom of movement of persons who have voluntarily come for treatment and in respect of whom no right exists to restrict fundamental rights to such an extent, except when applying restrictions as means of restraint.

On that basis, the Chancellor proposed to the administration of the clinic to revise the internal work arrangements so as to avoid using means of restraint in the form of isolating individuals if the preconditions for using means of restraint under § 11 of the Mental Health Act were not fulfilled.

(3.2) While touring the clinic on 21 February 2007, it was found that the acute department on the ground floor of the clinic was in a very poor condition. According to the administration, the department had not undergone any major repairs since the clinic moved to its current location in 1987. Renovating the acute department has been hampered by lack of money. However, in 2006 a renovation plan and reconstruction design of the acute department were prepared and are currently with Tartu City Administration for approval. According to the administration of the clinic, the extremely poor conditions in the acute department are depressing for both patients and staff.

Individuals under involuntary treatment are enabled only a 30-minute walk in the fresh air for each 24 hours. The reason for the very short walking time is absence of a suitable walking area, which has also not been constructed due to lack of money. However, restricting walking time to an unreasonably short period infringes upon the fundamental right to free self-realisation to a larger extent than is necessary in case of individuals subject to involuntary treatment.

On that basis, the Chancellor proposed to the Minister of Social Affairs and the Chairman of the Board of the Estonian Health Insurance Fund to cooperate for quickly finding the necessary resources for renovating the acute department and patients' walking yard at the psychiatric clinic of Tartu University Hospital Foundation, so as to ensure conditions of stay in line with human dignity to patients and reduce interference with the right to free self-realisation of individuals subject to involuntary treatment.

(4)Following the inspection visit, the Chancellor made proposals to the Minister of Social Affairs, the Chairman of the Board of the Estonian Health Insurance Fund, and the administration of the psychiatric clinic of Tartu University Hospital Foundation. Six months later, the Chancellor conducted a follow-up inspection to verify compliance with the proposals and the memorandum.

The Minister of Social Affairs in her reply informed the Chancellor that renovation of the acute department and patients' walking yard in the psychiatric clinic is planned to start in January 2008 and the work would take five months.

The head of the psychiatric clinic of Tartu University Hospital Foundation replied that, in order to avoid possible misinterpretations, the wording of clause 3.1 of "In-patient treatment regimes in the psychiatric clinic" was amended. In the new version, subjecting a patient to the third treatment regime presumes a decision for imposing involuntary treatment and applying the procedure for means of restraint. In addition, the head of the clinic explained that the wording of clause 1.4 of "In-patient treatment regimes in the psychiatric clinic" was also amended, so as to remove excessive restrictions in respect of individuals who have come for treatment voluntarily.

7. Inspection visit to the psychiatric clinic of Pärnu Hospital Foundation

Case No. 7-9/071096

(1) Advisers to the Chancellor of Justice conducted an own-initiative inspection visit to the psychiatric clinic of Pärnu Hospital Foundation on 05 September 2007. An individual who had been a client of the mental health service also participated in the inspection as an expert.[315]

The psychiatric clinic consists of four parts: in-patient department (with total 30 beds; its sub-departments include an acute department (eight beds), a general department (ten beds), a department for depression and anxiety disorders (12 beds)), an out-patient department (two drug addiction places for daytime in-patient treatment), a daytime in-patient treatment unit (eight supported employment positions), and a rehabilitation unit (three teams). In 2006, the most frequent diagnoses of patients in the in-patient department were addiction problems (37%), schizophrenic psychoses (23%), and mood disorders (21%).

315 The client's name cannot be disclosed in this report due to requirements relating to protection of sensitive personal data.

The clinic provides mental health care mostly in Pärnu County. The clinic also functions as an advanced-level service provider for Saare, Hiiu, and Rapla Counties. Some patients also come from other counties. Thus, the clinic is an important service provider for approximately 100 000 inhabitants in its service area.

From 2006 to date the clinic imposed involuntary treatment in 305 cases; the average duration of involuntary treatment was 4.93 days.

(2) During the inspection, advisers to the Chancellor of Justice, fulfilling in parallel the Chancellor's function as the national preventive mechanism under Art 3 of the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel or Degrading Treatment or Punishment, verified whether fundamental rights and freedoms of patients were guaranteed during treatment in the clinic.

(3.1) The clinic's responses to the preliminary questionnaire showed that the average duration of application of means of restraint was 4.32 days in 2005, 2.56 days in 2006, and 2.11 days in 2007. These data gave reason to suspect that the duration of applying means of restraint might contravene the opinion of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), according to which a patient must be released immediately when the emergency situation resulting in application of restraint ceases to exist.[316]

Interviews during the inspection revealed that the unit of registration in the register of means of restraint in the clinic was one day. Thus, the register also shows applications of means of restraint lasting a couple of hours as lasting one day.

The register where cases of application of means of restraint are registered only with a preciseness of one day does not enable adequate monitoring of cases of restraint and fails to provide an overview of their extent. Based on the CPT's 8th[317] and 16th[318] General Reports, every instance of the physical restraint of a patient (manual control, use of instruments of physical restraint, seclusion) should be recorded in a specific register established for this purpose as well as in the patient's file. The entry should include the times at which the measure began and ended, the circumstances of the case, the reasons for resorting to the measure, the name of the doctor who ordered or approved it, and an account of any injuries sustained by patients or staff. In addition, the CPT has stressed that patients should be entitled to attach comments to the register, and should be informed of this. Thus, the current register of applying means of restraint in the clinic does not meet the requirements, as it does not enable actual oversight of the number, frequency, and duration of instances of restraint.

On that basis, the Chancellor recommended the head of the psychiatric clinic to create a new register of applying means of restraint so as to meet the requirements, including the CPT recommendations for maintaining such a register.

(3.2) Under clause 2.2. of the "Guidelines for applying means of restraint in providing involuntary psychiatric treatment", a nurse may decide on the need to impose means of restraint in a dangerous situation.

Conversations during the inspection visit revealed that in practice staff were aware that in a dangerous situation under certain conditions other health care workers besides a doctor may decide on imposing means of restraint, but the decision on imposing means of restraint had always been made by a doctor.

The procedure and conditions for providing psychiatric care and the relationships with health care institutions which arise from providing psychiatric care are regulated by the Mental Health Act. Under § 14(3) of the Mental Health Act, means of restraint are used on the basis of decisions of doctors which are documented in medical files with justifications. The Act does not contain any exceptions to this norm.

In view of the above, the Chancellor proposed to the Management Board of Pärnu Hospital Foundation to bring clause 2.2 of "Guidelines for applying means of restraint in providing involuntary psychiatric treatment" into line with § 14(3) of the Mental Health Act, under which the need to use means of restraint is only decided by a doctor.

(3.3) Under clause 6 of "Guidelines for using a security service in providing involuntary psychiatric care", submitted to the Chancellor by the clinic, the reason for using a security service in the psychiatric clinic is the need to apply means of restraint. Means of restraint include physical restraint or isolation of an aggressive or dangerous patient. This is done by security staff under the guidance and supervision of a medical worker.

Applying means of restraint in itself is not a health service but a service supporting the provision of a health service. Thus, applying means of restraint could be performed by other specially trained individuals working in the institution besides doctors. Section 4 of the Security Act lists types of security services and states that the aim of a security service is to support the main service provided by an institution without interfering in that service. Section 32 of the Security Act lists the rights of security staff and, here too, no right is given to security staff to interfere in the main function of the institution. Security staff are given competence to detain an individual who hampers the in-

316 16th General Report on the CPT's Activities (CPT/Inf (2006) 35) par. 45. Available online at http:// www.cpt.coe.int/en/annual/rep-16.pdf.
317 8th General Report on the CPT's Activities (CPT/Inf (98) 12) par. 50. Available online at http:// www.cpt.coe.int/en/annual/rep-08.htm.
318 16th General Report on the CPT's Activities (CPT/Inf (2006) 35) par. 52. Available online at http:// www.cpt.coe.int/en/annual/rep-16.pdf.

stitution in performing its main function and then deliver the individual to a competent authority (e.g. the police). As the main function of a psychiatric clinic is providing psychiatric care, i.e. provision of a health service as well as activities related to provision of a health service (e.g. applying means of restraint, transport of individuals from one ward to another, care, etc), a security worker may not interfere with provision of psychiatric care. Security staff are not entitled to assist in applying means of restraint in respect of an individual even if the individual attacks other patients or staff. Only staff of the psychiatric clinic are authorised to restrain an individual. Security staff may take measures in the clinic in cases not related to provision of psychiatric care. For example, security staff may detain a visitor who attacks a patient or staff.

Inadmissibility of involving security staff in applying means of restraint was also emphasised by the Director General of the Health Care Board in a letter of 30 November 2005 to the Chancellor of Justice. The letter also mentioned that the attention of Pärnu Hospital Foundation had already been drawn to the issue.

On that basis, the Chancellor proposed to Pärnu Hospital Foundation to amend clause 6 of the "Guidelines for applying means of restraint in providing involuntary psychiatric treatment", so as to avoid participation of security staff in applying means of restraint."

(3.4) The clinic's responses to the preliminary questionnaire prior to inspection revealed that at night only one nurse and one caregiver were in the acute department with eight beds and only one caregiver in the general department with twelve beds.

The CPT in its 8th General Report[319] has emphasised that staff resources should be adequate in terms of numbers, categories of staff (psychiatrists, general practitioners, nurses, psychologists, occupational therapists, social workers, etc.), and experience and training. Deficiencies in staff resources will often seriously undermine attempts to offer activities individual approach and, further, they can lead to high-risk situations for patients. The CPT also emphasises the need to take measures to protect certain psychiatric patients from other patients who might cause them harm. This requires, inter alia, an adequate staff presence at all times, including at night and weekends.[320]

Shortage of staff may also lead to unnecessary restraint of patients. The purpose of restraint in such cases, including, for example, confining a patient in an accommodation ward or to a bed, is to facilitate work of staff at night. Shortage of staff may also lead to application of means of restraint as the first convenient measure by which staff safeguard themselves against problematic patients while performing other duties.
On the basis of the above considerations, the Chancellor proposed to Pärnu Hospital Foundation to review the clinic's available staff positions together with the head of the clinic and decide the need to create additional positions.

(3.5) The clinic's responses to the preliminary questionnaire revealed that, under the internal rules of the clinic, patients in the acute department had to wear hospital clothes. During interviews in the clinic it was found that the purpose of wearing hospital clothes is to rule out dangerous items, such as trouser belts, suspenders, and other similar items getting into the possession of patients. The hospital also justified the requirement for wearing hospital clothes by hygiene considerations.

The CPT in its 8th General Report has noted that the practice of continuously dressing patients in pyjamas/nightgowns is not conducive to strengthening personal identity and self-esteem; individualisation of clothing should form part of the therapeutic process.[321] Understandably, in certain cases dressing individuals in hospital clothes may be justified. This may take place, for example, if an individual arrives in hospital wearing extremely dirty or torn clothes or clothes which are very inconvenient for hospital stay. However individuals in hospital should as far as possible be allowed to use personal clothes appropriate for hospital stay.

On that basis, the Chancellor recommended the head of the psychiatric clinic of Pärnu Hospital Foundation to change the practice according to which patients in the acute department of the clinic were required to wear hospital clothes, and as far as possible enable patients to wear their own personal clothes if appropriate for hospital stay.

(4) Following the inspection visit, the Chancellor made a proposal to the Board of Pärnu Hospital Foundation and a recommendation to the head of the psychiatric clinic. The Chancellor will conduct a follow-up inspection to verify compliance with the proposal and recommendations in six months.

The chairman of the Board of Pärnu Hospital Foundation in his reply informed the Chancellor that clause 2.2 of the "Guidelines for applying means of restraint in providing involuntary psychiatric treatment" had been amended and aligned with § 14(3) of the Mental Health Act. Clause 6 of "Guidelines for using security service in providing involuntary psychiatric care" had also been amended, so as to rule out using security staff in applying means of restraint and providing a health service. The Chairman of the Board also informed the Chancellor that a psychiatrist had been hired in the psychiatric clinic, a psychiatric nurse in the in-patient unit, and an activity therapist. In addition, a new position for a psychiatrist had been created.

319 8th General Report on the CPT's Activities (CPT/Inf (98) 12) par. 42. Available online at http:// www.cpt.coe.int/en/annual/rep-08.htm.
320 *Ibid*. par. 30.
321 *Ibid*. par. 34.

The head of the psychiatric clinic of Pärnu Hospital Foundation in his reply informed the Chancellor that the procedure for registering cases of using means of restraint had been changed. Under the new procedure, the exact time of the beginning and end of applying means of restraint is registered, as well as injuries caused in the process of restraint, and the patient's assessment after applying means of restraint. Additionally, patients in the psychiatric department are no longer prohibited from wearing their own clothes if the clothes are appropriate for hospital stay.

8. Inspection visit to the psychiatric unit of Kuressaare Hospital Foundation

Case No. 7-9/070539

(1) On 18 May 2007, the Chancellor of Justice conducted an own-initiative inspection visit to the psychiatric unit of Kuressaare Hospital Foundation.

The psychiatric unit is part of the clinic for internal diseases of Kuressaare Hospital Foundation. The unit provides both in-patient and out-patient special psychiatric care to inhabitants of Saare County. The unit employs two psychiatrists, one clinical psychologist, one social worker, five medical nurses, and seven attendants. The unit has 15 beds.

In 2006, 376 persons were admitted for in-patient treatment, and 2598 out-patient appointments took place. The main types of diagnoses included non-psychological mental disorders (133 cases) and alcohol-induced disorders (112 cases). From the beginning of 2006 to April 2007, no involuntary treatment was applied in the psychiatric unit.

(2) During the inspection, the Chancellor, fulfilling in parallel his function as the national preventive mechanism under Art 3 of the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel or Degrading Treatment or Punishment, verified whether fundamental rights and freedoms of patients were guaranteed during treatment in the unit.

(3.1) Both the hospital's response to a preliminary questionnaire prior to the inspection visit and interviews conducted on-site revealed that the psychiatric unit was sometimes using the help of security staff to provide personal protection to health care workers in the course of applying means of restraint or some other activities. The same is apparent from clause 4.6 of the unit's internal act "Guidelines for applying means of restraint", under which the doctor who gave an order for applying means of restraint may call staff of a security firm to provide protection at the time of applying means of restraint. The security staff are entitled to intervene to protect medical staff and other patients if the person to be restrained endangers medical staff or other persons by their activity.

Under § 18 of the Constitution, no-one may be subjected to torture or to cruel or degrading treatment or punishment. Additionally, section 28(1) of the Constitution lays down the right to protection of health. Both of these fundamental rights may become infringed if persons without relevant training are involved in providing health services to individuals with mental problems. It needs to be stressed that applying means of restraint is a health service which can only be provided by health workers trained in the relevant speciality. Thus, no other persons, such as security staff or police officers, may be involved in applying means of restraint.

Under Art 32.4 of the Council of Europe Committee of Ministers Recommendation Rec(2004)10,[322] members of the police should receive appropriate training in the assessment and management of situations involving persons with mental disorder, which draws attention to the vulnerability of such persons in situations involving the police. If a provider of a health service considers it necessary to cooperate with a security firm to provide personal protection of health workers it must be ensured that rights of individuals are guaranteed to the same extent as in a situation where personal protection is provided by the police. Thus, security staff providing personal protection services in a psychiatric unit must have received training to the same extent as police officers under Art 32.4 of the Council of Europe Committee of Ministers Recommendation Rec(2004)10.

On that basis, the Chancellor recommended to the Management Board of Kuressaare Hospital Foundation to include in the contract concluded with a security firm to provide personal protection services in the psychiatric unit an obligation to ensure appropriate training to the extent required under Art 32.4 of the Council of Europe Committee of Ministers Recommendation Rec(2004)10 for all security staff providing the service in the psychiatric unit.

(3.2) While touring the psychiatric unit, it was found that patients were not ensured sufficient opportunities for activities. The psychiatric unit only provides patients the possibility to watch television and play board games during free time.

Under § 19(1) of the Constitution, everyone has the right to free self-realisation. An individual's freedom of decision

322 Council of Europe Committee of Ministers Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder. Available online at http://wcd.coe.int/ViewDoc.jsp?id=775685&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

is protected regardless of the importance of the selected activity for the individual's self-realisation.[323] Under principle 13.2 of the UN General Assembly's Resolution 46/119,[324] the environment and living conditions in mental health facilities must be as close as possible to those of the normal life of persons of similar age. In particular, attention should be paid to creating facilities for recreational and leisure activities, as well as facilities to purchase or receive items for daily living, recreation and communication. In addition, facilities, and encouragement to use such facilities, for a patient's engagement in active occupation suited to their social and cultural background must be created.

Thus, a provider of an in-patient psychiatric care service is obliged to ensure the right of patients to free self-realisation as widely as possible. The right may be implemented either by allowing individuals to use means and facilities necessary for self-realisation or by ensuring opportunities for activities by other methods provided by the health service provider. To facilitate subsequent social reintegration, it is also necessary to employ activity therapists or activity instructors at providers of psychiatric services.

In view of these considerations, the Chancellor of Justice recommended the administration of Kuressaare Hospital Foundation to ensure more widely than currently the fundamental right to free self-realisation for patients in the hospital, in particular in the psychiatric unit, by creating opportunities for recreational and leisure activities.

(4) Following the inspection visit, the Chancellor made a recommendation to the administration of Kuressaare Hospital Foundation for ensuring fundamental rights of individuals. The Chancellor will conduct a follow-up inspection to verify compliance with the proposal and recommendations in six months.

The administration of Kuressaare Hospital Foundation replied to the Chancellor that since June 2007 only appropriately trained police officers from Kuressaare Police Department of the West Police Prefecture were providing a personal protection service at the psychiatric unit. Additional recreational and leisure opportunities had also been created for patients – under the guidance of a psychologist, nurses, and care workers, it is possible to do handicrafts, draw, use the library, and develop physical strength on a fitness machine available in the unit.

9. Inspection visit to the psychiatric department of Narva Hospital Foundation

Case No. 7-9/071493

(1) On 28 November 2007, the Chancellor of Justice conducted an own-initiative inspection visit to the psychiatric department of Narva Hospital Foundation.

The department has 20 beds and 14 wards. The number of staff is 19. In 2006, a total of 869 patients were treated in the department, of whom two were under 15 years old. The average duration of treatment was 9.5 days. The main types of diagnoses for in-patients in 2006 were mental disorders caused by use of psychoactive substances (47.3%), schizophrenia and other delusion disorders (27.6%), organic mental disorders (11.1%), and mood disorders (7%).

From 2006 until the time of the inspection visit, a total of 36 persons had been subjected to involuntary treatment. The average duration of involuntary treatment was one to two days, and the main diagnoses were alcohol-related psychoses. Means of restraint are used approximately a hundred times a year (25% physical restraint and 75% isolation).

(2) During the inspection, the Chancellor, fulfilling in parallel his function as the national preventive mechanism under Art 3 of the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel or Degrading Treatment or Punishment, verified whether fundamental rights and freedoms of patients were guaranteed during treatment in the department.

(3.1) The hospital's responses to a preliminary questionnaire prior to the inspection visit showed that the department has twenty beds for provision of health services. However, it is customary that more than twenty patients are in treatment in the department. In 2006, on average 22 patients were in treatment every day, and on some days up to 30 patients. According to the assessment of Narva Hospital Foundation, considering the hospital's regional character and the large number of addiction patients, the optimum number of treatment places in the department would be 25. Such a number of places financed by the Estonian Health Insurance Fund would enable the hospital to plan its budgetary means more appropriately and, on the other hand, would help to prevent a situation where due to shortage of places individuals need to wait unreasonably long to be admitted for treatment prescribed to them. In addition, financing of an insufficient number of treatment places may lead to shortage of staff at the service provider. This, however, would directly endanger the fundamental right of individuals to protection of health.

On that basis, the Chancellor recommended the Chairman of the Board of the Estonian Health Insurance Fund to

323 M. Ernits. Kommentaarid §-le 19. – Justiitsministeerium. Eesti Vabariigi põhiseadus, Kommenteeritud väljaanne. [Comments on § 19. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition] Tallinn 2002, § 19 comment 3.1.

324 UN General Assembly resolution 46/119 of 17 December 1991 "Principles for the protection of persons with mental illness and the improvement of mental health care", available online at http://www.unhchr.ch/html/menu3/b/68.htm.

consider increasing the volume of contracted services at the psychiatric department of Narva Hospital by raising the number of treatment places financed by the Health Insurance Fund to 25.

(3.2) Both the hospital's responses to a preliminary questionnaire prior to the inspection visit and interviews conducted on-site revealed that security staff had been involved in providing a health service at the department. Based on the in-house administrative act "Guidelines for applying means of restraint at the psychiatric department of Narva Hospital Foundation", security staff participate in restraining patients. According to hospital representatives, security staff who are present on-site or called in assist with restraining patients.

The Chancellor recommended the Management Board of Narva Hospital Foundation to include in the contract concluded with a security firm for provision of personal protection services at the psychiatric department an obligation to ensure appropriate training to the extent required under Art 32.4 of the Council of Europe Committee of Ministers Recommendation Rec(2004)10[325] for all security staff providing a service at the psychiatric department.

(3.3) Both interviews with representatives of Narva Hospital and patient health files examined during the inspection visit revealed that in certain cases prescribing involuntary treatment did not comply with the procedure laid down in the Mental Health Act. One patient's health file showed that the individual had arrived for treatment on 17 November 2007 (Saturday) at 01.20. A psychiatrist examined the individual only on 19 November 2007 (Monday) and retroactively issued an order for applying involuntary treatment as of 17 November 2007.

Under § 11(3) of the Mental Health Act, a physician of the psychiatric department of a hospital promptly after examining an individual admitted to the psychiatric department makes a decision to apply involuntary treatment without court authorisation. The decision is documented according to the procedure established by the Minister of Social Affairs, and the date of documenting the decision is considered to be the commencement of involuntary in-patient treatment. It is also necessary to keep in mind the fact that involuntary treatment may be applied within 48 hours after commencement of involuntary in-patient treatment.

Thus, it constitutes an unlawful situation if a psychiatrist examines an individual admitted for involuntary treatment only two days after admission and makes a decision to apply involuntary treatment retroactively. Considering the fact that the individual was in treatment since 01.20 on 17 November 2007, by 01.20 on 19 November 2007 a need already existed to either release the patient from treatment, obtain the informed consent of the patient to provide the health service, or obtain court authorisation for applying involuntary treatment exceeding 48 hours. However, none of the above options were pursued. According to hospital representatives, it was customary that if a patient arrived for treatment at the weekend or during a public holiday, a psychiatrist would examine the patient only on the first following working day. In addition to unjustified detention, this procedure also leads to a situation where an individual in an acute state fails to receive appropriate treatment upon admission to hospital.

In essence, the practice of deciding on involuntary treatment applied at the psychiatric department of Narva Hospital Foundation infringes upon the fundamental right to liberty under § 20 and the right to protection of health under § 28(1) of the Constitution.

In view of this, the Chancellor recommended the head of the psychiatric department of Narva Hospital to ensure that individuals arriving for treatment at weekends or during public holidays are promptly examined by a psychiatrist and appropriate treatment is prescribed and, if necessary, a decision for applying involuntary treatment is made.

(3.4) Both the hospital's responses to a preliminary questionnaire prior to the inspection visit and interviews conducted on-site revealed that, if necessary, patients were confined to their living room or the room where they were staying.

The department has two separate wards for applying means of restraint. The restraining rooms are not different from ordinary wards for accommodating patients. The restraining room contains a spring bed for fixing a patient. The door contains a hatch window through which a health worker can observe the restrained individual. No alarm switch exists. The restraining room has no sanitary installations, so that isolated persons cannot immediately and independently use the toilet.

The Council of Europe's European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its 16th General Report has noted with regard to conditions in a restraining room: "In general, the place where a patient is restrained should be specially designed for that specific purpose. It should be safe (e.g. without broken glass or tiles), and enjoy appropriate light and adequate heating, thereby promoting a calming environment for the patient. Further, a restrained patient should be adequately clothed and not exposed to other patients. […] Vital functions of the patient, such as respiration, and the ability to communicate, eat and drink must not be hampered. […] The staff member may be outside the patient's room, provided that the patient can fully see

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

the staff member and the latter can continuously observe and hear the patient."[326]

Indirectly, the same principle is expressed in clause 1.3 of "Guidelines for applying means of restraint at the psychiatric department of Narva Hospital Foundation", under which safety of the patient must be guaranteed in an isolation ward.

Furthermore, the restraining room currently used at the department does not meet the above standards. First, it is not allowed to confine individuals to their living room or room where they are staying, because these rooms are adapted for daily living and do not enable ensuring safety of patients. Individuals who display signs that may serve as a precondition for applying means of restraint must not have access to any items which could be used to harm themselves during restraint. To ensure this, the CPT has expressed the need to isolate individuals only in a room specifically adapted for this.

Secondly, it is inadmissible to have a situation where a restrained individual is not constantly monitored by a specially trained member of hospital staff. The health file of a patient staying under treatment at the department revealed that the individual had been restrained by physical restraint at 01.20. The next entry on monitoring the individual's condition was made at 08.20, even though under clause 1.6.4 of "Guidelines for applying means of restraint at the psychiatric department of Narva Hospital Foundation" a doctor must examine an isolated patient at least 2-3 times within eight hours and, additionally, such a patient is monitored through a window every 15-20 minutes. Under clause 2.5.4, in case of physical restraint, a doctor must examine a restrained patient at least 3-4 times within eight hours and health workers must assess the patient's situation every 10-15 minutes.

Based on the above considerations, the Chancellor recommended the head of the psychiatric department of Narva Hospital to ensure that means of restraint in respect of patients are applied only in rooms specifically adapted for this. And restraining rooms in the department must be brought in line with the criteria under the CPT 16th General Report. In case of restraint, a restrained person must be under constant and uninterrupted supervision of a staff member of the health service provider.

(3.5) Both the hospital's responses to a preliminary questionnaire prior to the inspection visit and interviews conducted on-site revealed that individuals who did not have a mobile phone were allowed to use the telephone in the duty nurse's room to contact their close relatives or other persons.

Under § 26 of the Constitution, everyone has the right to inviolability of private life. Under § 43 of the Constitution, everyone has the right to confidentiality of messages sent or received by them by commonly used means of communication.

Under the current practice at the department, individuals can contact their close relatives or their representative only at the discretion of a health worker and probably in the health worker's presence. As individuals staying at the department are forced to deal with their private business in the presence of a health worker, the above constitutional freedoms are not sufficiently guaranteed. Being within hearing distance of an employee of the department may prevent individuals from contacting their representatives confidentially in order to discuss problems related to the department.

On that basis, the Chancellor recommended the head of the psychiatric department of Narva Hospital to ensure installing payphones or portable phones, so as to guarantee confidentiality of messages passed by individuals through the telephone and protection of private life of individuals.

(3.6) Under clause 5 of the in-house act "Duties and rights of patients at the psychiatric department of Narva Hospital Foundation", patients are obliged to accept all procedures and medicines prescribed by the doctor providing treatment.

Under § 766(3) of the Law of Obligations Act, patients may be examined and health services provided to them only with their consent. The same principle is affirmed by § 3(1) of the Mental Health Act, under which psychiatric care is provided on a voluntary basis, i.e. at the request or with the informed consent of a person. In addition, under § 4 clause 3 of the Act, a person has the right to refuse or discontinue psychiatric assessment or treatment, except in the case of involuntary treatment and coercive treatment. Thus, it is unlawful to impose by an in-house act on patients, whose treatment is voluntary, an obligation to consent to any procedures and treatments once admitted to the department.

On that basis, the Chancellor recommended the head of the psychiatric department of Narva Hospital to bring the document "Duties and rights of patients at the psychiatric department of Narva Hospital Foundation" into line with current legislation.

(3.7) The internet homepage of Narva Hospital Foundation at www.narvahaigla.ee is available only in Russian. A health service provider's internet website is an important source of information for individuals about reception times, internal hospital rules, visiting times, etc.

326 16th General Report on the CPT's activities (CPT/Inf (2006) 35), par. 48, 50. Available online at http:// www.cpt.coe.int/en/annual/rep-16.pdf.

Under § 4 of the Language Act, everyone has the right to access public administration and to communicate in Estonian, including in non-profit associations and foundations. Under §16, consumers of goods and services (including health services) have the right to receive information and servicing in Estonian.

The Chancellor of Justice recommended the administration of Narva Hospital Foundation to bring the website of Narva Hospital into line with requirements of the Language Act.

(3.8) Both the hospital's responses to a preliminary questionnaire prior to the inspection visit and interviews conducted on-site revealed that the right of patients to free self-realisation was restricted. The department offers an opportunity to watch television (there are two TV-sets) and read a limited amount of literature in Russian. Patients whose condition so allows may take walks outside with an accompanying member of staff.

Under § 19(1) of the Constitution and principle 13.2 of the UN General Assembly's Resolution 46/119,[327] it is presumed that the environment and living conditions in mental health facilities are as close as possible to those of the normal life of persons of similar age. Estonia must pay attention to creating opportunities for recreational and leisure activities, as well as opportunities to purchase or receive items for daily living and recreation.

The CPT in its General Report has also emphasised the importance of ensuring living conditions as close as possible to those of normal life. With regard to facilities for free self-realisation, the 8th General Report notes: "Psychiatric treatment should be based on an individualised approach, which implies the drawing up of a treatment plan for each patient. It should involve a wide range of rehabilitative and therapeutic activities, including access to occupational therapy, group therapy, individual psychotherapy, art, drama, music and sports. Patients should have regular access to suitably-equipped recreation rooms and have the possibility to take outdoor exercise on a daily basis; it is also desirable for them to be offered education and suitable work."[328]

Having examined patient health files during the inspection visit, the Chancellor could not see from any of the files that treatment plans drawn up for patients involved any rehabilitative or therapeutic practices. However, for purposes of reintegration to society it should be considered extremely important to offer various support services to individuals under treatment. Prescribing and providing purposeful and appropriate therapy should take place in cooperation with an activity therapist.

In view of the above considerations, the Chancellor recommended the administration of Narva Hospital Foundation to create a position of an activity therapist at the psychiatric department, and immediately take steps to fill the position with an adequately qualified person for providing appropriate services to individuals with special needs. Drawing up further treatment plans at the department should take place in cooperation with the activity therapist, and treatment plans should integrate rehabilitative and therapeutic practices.

(3.9) While touring the department, it was found that three security cameras had been installed in common rooms. The picture from the cameras is displayed at the nurse's post; no recording takes place.

Under § 26 of the Constitution, everyone has the right to inviolability of private life. State agencies and local authorities may interfere with the private life of individuals only in the cases and under the procedure provided by law. The scope of protection of § 26 primarily includes physical and mental inviolability, personal identity, and the right to one's image. Inter alia, physical and mental inviolability can be interfered with by surveillance of an individual.[329] Filming and recording of persons also infringes upon the fundamental right to informational self-determination under § 19 of the Constitution. The right to protection of personal data under Art II-68 of the EU Charter of Fundamental Rights also presumes that processing of personal data takes place on the basis of the consent of the person concerned or some other clearly defined legitimate basis laid down by law.

Section 14 of the Personal Data Protection Act, valid until 31 December 2007, laid down conditions for processing of personal data without consent of a data subject. As video monitoring of patients clearly concerns their health data, such data constitute sensitive personal data within the meaning of § 4(3) clause 3 of the Personal Data Protection Act. Under § 14(3) clause 2 of the Personal Data Protection Act, processing of sensitive personal data without the consent of a data subject was permitted for protection of the life, health or freedom of the data subject or other persons. However, this basis could be used only if every time the need for monitoring the specific person was assessed at the beginning of processing of personal data.

The new § 14(4) of the Personal Data Protection Act, valid since 01 January 2008, stipulates: "Surveillance equipment transmitting or recording personal data may be used for protecting persons or property only if this does not excessively harm the legitimate interests of the data subject and if collected data are only used in line with the purpose

327 UN General Assembly resolution 46/119 of 17 December 1991 "Principles for the protection of persons with mental illness and the improvement of mental health care", available online at http:// www.unhchr.ch/html/menu3/b/68.htm.

328 8th General Report on the CPT's activities (CPT/Inf (98) 12), par. 37. Available online at http://www.cpt.coe.int/en/annual/rep-08.htm.

329 U. Lõhmus Kommentaarid §-le 26. - Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments on § 26. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition] Tallinn 2002, § 26 comment 8-8.1.

of their collection. In case of such data collection, the data subject's consent is substituted by the fact of using the surveillance equipment and sufficiently clear publication of the data processor's name and contact data. The requirement does not extend to use of surveillance equipment by state agencies under the bases and procedure established by law." Thus, the Act creates a basis for video monitoring in the private sector, including in the case of voluntary treatment, but even in this case the requirement to notify the data subject exists, which substitutes a prior consent. The new Act presumes creating separate delegating norms for video surveillance by state agencies.

The Chancellor recommended the head of the psychiatric department of Narva Hospital Foundation to display in a clearly visible place information notifying the use of video surveillance at the department. The information should be in a place easily visible to persons entering the department and should include information as to specifically which common rooms are monitored.

(3.10) The hospital's responses to a preliminary questionnaire prior to the visit showed that no hindrances existed for patients to meet with independent counsellors (e.g. representatives of the Estonian Patient Advocacy Association, or legal counsel). However, while touring the department it was found that in practice no information materials had been made available for patients explaining possibilities to meet with patient representative bodies, applying for state legal aid, the competence of the Chancellor of Justice, or other possibilities of appeal. The Chancellor recommended the head of the psychiatric department to make information about possibilities of appeal available at all times for all patients under treatment. For this, posting information stands on walls in common rooms at the department could be considered as an option. In addition, the stands should contain information about the internal rules of the hospital and of the psychiatric department, and other relevant information.

Interviews held during the inspection visit revealed that no rehabilitation treatment was provided to individuals in cases of use of means of restraint. The CPT in its 16th General Report has noted: "For the staff of a psychiatric hospital, it should be of the utmost concern that the conditions and circumstances surrounding the use of restraint do not aggravate the mental and physical health of the restrained patient. This implies, inter alia, that previously prescribed therapeutic treatment should, as far as possible, not be interrupted and that substance-dependent patients should receive adequate treatment for withdrawal symptoms. Whether these symptoms are caused by deprivation of illegal drugs, nicotine or other substances should not make any difference."[330]

On that basis, the Chancellor recommended the head of the psychiatric department of Narva Hospital to take measures to ensure continuation of treatment for all individuals in respect of whom restraint has been applied. Patients with addiction problems must also receive necessary rehabilitative treatment during restraint.

(4) Following the inspection visit, the Chancellor made recommendations to the Chairman of the Board of the Estonian Health Insurance Fund, the administration of Narva Hospital Foundation, and the head of the psychiatric department of Narva Hospital. Six months later, the Chancellor conducted a follow-up inspection to verify compliance with the requirements in six months.

The Chairman of the Board of the Estonian Health Insurance Foundation replied that during the eleven months of 2007 the contract between Narva Hospital Foundation and the Health Insurance Fund had been executed to the extent of 91.4%. According to the Chairman of the Board of the Estonian Health Insurance Foundation, as at 01 December 2007 no patients were on the waiting list for in-patient treatment at the psychiatric department of Narva Hospital. Throughout 2007, nobody had been on the waiting list for treatment. On this basis, the Chairman of the Board of the Estonian Health Insurance Fund expressed the opinion that if Narva Hospital wished to have funding for 25 beds for in-patient psychiatric care, approval of the Minister of Social Affairs was needed as well as an operating permit from the Health Care Board reflecting the required number of hospital beds.

The head of the psychiatric department of Narva Hospital informed the Chancellor that clause 5 of the in-house act "Duties and rights of patients at the psychiatric department of Narva Hospital Foundation" had been amended and aligned with current legislation. The requirement under which patients were obliged to accept all procedures and medicines prescribed by the doctor treating them had been abolished. Information about video surveillance and possibilities of appeal had been displayed in visible places throughout the department. The department had obtained nicotine patches for rehabilitation of nicotine addicts. Portable phones had been made available for patients, so as to ensure confidentiality of messages transmitted by telephone and protection of private life.

The Chairman of the Board of Narva Hospital Foundation informed the Chancellor that with the aim of guaranteeing the right of health service consumers to information in Estonian, the information on the hospital website had been forwarded for translating into Estonian.

330 16th General Report on the CPT's activities (CPT/Inf (2006) 35), par. 47. Available online at http://www.cpt.coe.int/en/annual/rep-16.pdf.

PART 3.

OVERVIEW OF PERFORMANCE OF OTHER FUNCTIONS ENTRUSTED BY LAW TO THE CHANCELLOR OF JUSTICE

I INTRODUCTION

The main functions of the Chancellor of Justice are review of the legality and constitutionality of legislation, and duties of an ombudsman. However, in addition the Chancellor also has various other competencies. The following part first contains an overview of additional competencies entrusted to the Chancellor by the Chancellor of Justice Act. Then follows an overview of performing the functions under the Constitution and other Acts. A longer debate includes description of the Chancellor's activities with regard to initiating disciplinary proceedings in respect of judges and in promoting the principles of equality and equal treatment.

Section 1(3) of the Chancellor of Justice Act repeats § 139(3) of the Constitution, laying down that the Chancellor of Justice makes a proposal to the Riigikogu that criminal charges be brought against a member of the Riigikogu, the President of the Republic, a member of the Government of the Republic, the Auditor General, the Chief Justice of the Supreme Court, or a justice of the Supreme Court. In connection with Estonia's accession to the European Union, the Chancellor obtained similar competence in respect of members of the European Parliament elected from Estonia. Under § 1(3[1]) of the Chancellor of Justice Act, the Chancellor of Justice makes a proposal to the President of the European Parliament to deprive a member of the European Parliament elected from Estonia of his or her immunity under the Protocol on Privileges and Immunity.

In 2007, the Chancellor did not need to initiate any proceedings to propose bringing criminal charges against holders of high-level positions.

In the annual report for 2006, the Chancellor drew the attention of the Riigikogu to the fact that the legislative basis for lifting immunity is insufficiently regulated. Until now, for example, the Code of Criminal Procedure lacks provisions regulating criminal proceedings against a member of the Riigikogu in a situation where charges have already been drawn up and judicial proceedings have commenced. The Status of Members of Riigikogu Act also failed to specify steps that needed to be taken in connection with applying immunity proceedings within misdemeanour procedure.

Section 1(4) of the Chancellor of Justice Act grants the Chancellor competence to submit a request to the Supreme Court *en banc* to declare the President of the Republic continuously incapable of performing his or her duties. The President of the Republic Rules of Procedure Act states that continuous incapacity means loss of capacity for work due to health. However, no such restriction exists in § 83 of the Constitution or in the Chancellor of Justice Act. Similarly, no such restriction exists in the Constitutional Review Court Procedure Act regulating deliberation of the above request in the Supreme Court.

If the Supreme Court declares President of the Republic continuously incapable of performing his or her duties, then the powers of the President are suspended. If the President is incapable of performing his or her duties for more than three consecutive months, the Riigikogu elects a new President within fourteen days. The Chancellor of Justice has never had to submit the above request.

Under § 1(5) of the Chancellor of Justice Act, the Chancellor resolves discrimination disputes arising between persons in private law on the basis of the Constitution and other Acts.

In 2007, the Chancellor was asked to initiate conciliation proceedings on three occasions. These did not reach the stage of hearing or agreement.

The Chancellor also deals more generally with promoting the principles of equality and equal treatment (Chapter 4, Title 4 Chancellor of Justice Act). This means that the Chancellor must monitor that the Riigikogu, executive authorities, local authorities, or other bearers of public authority comply with the principle of equal treatment. This competence is described in more detail in section 3 of Part 3 of the Annual Report.

Section 2(1) of the Chancellor of Justice Act repeats § 141(2) of the Constitution, giving the Chancellor of Justice the right to attend sessions of the Riigikogu and the Government with the right to speak. This means the Chancellor is entitled to speak on topics discussed at meetings of the Riigikogu and the Government, subject to the relevant procedure. Part 1 of the Annual Report provides an overview of the Chancellor's communication with the Riigikogu and how the Chancellor has used his right to speak before the Riigikogu. Part 2 contains an overview of how the Chancellor has used his right to speak at sessions of the Government.

Every year the Chancellor receives a large number of petitions complaining against activities of the courts during judicial proceedings or expressing dissatisfaction with a court judgment. However, under the Constitution, courts are independent in the administration of justice and other bodies or institutions may not interfere in this process. This also applies to the Chancellor of Justice.

Section 91(2) of the Courts Act gives the Chancellor the right to initiate disciplinary proceedings against all judges. Section 2 of Part 3 of the Annual Report explores how and based on what considerations the Chancellor initiates disciplinary proceedings against judges and provides an overview of the current practice.

The Constitution and the Chancellor of Justice Act give the Chancellor the right to initiate constitutional review court proceedings. Alongside the Chancellor of Justice, also the President of the Republic, local government councils, and courts are competent to initiate judicial constitutional review of legislation of general application. In these cases, the Chancellor is involved in the proceedings as a participant in order to assess the constitutionality of a disputed act. In 2007, the Chancellor provided thirteen such assessments to the Supreme Court:

1. Request by Tallinn Administrative Court to declare unconstitutional the duty to pay a fee for participation in an auction, established under clause 6 and clause 9 point 2 of the "Procedure for privatisation of non-residential premises", approved by Government Regulation No. 175 of 18 June 1996.
2. Request by Tallinn Court of Appeal to declare unconstitutional the fourth sentence of clause 3, in the wording valid from 13 June 1999 to 17 October 2003, of the "Procedure for designation of land necessary for servicing a building", approved by Government Regulation NO. 144 of 30 June 1998.
3. Request for the opinion of the Supreme Court on the constitutionality of § 21(1) clause 5 of the Citizenship Act.
4. Request by Tartu County Court to declare unconstitutional § 25^{21} of the Bailiffs Act.
5. Request by Tallinn City Council to declare unconstitutional § 8(2) and § 9(4) of the War Graves Protection Act.
6. Request by Tallinn Administrative Court to declare unconstitutional § 120, § 130(1), § 131(3), and § 133(1) and (3) of the Public Service Act.
7. Request for the opinion of the Supreme Court on the constitutionality of Tallinn City Council Regulation No. 17 of 27 June 1996.
8. Request by Tallinn Administrative Court to declare unconstitutional § 15(2) clause 6 of the Value Added Tax Act.
9. Request by Tallinn Administrative Court to declare unconstitutional § 9, in the version valid until 01 December 2006, of the Liquid Fuel Stocks Act.
10. Request by Tartu Court of Appeal to declare unconstitutional § 14(2) of the Land Reform (Amendment) Act.
11. Request by Tallinn Court of Appeal to declare unconstitutional clause 1 of "Headings of nomenclature of Estonian goods including soft drinks", approved by the Minister of Finance Regulation No. 24 of 07 March 1997.
12. Request for the opinion of the Supreme Court on the constitutionality of § 1(3) of the Compensation for Damage Caused by the State to a Person by Unjust Deprivation of Liberty Act
13. Request for the opinion of the Supreme Court on awarding compensation of procedural expenses to applicants in the constitutional review case No. 3-4-1-14-07 (request by Tallinn Administrative Court to verify the constitutionality of § 120, § 130(1), § 131(3), and § 133(1) and (3) of the Public Service Act).

Under the Constitutional Review Court Procedure Act, the Chancellor may also give his opinion in proceedings for deciding termination of activities of a political party. The same applies to proceedings where the Supreme Court is adjudicating a request by the Chairman of the Riigikogu acting as President of the Republic and asking the Supreme Court to grant consent to declare extraordinary elections to the Riigikogu or refuse to proclaim a law. The Supreme Court has never had to use this competence.

II THE PRINCIPLES OF EQUALITY AND EQUAL TREATMENT

1. General outline

One of the fundamental principles in the Estonian Constitution is the requirement of equal treatment of individuals. The right to equality according to Aristotle means in general that equals should be treated equally and unequals unequally.

Rights related to equality protect individuals against unjustified unequal treatment in comparison to other individuals. In order to ensure equal treatment in practice, it is necessary to prohibit discrimination, eliminate existing inequality, and promote the principle of equal treatment.

Under the Chancellor of Justice Act, with regard to issues of equality and equal treatment the Chancellor's competence includes verifying the constitutionality and legality of legislation (legal review competence), verifying discrimination caused through activity of representatives of public authority (ombudsman competence), and conducting conciliation proceedings between individuals in private law (discrimination dispute settlement competence).

Thus, with regard to the Chancellor's competence, first it is important to distinguish whether a case concerns activities of the state, local authorities, or other bodies exercising public authority, or whether the dispute is purely between private individuals (in this case the Chancellor's competence is limited to discrimination-related conciliation proceedings). Second, it is important to distinguish between review of constitutionality of a legal act and constitutionality of activity. The distinction is necessary due to differences in procedural elements.
In addition, under the Chancellor of Justice Act the Chancellor is competent to analyse the effect of legislation on promoting the principles of equality and equal treatment, and make proposals for amending legislation, as well as raise awareness of the need to implement these principles and cooperate to further develop them.

The Chancellor of Justice considers it important for his Office to deal with analysing, debating, and training in this field. On 19 September 2007, a debate was held at the Chancellor's Office about the possibility of establishing a scheme for ascertaining the principle of equal treatment, and the Chancellor's approach to resolving various cases. During the debate, an assistant adviser to the Chancellor made an intriguing and future-oriented presentation on the doctrine "'Equality before the law' – its multiplicity of meanings and relation to the idea of justice". The presenter pointed out the common notion of gender under the doctrine, the principles of equality before and within the law, and the reason for different treatment (i.e. approaches to prohibition of arbitrariness).

Both the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Additional Protocols, as well as judgments of the European Court of Human Rights, are binding on Estonia. The Chancellor has repeatedly referred to opinions of the Court of Human Rights when ascertaining compliance with the principle of equal treatment. For example, the Court has stated that Art 14 of the Convention affords equal treatment to individuals in similar situations.[331] To ascertain instances of discrimination, the Court has taken into account whether different treatment has a justified purpose and whether measures taken are proportionate to the desired objective. The principle of equal treatment is violated if different treatment has no objective and reasonable justification in a democratic society. The existence of such justification must be assessed in relation to the aim and effects of the measure under consideration. In ascertaining proportionality it is necessary to establish whether a reasonable relationship of proportionality exists between the means employed and the aim sought.[332]

On 11 October 2007, advisers to the Chancellor of Justice went on a training visit to the European Court of Human Rights. Judge Rait Maruste explained the Court's approach to determination of compliance with the principle of equal treatment. To summarise, Judge Maruste explained that the general approach is that the distinction between different individuals or groups is possible but it must be justified.[333]

During the reporting year, the Chancellor investigated the aspect of equal treatment in 60 cases (cf 23 cases in 2006), including five petitions for initiating conciliation proceedings.

1. Under § 15 of the Chancellor of Justice Act, everyone has the right of recourse to the Chancellor of Justice to review the conformity of an Act or other legislation of general application with the Constitution or the law.

Similarly to previous years, in 2007 the Chancellor frequently asked supervised agencies to explain and justify the reasons for different treatment of certain individuals or situations.

331 European Court of Human Rights judgment of 18 February 1991 in case No. 12033/86, *Fredin v Sweden*, par. 60.

332 European Court of Human Rights judgment of 23 July 1968 in case No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, *Belgian Linguistics v Belgium,* par. 10.

333 European Court of Human Rights presented a similar general approach in its judgment of 04 March 2008 in case No. 42722/02 *Stoica v Romania*, par. 117: "The Court's case-law on Article 14 establishes that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations".

During the reporting year, the issue of equal treatment arose, for example, in the following cases: unequal treatment in granting child care benefit in Saue rural municipality (case No. 6-4/070643)[334], unequal treatment of a foreign national in granting Estonian citizenship (case No. 9-2/70501)[335], equal treatment based on age in case of release from office (case No. 9-2/070888)[336], different treatment of pensioners in payment of compensation for dentures (case No. 6-1/070958)[337].

2. Under § 19(1) of the Chancellor of Justice Act, everyone has the right of recourse to the Chancellor of Justice for protection of their rights by filing a petition to request verification whether or not a state agency, local government agency or body, legal person in public law, natural person or legal person in private law performing public duties adheres to the principles of observing fundamental rights and freedoms and principles of good administration.

This provision grants the Chancellor competence for verifying lawfulness of measures and decisions of public authority, including those of any officials. The provision is seemingly general and discrimination is not explicitly mentioned. However, prohibition of discrimination is one of the most important principles which representatives of public authority are required to observe in their activities.

During the reporting year, the issue of equal treatment arose, for example, in the following cases: children's camps refused to admit children from children's homes (case No. 7-7/070108)[338], special equipment was applied in respect of a prisoner (case No. 7-4/070561)[339], and children with special educational needs must be guaranteed access to education (case No. 7-4/071695)[340].

These cases are described in more detail in Part 2 of the Annual Report.

3. Under § 19(2) of the Chancellor of Justice Act, everyone has the right of recourse to the Chancellor of Justice for conducting conciliation proceedings if they find that a natural person or a legal person in private law has discriminated against them on the basis of sex, race, nationality (ethnic origin), colour, language, origin, religion or religious beliefs, political or other opinion, property or social status, age, disability, sexual orientation, or other attributes specified by law.

Conciliation proceedings are based on the idea that it should be relatively easy for individuals (including legal persons) to contact the Chancellor of Justice and, due to the discreetness of the Chancellor's proceedings, the rights and interests of petitioners are ensured throughout the proceedings. The outcome of proceedings is not punishment. The Chancellor as an intermediary listens to both parties, ascertains the facts, and tries to conciliate the parties. All information relating to conciliation proceedings is only disclosed in a form which does not enable identification of the parties in the proceedings.

The aim of voluntary conciliation is to bring the disputing parties closer to each other and encourage them to change their positions and find a common solution. The Chancellor's role is to propose solutions.

Conciliation is extremely important for ensuring legal peace, thanks to which it might be possible for the disputing parties to continue cooperation without victimising anyone.

In 2007, no conciliation proceedings ending in an agreement took place in the Office of the Chancellor of Justice. As was previously explained, the Chancellor received only five petitions asking to initiate conciliation proceedings.

In the first case, the petitioner claimed that they had been discriminated against due to nationality. According to the petitioner, working became impossible after their photograph had been published in a newspaper, and they were forced to leave work. The petitioner claimed that their photograph had been taken prior to the April riots and they had not participated in the riots, but colleagues and management did not believe them. The petitioner asked the Chancellor to initiate conciliation proceedings and compensate for the damage caused. However, in the matter of the petition, the respondent did not wish to participate in conciliation proceedings and therefore the Chancellor did not consider it possible to initiate the proceedings. The Chancellor advised the petitioner to have recourse to the court for compensation of damage.

In the second case, a male petitioner was of the opinion that selling tickets at different prices to men and women in nightclubs was contrary to the principle of equal treatment and asked the Chancellor to initiate conciliation proceedings. The Chancellor reached the opinion that conciliation proceedings were not the most effective remedy in this case, as conciliation proceedings are voluntary and prior consent for participation in proceedings must exist by the individual or institution which allegedly violated the petitioner's rights. The Chancellor advised the petitioner to

334 Cross reference
335 Cross reference
336 Cross reference
337 Cross reference
338 Cross reference
339 Cross reference
340 Cross reference

contact the Gender Equality Commissioner.

In the third case, the petitioner claimed that they had been discriminated against due to nationality. The petitioner had requested to be included in the internal audit committee of an apartment association, but the organiser of the general meeting of the association had turned down the request and refused to put it to a vote. The organiser of the general meeting was of the opinion that the petitioner could not speak Estonian. No proceedings were initiated, as the respondent did not react to Chancellor's repeated proposals to participate in conciliation proceedings.

The fourth case involved unequal treatment based on sex and possible discrimination against a woman with small children. Processing of the petition was subject to limitation under § 35[6] of the Chancellor of Justice Act, which lays down a deadline of four months for recourse to the Chancellor as of the date when the person became aware or should have become aware of the alleged discrimination. According to the petition, the alleged discrimination took place eleven months prior to petitioning the Chancellor of Justice. By this time, the Chancellor was no longer competent to deal with the petition. The petition was forwarded for review and opinion to the Gender Equality Commissioner whose competence includes monitoring compliance with requirements under the Gender Equality Act.

In the fifth case, the Chancellor was contacted by a sentenced prisoner who asked to initiate conciliation proceedings between themselves and the Ministry of Justice. The petitioner was of the opinion that due to their regular transfer from one prison to another their fundamental rights and freedoms were violated. The Chancellor did not consider it possible to initiate proceedings because the petition did not show that activities of a natural person or a legal person in private law had discriminated against the petitioner. Under the Constitution and the Chancellor of Justice Act, transfer of prisoners is not a matter within the Chancellor's competence and, therefore, under § 25(1) of the Chancellor of Justice Act the Chancellor cannot deal with relevant complaints.

The purpose of the three above-mentioned legal provisions (§ 15, § 19(1), § 19(2) Chancellor of Justice Act) is to ensure easy, quick, and effective protection of the rights of potential victims of discrimination. Discrimination cases are usually emotional, as individuals' own assessment of the matter may be subjective. Therefore, in the process of conciliation, the Chancellor proposes solutions which try to take maximum account of the rights of the victim. When looking for solutions, it is necessary to avoid situations where individuals abandon protecting their rights simply because the proceedings in which they have to participate are excessively complicated.

In case of violations of the fundamental right to equality, the Chancellor may make a proposal or a recommendation to the Riigikogu, a state agency, or other representative of public authority (e.g. a recommendation to make a new decision or apologise to the petitioner). The proceedings may also end with an agreement reached through conciliation. This agreement is not subject to judicial appeal or compulsory execution through a bailiff.

The Chancellor lacks legal means of coercion (e.g. possibility of imposing a fine) to force compliance with his proposals. However, due to the Chancellor's strong authority in Estonian society, most of his proposals have been complied with.

III STATISTICS OF PROCEEDINGS

1. General outline of statistics of proceedings

1.1 Petition-based statistics

In 2007, the Chancellor of Justice received 2266 petitions, on the basis of which 1740 cases were opened. The number of petitions was higher in 2007 as compared to 2006, but more or less the same as in 2004 and 2005.

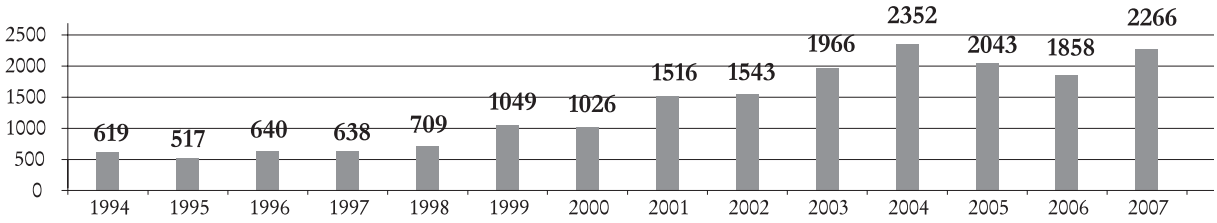

Figure 1. Number of petitions 1994–2007

1.2 Statistics based on cases opened

Until 2004, statistics were based on petitions submitted by individuals. Since 2005, statistics are based on cases opened. A 'case opened' means taking procedural steps and drafting documents to resolve an issue falling within the jurisdiction of the Chancellor. Petitions that raise the same issue are joined and regarded as a single case.

The Chancellor opens a case either based on a petition or on his own initiative. Proceedings of cases are divided into substantive and non-substantive proceedings. Substantive proceedings are divided as follows based on the Chancellor's competencies:

- review of the legality or constitutionality of legislation (i.e. review proceedings);
- verification of the legality of measures of the Government, local authorities, other public-law legal persons or of a private person, body or institution performing a public function (i.e. ombudsman proceedings);
- proceedings arising from the Chancellor of Justice Act and other Acts (i.e. special proceedings).

Resolving petitions received by the Chancellor takes place according to the principle of freedom of form and expediency of proceedings, and by taking necessary investigative measures to ensure effective and independent investigation. Outcomes of cases are divided as follows depending on the type of proceedings.

In reviewing the constitutionality and legality of legislation, the outcome of proceedings is classified according to whether a conflict was found or not:

A conflict was found if:

+ a proposal was made to bring an Act into conformity with the Constitution;
+ a proposal was made to bring a regulation into conformity with the Constitution or an Act;
+ a request was made to the Supreme Court to declare a legal act unconstitutional and invalid;
+ a report was made to the Riigikogu;
+ a memorandum was sent to executive authorities for initiating a Draft Act;
+ a memorandum was sent to executive authorities for adopting a legal act;
+ a problem was resolved by the relevant institution during the proceedings;

No conflict was found if:

− an opinion was issued stating a finding of no conflict.

In reviewing the legality of activities of bodies performing public functions, the outcome of proceedings is classified according to whether a violation was found or not:

A violation was found if:

+ a proposal was made for eliminating a violation;
+ a recommendation was made for complying with lawfulness and the principle of good administration;
+ a problem was resolved by the relevant institution during the proceedings;

No violation was found if:

− an opinion was issued stating a finding of no violation.

Special proceedings are classified depending on outcome as follows:

- o an opinion within constitutional review court proceedings;
- o a reply to an interpellation by a member of the Riigikogu;
- o a reply to a written enquiry by a member of the Riigikogu;
- o an opinion on a draft legal act;
- \+ a proposal to grant consent to lifting the immunity of a member of the Riigikogu and drawing up a statement of charges in respect of the member;
- – an opinion to the Riigikogu on lifting the immunity of a member of the Riigikogu;
- \+ initiating disciplinary proceedings against a judge;
- – a decision not to initiate disciplinary proceedings against a judge;
- \+ an agreement reached within conciliation proceedings;
- – terminating or suspending conciliation proceedings due to failure to reach an agreement.

In case of petitions declined for proceedings, the outcome is classified as follows:

- o explanation given of reasons for refusal;
- o petition forwarded to other competent bodies;
- o taken note of.

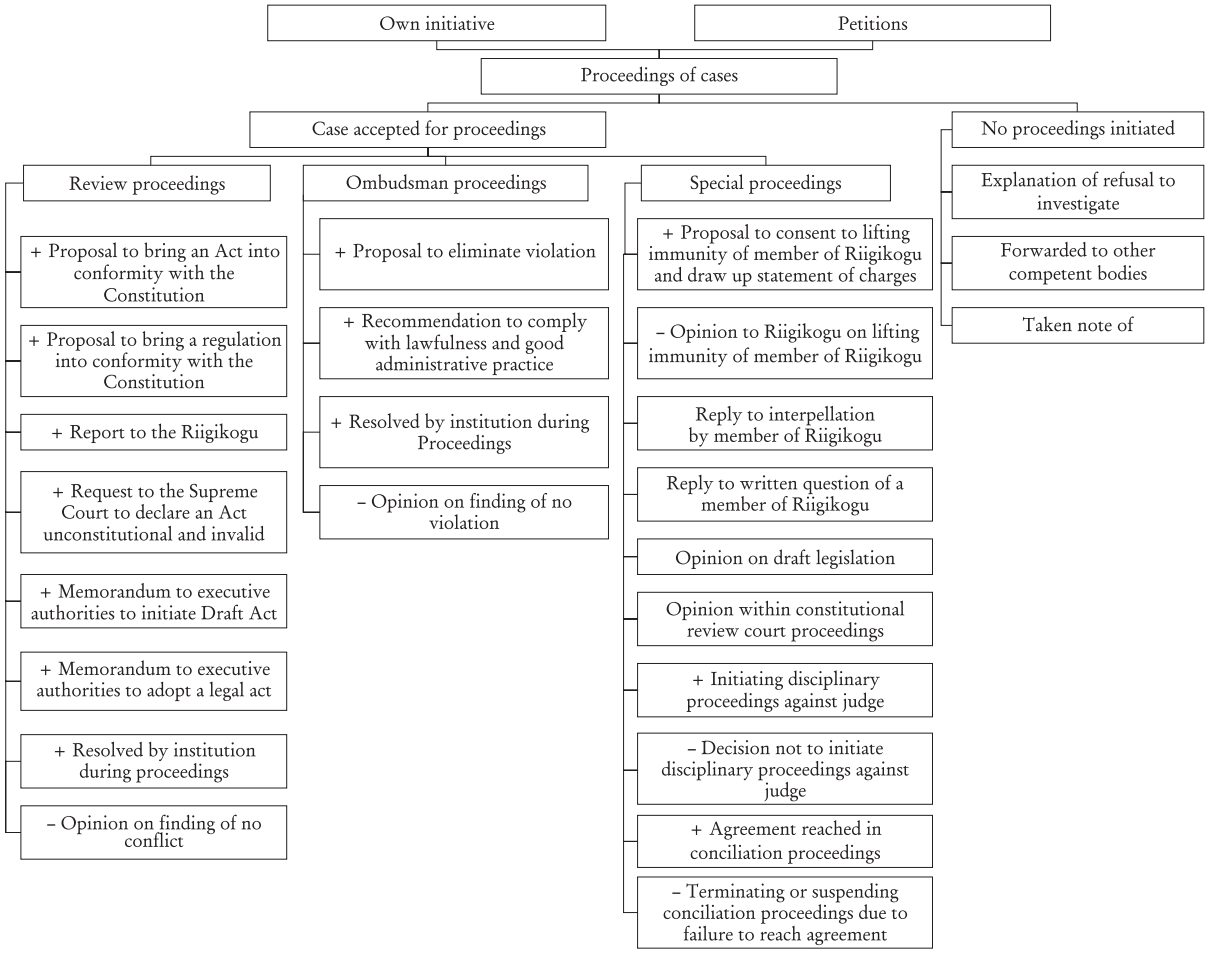

Figure 2. Classification of proceedings of cases and outcome of proceedings

During the reporting year 2007, there were 1740 cases opened, which is 35% more than in 2006. As at 01 March 2008, 1621 proceedings had been completed. In 51 cases follow-up proceedings are pending and 68 cases are still being investigated. In 474 cases, substantive proceedings were conducted during the reporting year. 70 proceedings were initiated based on the Chancellor's own initiative. 28 inspection visits were conducted.

In comparison to 2006, the number of own-initiative proceedings increased two-fold. There were more proceedings in case of which no substantive procedure was launched. Four times more inspection visits were conducted in 2007.

Table 1. Distribution of cases by content

	2005	2006	2007
Cases accepted for proceedings	725 *43,5%*	551 *34,6%*	474 *27,2%*
incl. review proceedings	247 *14,8%*	207 *13%*	150 *8,6%*
incl. ombudsman proceedings	372 *22,3%*	258 *16,2%*	252 *14,5%*
incl. special proceedings	106 *6,4%*	86 *5,4%*	72 *4,1%*
Non-substantive proceedings of cases	941 *56,5%*	1043 *65,4 %*	1266 *72,8%*
Total cases	1666 *100%*	1594 *100%*	1740 *100%*
incl. own-initiative proceedings	57 *3,4%*	35 *2,2 %*	70 *4%*
incl. inspection visits	12 *0,7%*	8 *0,5%*	28 *1,6%*

2. Outcome of proceedings of cases

The outcome of proceedings of cases demonstrates what kind of solutions or measures the Chancellor reached as a result of his proceedings. The number of proceedings initiated does not exactly correspond to the number of outcomes, as only completed cases can have an outcome, while the distribution of cases by content includes all cases opened during the reporting year.

2.1 Review of constitutionality and legality of legislation of general application

To review the constitutionality and legality of legislation of general application, 150 cases were opened, i.e. 8% of the total number of cases and 31.6% of the total number of substantive proceedings of cases. Of these, 131 were opened on the basis of petitions and 19 on own initiative.

In comparison to 2006, the number of review proceedings decreased somewhat in 2007. In 2006, 207 proceedings were initiated to review the constitutionality and legality of legislation of general application, i.e. 13% of the total number of proceedings.

Within constitutional review proceedings the following were scrutinised:

- conformity of Acts with the Constitution (94 proceedings, of these 80 based on petitions by individuals and 14 on own initiative);
- conformity of Government regulations with the Constitution and Acts (11 proceedings, of which all based on petitions);
- conformity of regulations of Ministers with the Constitution and Acts (12 proceedings, of which 10 based on petitions and two on own initiative);
- conformity of regulations of local councils and rural municipality and city administrations with the Constitution and Acts (31 proceedings, of which three based on application by County Governor, 26 based on petitions by individuals, and two on own initiative);
- legality of a legal act issued by a legal person in public law (one proceeding based on petition);
- legality of other legislation of general application (one proceeding on own initiative).

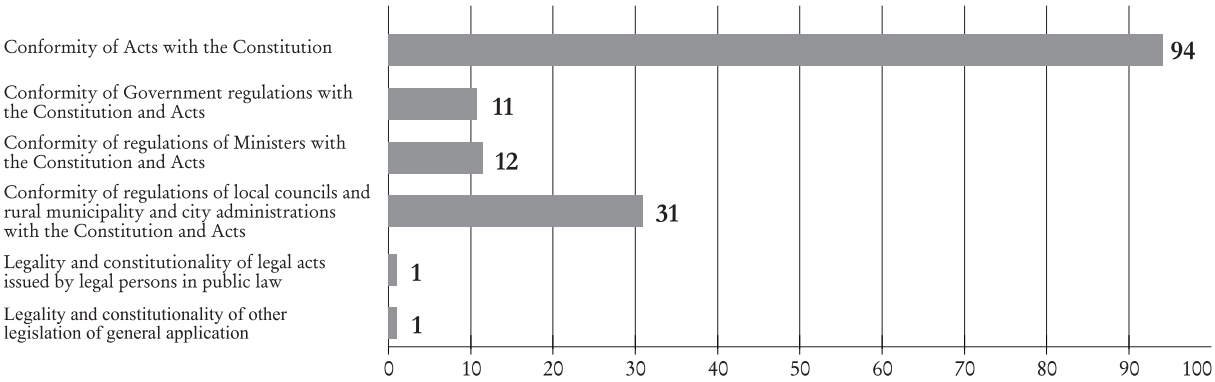

Figure 3. Distribution of constitutional review proceedings

As a result of review of the constitutionality and legality of legislation of general application, the Chancellor reached the following outcomes:

- proposal to bring an Act into conformity with the Constitution (in 2007, the Chancellor made no proposals to the Riigikogu);
- proposal to bring a regulation into conformity with the Constitution or an Act (four proceedings);
- request to the Supreme Court for declaring legislation of general application unconstitutional and invalid (in 2007, the Chancellor made no proposals to the Supreme Court);
- report to the Riigikogu (one proceeding);
- memorandum to executive authorities for initiating a Draft Act (13 proceedings);
- memorandum to executive authorities for adopting a legal act (seven proceedings);
- case resolved by the institution during proceedings (22 proceedings);
- opinion stating a finding of no conflict (69 proceedings).

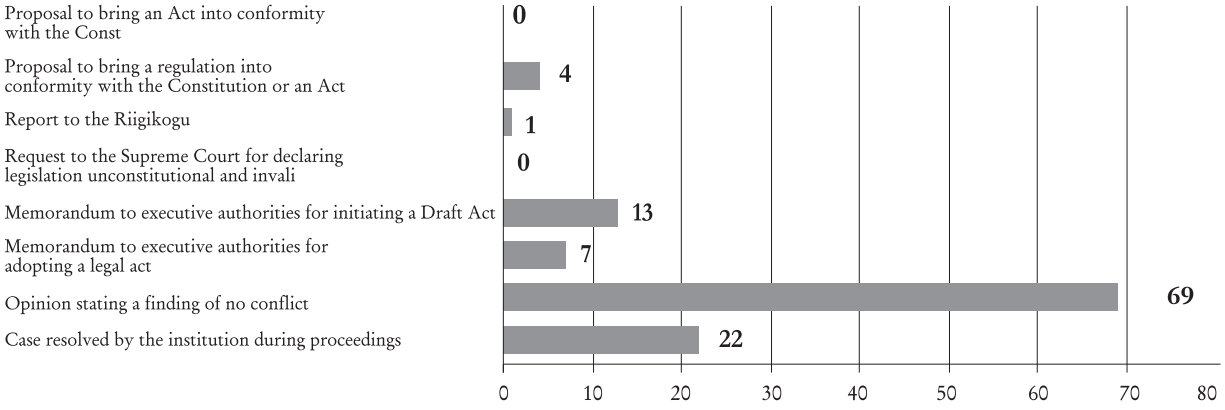

Figure 4. Outcomes of proceedings for review conformity with the Constitution and Acts

2.2 Verification of lawfulness of activities of agencies and institutions performing public functions

252 proceedings were initiated for verification of legality of measures of the state, local authorities, other public-law legal persons or of a private person, body or institution performing a public function, i.e. 1.5% of the cases and 53.2% of the total number of substantive proceedings. Of these, 201 were based on petitions by individuals and 51 on own initiative.

In comparison with 2006, the number of ombudsman proceedings was more or less the same. In 2006, 258 cases were opened, i.e. 16.2% of the total number of cases.

In proceedings initiated to verify the activities of agencies and institutions performing public functions, the following were scrutinised:

- activities of a state agency or body (155 proceedings, of these 126 based on petitions and 29 on own initiative);
- activities of a local government body or agency (59 proceedings, of these 53 based on petitions and six on own initiative);
- activities of a body or agency of a legal person in public law, or of a body or agency of a private person performing state functions (38 proceedings, of these 22 based on petitions and 16 on own initiative).

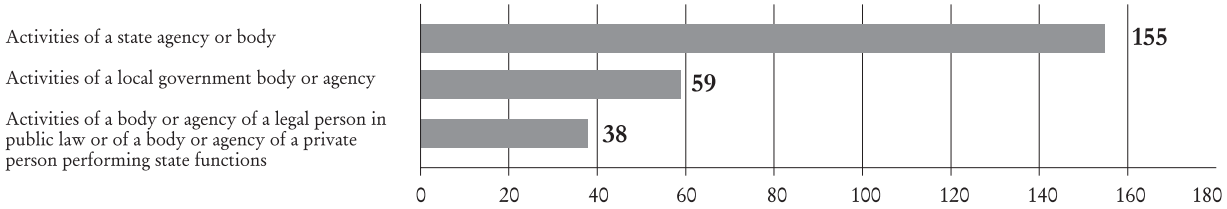

Figure 5. Distribution of proceedings for scrutiny of activities of persons, agencies. and bodies

Outcomes of supervision over activities of agencies and institutions performing public functions:

- proposal to eliminate a violation (32 proceedings);
- recommendation to comply with lawfulness and good administrative practice (49 proceedings);
- resolved by the institution during the proceedings (31 proceedings);
- opinion stating a finding of no violation (77 proceedings).

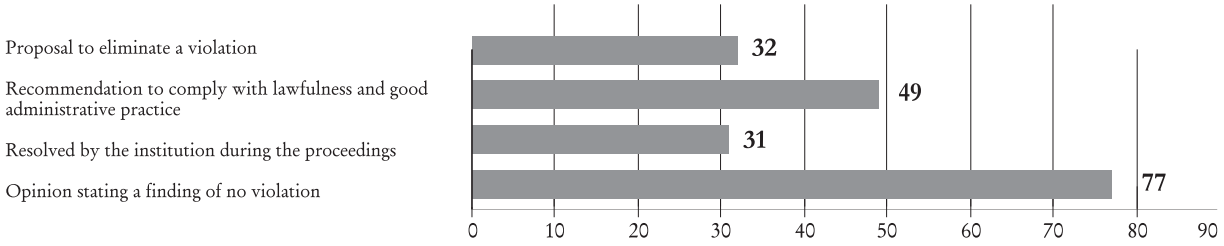

Figure 6. Outcomes of proceedings initiated for scrutiny of activities of persons, agencies. and bodies

2.3 Special proceedings

There were 72 special proceedings during the reporting year, i.e. 4.1% of the total number of cases opened and 15.2% of the total number of substantive proceedings.

In comparison to 2006, the number of special proceedings was smaller. In 2006, 86 special proceedings were initiated, i.e. 5.4% of the total number of proceedings.

Special proceedings are divided as follows:

- providing an opinion on a legal act within constitutional review proceedings (13 proceedings);
- replying to interpellations and written questions by members of the Riigikogu (nine proceedings);
- proceedings for initiating disciplinary proceedings against judges (16 proceedings);
- conciliation proceedings to resolve discrimination disputes between private individuals (three proceedings);
- opinions on draft legal acts and documents (17 proceedings)
- other activities arising from law (13 proceedings).

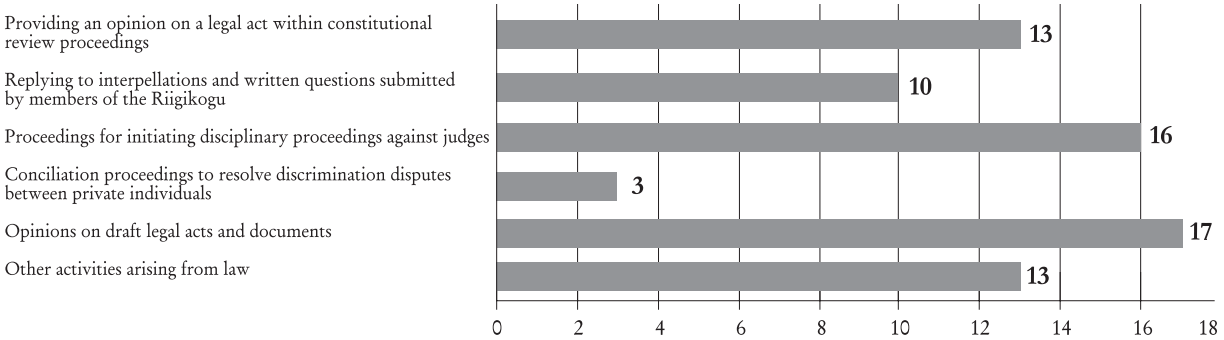

Figure 7. Distribution of special proceedings

2.4 Cases not accepted for proceedings

Upon receiving a petition, the Chancellor of Justice first assesses whether to accept it for further proceedings or not. He will reject a petition if its resolution is not within his competence. In that case, the Chancellor will explain to the petitioner which institution should deal with the issue. The Chancellor can also reject a petition if it is clearly unfounded or if it is not clear from the petition what constituted the alleged violation of the petitioner's rights or principles of good administration.

The Chancellor of Justice will also reject a petition if a court judgment has been made in the matter of the petition, the matter is concurrently subject to judicial proceedings or pre-trial complaint proceedings (e.g. when a complaint is being reviewed by an individual labour dispute settlement committee or similar pre-judicial body). The Chancellor cannot, and is not permitted to duplicate these proceedings, as the possibility of filing a petition with the Chancellor of Justice is not considered to be a legal remedy. Rather, the Chancellor of Justice is a petition body, with no direct possibility to use any means of enforcement and who resolves cases of violation of people's rights if the individual lacks legal remedies or they cannot use existing remedies for some reason (e.g. the deadline for filing a complaint with a court of law has passed).

The Chancellor may also reject a petition if a person can file an administrative appeal or use other legal remedies or if administrative appeal proceedings or other non-compulsory pre-trial proceedings are 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 may reject a petition if it was filed more than one year after the date on which the person became, or should have become, aware of violation of their rights. Applying the one-year deadline is in the discretion of the Chancellor and depends on the circumstances of the case – for example, severity of the violation, its consequences, whether it affected the rights or duties of third parties, etc.

In 2007, the Chancellor declined to open proceedings in 1266 cases, which makes up 72.8% of the total number of cases.

In comparison to 2006, again the number of petitions rose where the Chancellor did not consider it possible to open proceedings. (Declining to open proceedings made up 65.4% of the total number of cases).

Proceedings were not opened for the following reasons:

- the individual could file an administrative challenge or use other legal remedies (510 cases);
- lack of competence by the Chancellor (434 cases);
- judicial proceedings or compulsory pre-trial proceedings were pending in the matter (145 cases);
- petition did not comply with requirements under the Chancellor of Justice Act (97 cases)
- a petition was manifestly unfounded (57 cases);
- the petition had been filed one year after the petitioner discovered the violation (14 cases);
- administrative challenge proceedings or other voluntary pre-trial proceedings were pending (nine cases).

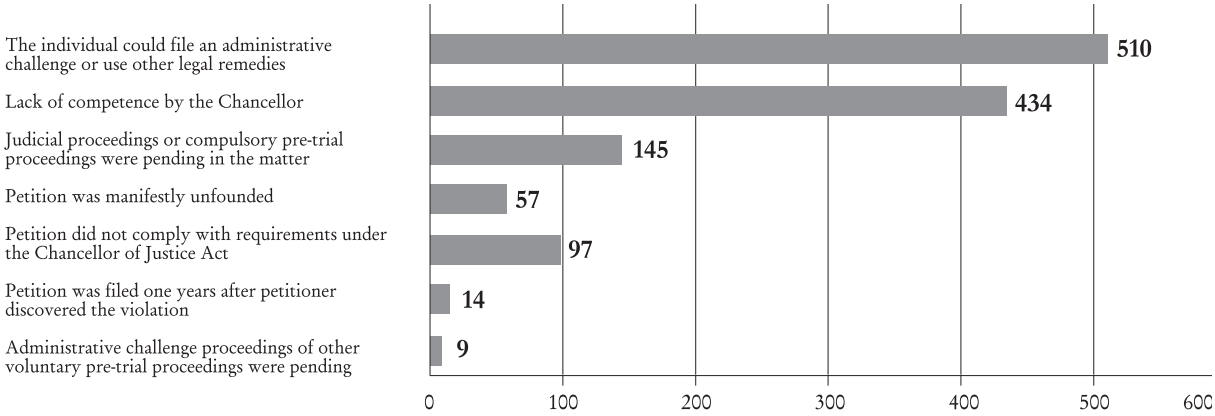

Figure 8. Reasons for declining to initiate proceedings of petitions

In case of petitions declined for proceedings, the competence of the Chancellor, Acts and other legislation were explained to the petitioners. Steps taken based on petitions in 2007:

- an explanatory reply was given (1046 cases);
- a petition was forwarded to competent bodies (216 cases);
- a petition was taken note of (21 cases).

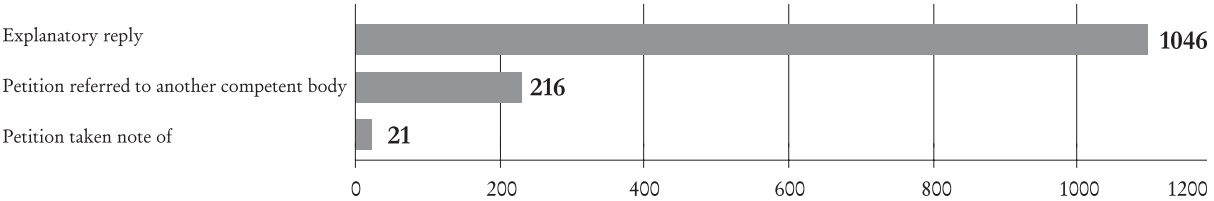

Figure 9. Distribution of replies in case of declining to accept a petition for proceedings

3. Distribution of cases by area of responsibility

By types of respondents, proceedings of cases were divided as follows:

- the state – 1164 cases;
- local authorities – 304 cases;
- a legal person in public law, except local authorities – 23 cases;
- a legal person in private law – 172 cases;
- a natural person – 35 cases.

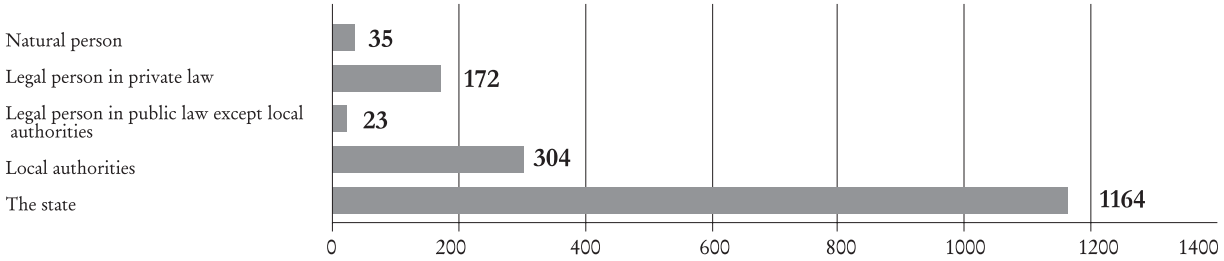

Figure 10. Distribution of cases by respondents

Distribution of cases opened in 2007 by areas of government and type of proceedings is shown in Tables 2 and 3. Proceedings are divided by areas or responsibility of government agencies and other institutions depending on who was competent to resolve the petitioned matter or against whose activities the petitioner complained.[341]

Table 2. Distribution of cases by respondent state or government agencies or institutions

Agency, body, person	Cases opened	Proceedings initiated	Finding of violation of lawfulness or good administrative practice	Finding of conflict with the Constitution or an Act	No proceedings conducted
Riigikogu	138	47	–	4	91
Supreme Court or other courts, except registry departments	162	26	4	–	136
President of the Republic or Office of the President	1	–	–	–	1
Government of the Republic or Prime Minister	15	3	–	–	12
Chancellor of Justice or Chancellor's Office	7	3	–	–	4
National Audit Office	1	–	–	–	1
Area of government of the Ministry of Education and Research	28	15	4	2	13
Ministry of Education and Research	20	10	3	1	10
Agency subordinate to the Ministry of Education and Research	8	5	1	1	3
Language Inspectorate	–	–	–	–	–
Area of government of the Ministry of Justice	379	54	6	3	325
Ministry of Justice	57	23	–	3	34
Agency subordinate to the Ministry of Justice	27	3	–	–	24
Tallinn Prison	77	12	2	–	65
Maardu Prison	1	–	–	–	1
Ämari Prison	29	1	–	–	28
Tartu Prison	86	7	1	–	79
Murru Prison	56	4	2	–	52
Prosecutor's Office	38	2	–	–	36

341 In case of review of constitutionality of Acts, the Riigikogu is the respondent.

Harku Prison	4	–	–	–	4
Viljandi Prison	4	2	1	–	2
Area of government of the Ministry of Defence	21	9	6	1	12
Ministry of Defence	7	3	1	1	4
Agency subordinate to the Ministry of Defence	14	6	5	–	8
Defence Resources Agency	–	–	–	–	–
Area of government of the Ministry of the Environment	40	13	5	–	27
Ministry of the Environment	28	12	4	–	16
Agency subordinate to the Ministry of the Environment	3	–	–	–	3
Land Board	6	1	1	–	5
Environmental Inspectorate	2	–	–	–	2
Communications Board	1	–	–	–	1
Maritime Administration	–	–	–	–	–
Area of government of the Ministry of Culture	11	6	1	–	5
Ministry of Culture	8	6	1	–	2
Agency subordinate to the Ministry of Culture	1	–	–	–	1
National Heritage Board	2	–	–	–	2
Area of government of the Ministry of Economic Affairs and Communications	39	17	2	1	22
Ministry of Economic Affairs and Communications	20	12	–	1	8
Agency subordinate to the Ministry of Economic Affairs and Communications	11	1	1	–	10
Consumer Protection Board	3	2	–	–	1
Technical Inspectorate	1	1	–	–	–
Energy Market Inspectorate	1	1	1	–	–
Road Administration	3	–	–	–	3
Patent Office	–	–	–	–	–
Competition Board	–	–	–	–	–
Area of government of the Ministry of Agriculture	7	–	–	–	7
Ministry of Agriculture	3	–	–	–	3
Agency subordinate to the Ministry of Agriculture	–	–	–	–	–
Agricultural Registers and Information Board	4	–	–	–	4
Plant Production Inspectorate	–	–	–	–	–
Veterinary and Food Board	–	–	–	–	–
Area of government of the Ministry of Finance	33	15	1	–	18
Ministry of Finance	19	12	–	–	7
Agency subordinate to the Ministry of Finance	–	–	–	–	–
Tax and Customs Board	13	3	1	–	10
Public Procurement Office	1	–	–	–	1
Area of government of the Ministry of Internal Affairs	123	36	12	–	87

Ministry of Internal Affairs	24	13	2	–	11
Agency subordinate to the Ministry of Internal Affairs	7	–	–	–	7
Police Board	60	13	6	–	47
Citizenship and Migration Board	20	6	2	–	14
Data Protection Inspectorate	3	–	–	–	3
Security Police Board	5	1	–	–	4
Rescue Board	–	–	–	–	–
Border Guard Administration	4	3	2	–	1
Minister for Regional Affairs, county administration, or subordinate agencies	21	6	2	–	15
Area of government of the Ministry of Social Affairs	104	48	6	3	56
Ministry of Social Affairs	41	27	3	3	14
Agency subordinate to the Ministry of Social Affairs	13	4	1	–	9
Social Insurance Board	37	12	1	–	25
Health Protection Inspectorate	5	3	1	–	2
Labour Inspectorate	1	–	–	–	1
Health Care Board	6	2	–	–	4
Labour Market Inspectorate	1	–	–	–	1
State Agency of Medicines	–	–	–	–	–
Ministry of Foreign Affairs	8	3	1	–	5
State Chancellery	2	–	–	–	1
Agency subordinate to the State Chancellery	1	–	–	–	1
National Electoral Committee	–	–	–	–	–

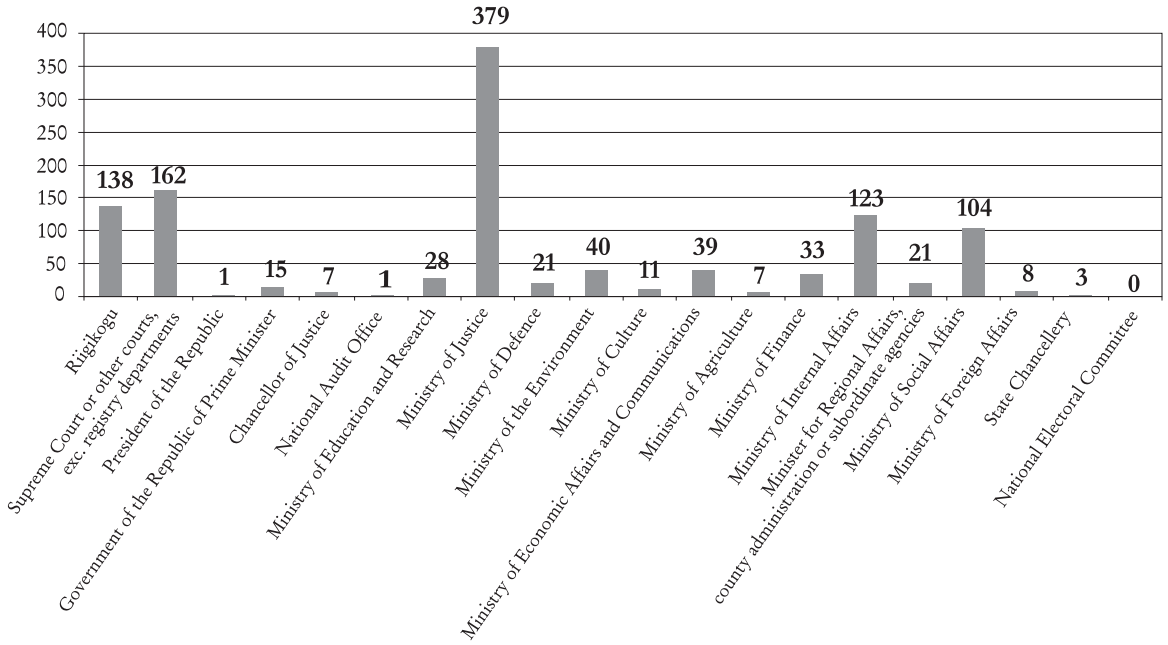

Figure 11. Distribution of cases by respondents on state level

Table 3. Distribution of cases by respondents on local government level

Respondent on local government level	Cases opened	Proceedings initiated	Finding of violation of lawfulness or good administrative practice	Finding of conflict with the Constitution or an Act	No proceedings conducted
Harju County local authorities, except Tallinn city	50	6	1	1	44
Hiiu County local authorities	1	–	–	–	1
Ida-Viru County local authorities, except Narva city	20	7	1	–	13
Jõgeva County local authorities	3	1	1	–	2
Järva County local authorities	–	–	–	–	–
Lääne County local authorities	8	3	–	2	5
Lääne-Viru County local authorities	14	4	1	1	10
Põlva County local authorities	5	1	–	1	4
Pärnu County local authorities	17	4	2	–	13
Rapla County local authorities	4	2	1	–	2
Saare County local authorities	9	3	–	–	6
Tartu County local authorities, except Tartu city	17	9	3	–	8
Valga County local authorities	19	11	4	–	8
Viljandi County local authorities	5	3	1	–	2
Võru County local authorities	8	2	–	–	6
Narva City	8	3	2	–	5
Tallinn City	79	17	3	1	62
Tartu City	31	11	–	–	20

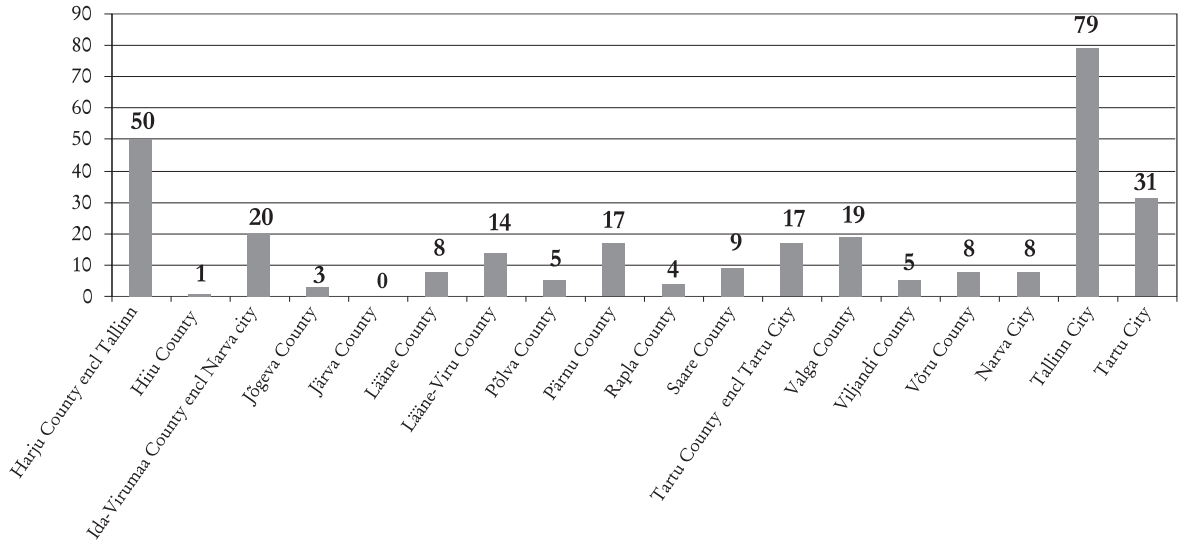

Figure 12. Distribution of cases by respondents on local government level

4. Distribution of cases by areas of law

Similarly to previous years, the largest number of cases was opened in connection with criminal enforcement procedure and imprisonment law. Compared to other areas of law, significantly more cases were opened in relation to issues of ownership reform and social welfare. In comparison to 2006, the number of cases in education and research law has increased almost twofold.

Table 4. Cases opened by areas of law

Area of law	Number of cases
Criminal enforcement procedure and imprisonment law	301
Ownership reform law	86
Social welfare law	70
Pre-trial criminal procedure	68
Education and research law	65
Local government organisation law	64
Health law	61
Construction and planning law	61
Social insurance law	59
Criminal and misdemeanour court procedure	59
Civil procedure	58
Environmental law	54
Financial law (incl. tax and customs law, state budget, state property)	53
Administrative law ((administrative management, administrative procedure, administrative enforcement, public property law, etc)	49
Public service	42
Other public law	41
Government organisation law	40
Personal data protection, databases and public information, state secrets law	38
Enforcement procedure	37
Citizenship, migration, and language law	35
Energy, public water supply and sewerage law	34
Transport and road law	30
Law of obligations	29
Non-profit associations and foundations law	29
Property law, including intellectual property law	28
Labour law (including collective labour law)	27
Legal aid and notarial law	22
Police and law enforcement law	21
Economic and trade management and competition law	17
Other private law	15
Misdemeanour procedure	12
Administrative court procedure law	12
National defence law	12
Election and referendum law, political party law	11
Family law	10
Traffic regulation law	9
Telecommunications, broadcasting, and postal services law	9
Company, bankruptcy, and credit institutions law	8
Substantive penal law	8

Consumer protection law	6
Agricultural law (including food and veterinary law)	6
Law of succession	5
International law	5
Heritage law	5
Constitutional review court procedure law	3
Animal protection, hunting, and fishing law	1

5. Distribution of cases by regions

During the reporting year, the largest number of petitions and cases opened on the basis of them was in Tallinn (569 cases), Tartu (257 cases), and Harju County (except Tallinn (244 cases)). A large number of cases were also from Ida-Viru County (except Narva (67 cases)) and Pärnu County (57 cases). Thus, by regions the largest number of cases is still related to larger cities. Similarly to 2006, the smallest number of cases during the reporting year was from Hiiu County (eight cases). 23 cases were based on petitions received from abroad.

In comparison to 2006, the number of cases opened on the basis of petitions from Tartu increased. In 2007, Tartu produced 102 cases more than in 2006. The number of cases opened on the basis of petitions from Ida-Viru County and Narva has also risen. In comparison to 2006, the number of cases from Tartu County (except Tartu) and Lääne-Viru County dropped. Similarly to the previous year, a large number of cases was opened based on e-mail petitions (133 cases).

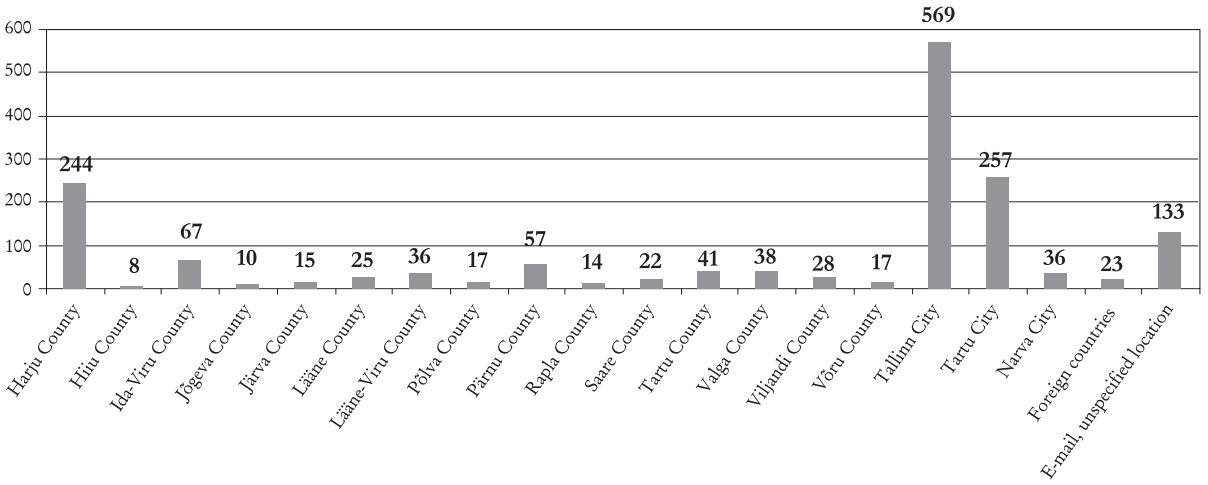

Figure 13. Distribution of cases by location of petitioner

6. Language of proceedings

Cases were mostly opened on the basis of petitions submitted in Estonian. 1370 cases, i.e. 78.7% of the total number of cases, were opened based on petitions in Estonian. 274 cases, i.e. 15.7% of the total number of cases, were opened based on petitions in Russian.

In comparison to 2006, the number of petitions in Russian was almost the same in 2007. In 2006, the proportion of cases opened based on petitions in Russian was 16.1% of the total number of cases.

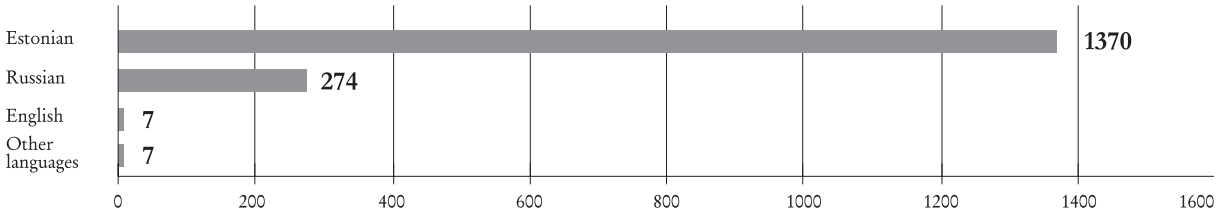

Figure 14. Distribution of cases by language of petition

7. Inspection visits

The Chancellor of Justice is authorised to conduct inspection visits to prisons, military units, police detention centres, expulsion centres, reception or registration centres for asylum seekers, psychiatric hospitals, special care homes, schools for pupils with special educational needs, general care homes, children's homes and youth homes, as well as all other agencies and institutions subject to the Chancellor's supervision.

Inspection visits are divided into regular and extraordinary visits. Regular inspection visits are scheduled in the annual action plan of the Office of the Chancellor of Justice, and supervised institutions are notified about them in advance. Extraordinary inspection visits are not reflected in the annual plan. Supervised institutions are not notified about them in advance, or they are notified immediately prior to inspection.

As of 18 February 2007, the Chancellor of Justice also functions as the national preventive mechanism established under Art 3 of the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel or Degrading Treatment or Punishment (OPCAT), so that targets of inspection visits include, in addition to national custodial institutions, all other institutions where freedom of individuals may be restricted.

Inspection visits are divided into three categories, depending on the agency or institution inspected:

- inspection of closed institutions – institutions where individuals are staying involuntarily and where their freedom may be restricted (OPCAT institutions);
- inspection of open institutions – institutions where individuals are staying voluntarily (schools, children's homes);
- inspection of administrative authorities – state or local government agencies, in respect of which compliance with good administrative practice is verified (ministries, county administrations, local government units).

During the reporting year, the Chancellor made 28 inspection visits, of which 18 were to closed institutions, five to open institutions, and five to administrative authorities. There were six extraordinary inspection visits, all of them to scrutinise closed institutions.

In comparison to 2006, the number of inspection visits rose significantly. In 2006, there were eight inspection visits, while in 2007 the number was almost four-fold. The Chancellor's designation as the national preventive mechanism under OPCAT could be considered the reason for the increased number of inspection visits.

8. Reception of individuals

In 2007, 343 individuals came to a reception at the Office of the Chancellor of Justice or to receptions organised in counties. In addition to Tallinn, individuals were also received in Tartu, Jõhvi, Narva, and Pärnu. Advisers to the Chancellor organised receptions during their business trips in county administrations, rural municipality or city administrations, and in institutions during inspection visits. Individuals were informed about receptions in advance via local newspapers, and information was also posted on the homepage of the Chancellor of Justice.

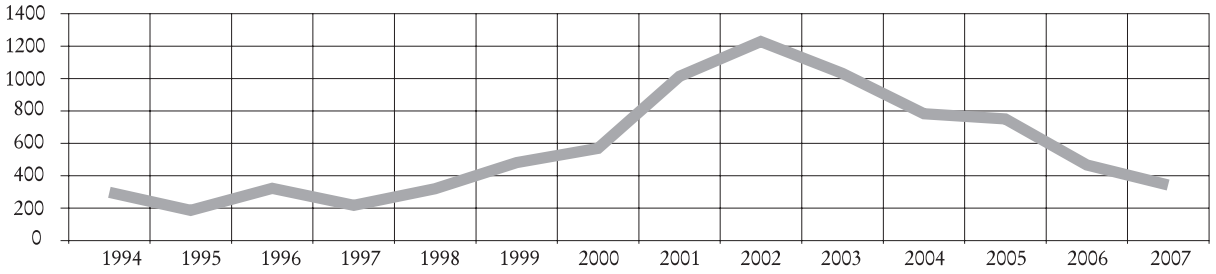

Figure 15. Number of persons coming to reception with the Chancellor in 1994–2007

In comparison with 2006, the number of persons coming to receptions has dropped. In 2006, 467 individuals came to a reception with the Chancellor. However, at the same time more solutions have been found to problems of individuals by communicating with them by telephone.

The largest number of persons came to a reception in Tallinn (187) and Tartu (55). The number was somewhat smaller in Pärnu County and Ida-Viru County (except Narva) (43 and 30 respectively).

Questions raised during receptions most frequently related to ownership reform law and rights of ownership (56 and 31 persons respectively). A number of issues also related to social welfare law (28 persons), civil procedure (23 persons), and local government organisation (21 persons). Similarly to previous years, people were interested in pre-trial

criminal procedure, criminal and misdemeanour court procedure, and criminal enforcement and imprisonment law (total 18 persons).

Mostly, people coming to receptions needed clarification concerning legislation, and legal advice. In most cases, people's concerns were resolved during the reception. However, individuals were also advised to file a written petition to initiate proceedings of cases.

9. Summary

The number of petitions received by the Chancellor during the reporting year increased slightly as compared to 2006, but remained on the same level as in 2004 and 2005.

During the reporting year, the Chancellor opened 146 cases more than in 2006. In 2007, the number of own-initiative proceedings was twice the number for 2006.

The number of proceedings initiated for verification of the constitutionality and legality of legislation of general application was slightly smaller than in 2006, while the number of proceedings initiated for scrutiny of activities of agencies and institutions performing public functions remained on the same level. During review proceedings, in 26 cases in 2007 the Chancellor found a violation of the Constitution or an Act. As a result of ombudsman proceedings, violations of principles of lawfulness and good administrative practice were found in 81 cases.

The number of cases where no substantive proceedings were conducted has grown. If in 2006 no substantive proceedings were initiated in 65.4% of cases, in 2007 the proportion was 72.8%. In cases without substantive proceedings, most often explanatory and clarifying replies were given, making up 83% of the total number of replies.

During the reporting year, most cases were opened in relation to criminal procedural enforcement procedure and imprisonment law. There were also more cases in relation to issues of ownership reform and social welfare law. In comparison to 2006, the number of cases in the field of education and research law has risen.

By regional distribution, the largest number of cases is from larger cities. During the reporting year, most cases were opened based on petitions from Tallinn and Tartu. Among counties, most cases are from Harju County.

Cases were mostly opened based on petitions in Estonian, making up 78.7% of the total number of cases. Cases opened on the basis of petitions in Russian made up 15.7% of the total number of cases.

In 2007, almost four times more inspection visits were conducted than in 2006. 18 inspection visits were carried out to perform the Chancellor's functions under OPCAT.

In 2007, 343 individuals came to receptions at the Office of the Chancellor of Justice or to receptions organised in counties. In comparison to 2006, the number of individuals coming to receptions dropped slightly. Questions most frequently raised during receptions related to ownership reform and social welfare law, civil procedure, and local government organisation.

PART 4.

ACTIVITIES OF THE OFFICE OF THE CHANCELLOR OF JUSTICE

I ORGANISATION

The Office of the Chancellor of Justice (the Office) is an agency established to support the Chancellor of Justice as a constitutional institution. The Chancellor of Justice is Head of the Office.

1. Structure

In terms of structure, the Office includes the Chancellor of Justice, two Deputies, the Director, and four departments: the general department and three specialised department whose competence is divided on the basis of areas of government of Ministries. Each department is led by a Head of department who is also an advisor to the Chancellor.

The area of activity of the First Department includes all matters that fall within the area of government of the Ministry of Social Affairs, the Ministry of Education and Research, the Ministry of Culture, and their subordinate agencies.

The area of activity of the Second Department includes all matters that fall within the area of government of the Ministry of Economic Affairs and Communications, the Ministry of Agriculture, the Ministry of Finance, the Ministry of the Environment, and their subordinate agencies; as well as issues within the competence of the Bank of Estonia, the Financial Supervision Authority, and the National Audit Office.

The area of activity of the Third Department includes all matters that fall within the area of government of the Ministry of Internal Affairs, the Ministry of Defence, the Ministry of Foreign Affairs, the Ministry of Justice, and their subordinate agencies and other units; as well as issues within the competence of the Prime Minister, Ministers without portfolio, and the State Chancellery; initiating 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 organisational work of the Office of the Chancellor of Justice, reception of individuals, drafting the budget, monitoring and analysing prudent use of 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.

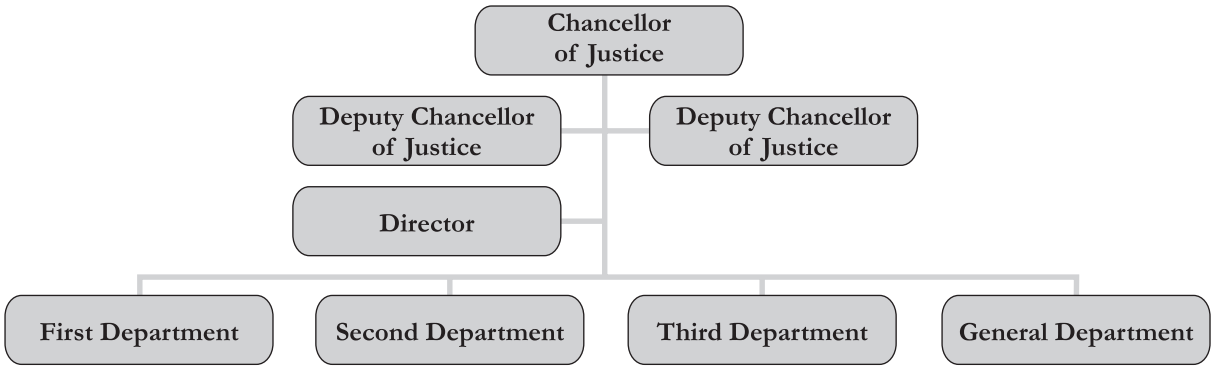

Figure 1. Outline of the structure of the Office of the Chancellor of Justice

2. Composition of staff by gender, age, and education

As at 31 December 2007, there were 50 staff positions in the Office, of which 44 were filled. Staff members included 31 women and 13 men. 34 of filled positions belonged to the rank group of higher officials and 14 to the rank group of senior officials. 29 staff members performed a main function and 15 staff members a support function.

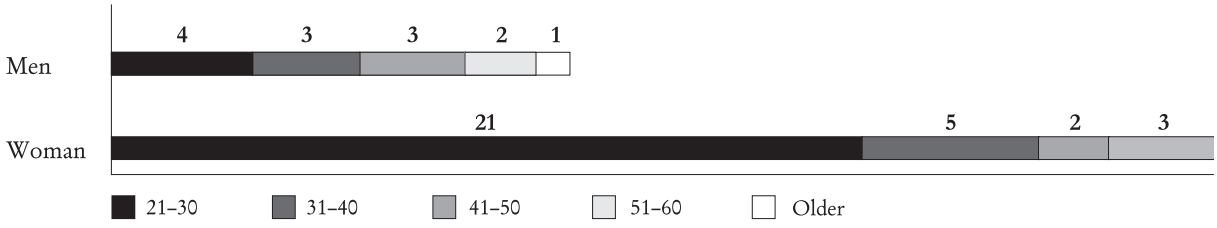

Figure 2. Age composition of staff of the Office as at 31 December 2007

The majority of staff were in the age group 21-30. The youngest staff member was 22 and the oldest 78. The average age of the staff was 35 years.

42 employees had higher education and two had vocational secondary education. In 2007, 11 employees were pursuing a course of studies either at the Bachelor's, Master's, or Doctoral level. Four employees held a PhD and eleven held a Master's degree.

3. Budget implementation report

Budget implementation report in terms of income and expenses, in kroons

		31.12.2007 Budget	31.12.2007 Discharge
EXPENDITURE			
Operating expenditure		***23 057 881***	***22 849 759***
50	*Labour costs*	***16 039 033***	***16 039 032***
500	Salaries	11 832 615	11 832 614
505	Fringe benefits	174 630	174 631
506	Taxes and social insurance payments	4 031 788	4 031 787
55	*Maintenance expenses*	***7 018 848***	***6 810 727***
5500	Administrative expenses	1 300 000	1 278 960
5502	Research and development	41 000	40 356
5503	Business trips	550 000	533 415
5504	Training expenses	500 000	473 238
5511	Maintenance costs of immovables, buildings, and premises	2 900 000	2 874 773
5513	Vehicle maintenance expenses	340 000	338 104
5514	Information and communication technology	1 222 848	1 114 570
5515	Inventory expenses	120 000	118 468
5522	Medical expenses	40 000	35 668
5540	Sports expenses	5 000	3 175
Targeted allocations for current expenses		***15 000***	***8 705***
4500	Membership fees of international organisations (International Ombudsman Institute)	15 000	8 705
Foreign aid and projects		***195 101***	***476 989***
55	Foreign aid from the German Foundation for International Legal Cooperation, use in 2007 of the balance from 2006	195 101	195 101
55	Measure 1.4 "Raising administrative capacity" (not contained in budget)		281 888
Repayment of student loans		***200 833***	***152 136***
505	Repayment of principal sum of the loan	116 615	88 356
506	Income tax and social tax on fringe benefits	84 218	63 780
Total expenditure		**23 468 815**	**23 487 589**

II ACADEMIC LAW ACTIVITIES

1. Scientific events

1.1 Conference *Elurikkus või rikutud elu* (Wealthy life or spoilt life)

On 11 May the Chancellor of Justice organised an international scientific conference on environmental law entitled *Elurikkus või rikutud elu* (Wealthy life or spoilt life). The conference focused on possibilities to protect rights of individuals in case of environmental violations, explored issues of environmental supervision, punishments and case law in Estonian and German environmental law, and raised issues concerning Estonian environmental legislation. The conference was held in cooperation with the German Foundation for International Legal Cooperation. This was already the fifth annual conference of the Chancellor of Justice.

Presentations at the conference dealt with European nature protection law and its supervision, principles of environmental law in the administration of justice by the European Court of Justice, protection of subjective rights of individuals in Estonian court practice, penal law applied in cases of environmental violations, and problems of drafting environmental legislation in Estonia and Germany. There were total eight presentations, delivered by Evelin Lopman, an adviser to the Chancellor of Justice, Kärt Vaarmari, an environmental law lawyer from the Estonian Fund for Nature, Tartu University Professor Jaan Sootak and Associate Professor Hannes Veinla, and recognised legal scholars and practitioners from Germany: Ludwig Krämer, Hans D. Jarass, Martin Hussels, and Michael Kloepfer. Moderators of the conference were Justice of the Estonian Supreme Court Julia Laffranque, and Minister of Justice Rein Lang. Conference presentations were published in the journal *Juridica* No. 7.

Invitations for participation had been sent to all major stakeholders in issues of environmental law: the Riigikogu, representatives of the Government and ministries, judges, representatives of local authorities, environmental and nature experts, and representatives of civil society and non-profit organisations, legal scholars, and foreign guests dealing with this field.

1.2 Academic lecture by Professor of German and European public law from the University of Münster

On 09 May, Hans D. Jarass, Professor Ordinary of German and European public law and Director of the Institute of Environmental and Planning Law of the University of Münster, delivered an academic lecture at the Office of the Chancellor of Justice on the topic *The Impact of an active Constitutional Court on the dimensions or functions of fundamental Rights. German experiences.*

The lecture explored the tendency of constitutionalisation which may emerge in a country where fundamental rights are applied by a constitutional review court. The speaker analysed the effect of the negative and positive dimension of fundamental rights on public as well as private law.

Professor Jarass is a recognised environmental and constitutional law expert. At the office of the Chancellor of Justice, the Professor delivered a lecture in his second expert field – constitutional law.

1.3 Public lecture by University of Tartu public law researcher

On 17 October, Rodolphe Laffranque, a public law researcher from the University of Tartu Law Faculty, delivered a public lecture on the topic "Human dignity in French judicial practice" at the Office of the Chancellor of Justice. Mr. Laffranque explored the origins of human dignity as a constitutional principle and its development in different fields, analysing several judgements from French courts in which human dignity had been used as an argument.

2. Scientific articles

M. Ernits. Avalik väljendusvabadus ja demokraatia (I osa). [Public freedom of expression and democracy (Part I)] – *Juridica* No. 1 (2007).

K. Eller. Korrakaitse üldvolituse koosseis Saksa õiguses ja Eesti korrakaitseseaduse eelnõus. [General competencies related to law and order in German law and in the Estonian Draft Maintenance of Law and Order Act] – *Juridica* No. 1 (2007).

M. Ernits. Avalik väljendusvabadus ja demokraatia (II osa). [Public freedom of expression and democracy (Part II)] – *Juridica* No. 3 (2007).

E. Lopman. Kaitsealade moodustamise põhimõtted Euroopa looduskaitseõiguses ja selle siseriiklik järelevalve.

[Principles of forming conservation areas in European nature protection law, and its national supervision] – *Juridica* No. 7 (2007).

A. Uritam. Lapsed ja nende karistamine: kas lüüa või mitte? [Children and punishment: to slap or not to slap– *Juridica* No. 8 (2007).

K. Žurakovskaja. Liberaalsete väljendusvabaduse kontseptsioonide juriidiline teostamine. [Legal implementation of liberal concepts of freedom of expression] – *Juridica* nr 8 (2007).

M. Amos. Isikute põhiõiguste riive lubatavusest ning ulatusest tahtest olenematu ravi läbi- viimisel. [Admissibility of interference with fundamental rights of individuals in imposing involuntary treatment] – Eesti Arst No. 12 (2007).

M. Ernits. *An Early Decision with Far-reaching Consequences*. – *Juridica International* No. 1 (2007).

A. Jõks. *The Chancellor of Justice's Role in Protecting the Constitution and Balancing the Legislature's Activity: Is the Chancellor of Justice Only a Prosecutor of the Supreme Court?* – *Juridica International* nr 2 (2007).

III INTERNATIONAL RELATIONS

1. Foreign guests of the Office of the Chancellor of Justice

06 February	Legal Adviser to the President of the Republic of Latvia Sandra Kukule.
15 February	UNICEF Deputy Executive Director Rima Salah.
22 February	OSCE ODHIR representatives Judge of the Macedonian Constitutional Court Mirjana Lazarova Trajkovska and ODIHR electoral adviser Jonathan Stonestreet in connection with the election observation mission for the elections of the XI Riigikogu.
01 May	Delegation of the Russian Duma.
11 May	Representatives of the German Foundation for International Legal Cooperation Tatiana Bovkun, Ludwig Krämer, Hans D. Jarass, Martin Hussels, Michael Kloepfer.
19 September	President of the Council of Europe Parliamentary Assembly René van der Linden.
25 September	UN Special Rapporteur on Racial Discrimination Doudou Diéne.
02 October	Council of Europe Commissioner for Human Rights Thomas Hammarberg.
21 November	GRECO Evaluation Team for control of financing of political parties and electronic electoral campaigns.

2. Cooperation with European Union institutions, international organisations, and organisations in foreign countries

2.1 European Ombudsman

The European Ombudsman investigates complaints about maladministration in the institutions and bodies of the European Union, including, among others, the European Commission, the Council of the EU, the European Parliament, the European Environmental Agency, and the European Agency for Safety and Health at Work. The European Ombudsman also organises cooperation between ombudsmen of EU member states. The European Network of Ombudsmen and an intranet have been created. The Estonian Chancellor of Justice has actively participated in cooperation through his contact persons and also contributed to the *European Ombudsmen Newsletter* published by the European Ombudsman.

2.2 European Commission's Advisory Committee on Equal Opportunities between Men and Women

Representative of the Chancellor of Justice in the European Commission's Advisory Committee on Equal Opportunities between Men and Women is Head of the First Department and Adviser to the Chancellor of Justice Eve Liblik. In 2005-2006, she served as President of the Advisory Committee. In 2007, Eve Liblik participated as an expert in Committee's regular meetings taking place twice a year in Brussels.

2.3 German Foundation for International Legal Cooperation

The Chancellor of Justice has cooperated with the German Foundation for International Legal Cooperation (IRZ) since 2003. With the support from the IRZ, in 2007 the Chancellor of Justice scientific conference *Elurikkus või rikutud elu* (Wealthy life or spoilt life) was organised.

CONTACT INFORMATION

Óiguskantsleri Kantselei
Kohtu 8
15193 TALLINN
Telefon: +372 693 8400 Chancellor of Justice
+372 693 8404 Information, reception of individuals
Fax: +372 693 8401
E-mail: info@oiguskantsler.ee

Indrek Teder		
Chancellor of Justice	info@oiguskantsler.ee	693 8400
Helen Paliale		
Assistant to the Chancellor of Justice	helen.paliale@oiguskantsler.ee	693 8400
Aare Reenumägi		
Deputy Chancellor of Justice	aare.reenumagi@oiguskantsler.ee	693 8400
Madis Ernits		
Deputy Chancellor of Justice	madis.ernits@oiguskantsler.ee	693 8400
Alo Heinsalu		
Director	alo.heinsalu@oiguskantsler.ee	693 8424

FIRST DEPARTMENT

Eve Liblik		
Head of the Department	eve.liblik@oiguskantsler.ee	693 8418
Kaidi Kaidme		
Assistant to the Head of the Department	kaidi.kaidme@oiguskantsler.ee	693 8442
Igor Aljošin		
Senior Adviser	igor.aljosin@oiguskantsler.ee	693 8411
Anu Uritam		
Adviser	anu.uritam@oiguskantsler.ee	693 8414
Andres Aru		
Adviser	andres.aru@oiguskantsler.ee	693 8433
Mari Amos		
Adviser	mari.amos@oiguskantsler.ee	693 8441
Kadri Soova		
Acting Adviser	kadri.soova@oiguskantsler.ee	693 8428

SECOND DEPARTMENT

Ave Henberg		
Head of the Department	ave.henberg@oiguskantsler.ee	693 8435
Janar Kivirand		
Adviser	janar.kivirand@oiguskantsler.ee	693 8408
Triin Roosve		
Adviser	triin.roosve@oiguskantsler.ee	693 8439
Kärt Muller		
Adviser	kart.muller@oiguskantsler.ee	693 8432
Evelin Lopman		
Adviser	lapsehoolduspuhkusel	

THIRD DEPARTMENT

Nele Parrest		
Head of the Department	nele.parrest@oiguskantsler.ee	693 8438
Saale Laos		
Senior adviser	saale.laos@oiguskantsler.ee	693 8447
Helen Kranich		
Adviser	helen.kranich@oiguskantsler.ee	693 8446
Monika Mikiver		
Adviser	monika.mikiver@oiguskantsler.ee	693 8412

Liina Lust		
Adviser	liina.lust@oiguskantsler.ee	693 8429
Lauri Mälksoo		
Adviser	lauri.malksoo@oiguskantsler.ee	693 8419
Kaarel Eller		
Adviser	kaarel.eller@oiguskantsler.ee	693 8426
Jaanus Konsa		
Acting Adviser	jaanus.konsa@oiguskantsler.ee	693 8445
Raivo Sults		
Acting Adviser	raivo.sults@oiguskantsler.ee	693 8415
Ksenia Žurakovskaja		
Assistant Adviser	ksenia.zurakovskaja@oiguskantsler.ee	693 8430
Indrek-Ivar Määrits		
Adviser	indrek-ivar.maarits@oiguskantsler.ee	693 8406
Kristiina Albi		
Adviser	kristiina.albi@oiguskantsler.ee	

GENERAL DEPARTMENT

Eve Marima		
Chief Accountant and Financial Adviser		
Acting Head of the Department	eve.marima@oiguskantsler.ee	693 8421
Teele Päivalill		
Assistant to the Head of the Second Department		
Acting Assistant to the Head of the General		
Department	teele.paivalill@oiguskantsler.ee	693 8424
Kaidi Kaidme		
Assistant to the Chief Accountant-Financial		
Adviser	kaidi.kaidme@oiguskantsler.ee	693 8442
Jaana Padrik		
Adviser on Public Relations	jaana.padrik@oiguskantsler.ee	693 8423
Piret Juhansoo		
Personnel Adviser	piret.juhansoo@oiguskantsler.ee	693 8425
Helbe Liin		
Information Adviser and Archivist	helbe.liin@oiguskantsler.ee	693 8422
Vahur Soikmets		
Assistant Adviser on Administrative Matters	vahur.soikmets@oiguskantsler.ee	693 8440
Nele-Marit Oras		
Acting Adviser on Document Management	nele-marit.oras@oiguskantsler.ee	693 8437
Kristel Kaasik		
Assistant Adviser on Document Management	kristel.kaasik@oiguskantsler.ee	693 8444
Anu Koppa		
Substitute for Assistant Adviser		
on Document Management	anu.koppa@oiguskantsler.ee	693 8413
Kertti Pilvik		
Head of the Department	on parental leave	
Kadi Kingsepp		
Assistant Adviser on Document Management	on parental leave	
Katrin Sirel		
Assistant to the Head of the General Department	on parental leave	
Maria Kustova		
Assistant to the Head of the Third Department	on parental leave	

Reception of persons:		
Edgar Mikiver		
Senior Adviser on Reception of Persons	edgar.mikiver@oiguskantsler.ee	693 8405
Kristel Lekko		
Adviser on Reception of Persons	kristel.lekko@oiguskantsler.ee	693 8443
Martin Pedosk		
Assistant Adviser on Reception of Persons	martin.pedosk@oiguskantsler.ee	693 84 36
Ivi Vei		
Assistant Adviser on Reception of Persons	ivi.vei@oiguskantsler.ee	693 8404
Eva Poom		
Adviser on Reception of Persons	on parental leave	

TIMES OF RECEPTION OF INDIVIDUALS

Reception at the Office of the Chancellor of Justice

The Chancellor of Justice and his Deputies receive individuals on Wednesdays 09.00 – 11.00.

Reception adviser receives individuals at 09.00–11.00 and 14.00–17.00 and on Wednesdays at 14.00–17.00.

Registration for reception by telephone on +372 693 8404.

Reception in counties

Pärnu County Administration
Akadeemia 2, 80088 Pärnu
Every other month on third Thursday at 10.00–17.00

Tartu Courthouse
Kalevi 1, 50050 Tartu
Every other month on third Thursday at 10.00–17.00

Narva City Administration
Peetri square 5-316, 20308 Narva
Every other month on first Monday at 10.00–13.00

Ida-Viru County Administration
Keskväljaku 1, 41532 Jõhvi
Every other month on first Monday at 14.00–17.00

Registration for reception by telephone on +372 693 8404.

The Chancellor of Justice and advisers to the Chancellor also receive individuals during business trips in county administrations, city and rural municipality administrations, of which advance information is provided through the mass media.

Office of the Chancellor of Justice

Kohtu 8 Street 15193 TALLINN