CHANCELLOR OF JUSTICE

ANNUAL REPORT 2004
of the Chancellor of Justice

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

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

Tallinn 2005

OFFICE OF THE CHANCELLOR OF JUSTICE
KOHTU STREET 8
15193 TALLINN
Phone: +372 693 8400
Fax: +372 693 8401
Homepage: http://www.oiguskantsler.ee

Translator: Margus Puusepp

Design: Hele Hanson-Penu
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Dear reader,

In accordance with section 4 of the Chancellor of Justice Act, the Chancellor has to submit an annual report of his activities to the Riigikogu.

The present overview of the conformity of legislation of general application with the Constitution and the laws covers the period from 1 June until 31 December 2004, and the outline of activities concerning the protection of fundamental rights and freedoms of persons, the period from 1 January until 31 December 2004. The overview contains summaries of the main cases that were settled as well as generalisations of the legal problems and difficulties, together with proposals on how to improve the protection of fundamental rights and freedoms and how to raise the quality of law making. The readers will also be able to familiarise themselves with the organisation of work in the Office of the Chancellor of Justice.

According to the Constitution, the Chancellor of Justice is an independent constitutional institution. Such a status enables him to assess problems objectively and to protect people effectively from arbitrary measures of the state authority. One tool for fulfilling this task is the opportunity that the Chancellor of Justice has to submit to the Riigikogu his conclusions and considerations regarding shortcomings in legislation, in order to contribute to strengthening the principles of democracy and the rule of law. I am grateful to the members of the Riigikogu and its committees, in particular the Constitutional Committee, the Legal Affairs Committee and the Social Affairs Committee, for having been open to mutual, trustful and effective cooperation, which will hopefully continue just as fruitfully in the future.

Glancing back at the previous year and assessing the situation of fundamental constitutional principles and rights in Estonia, I am happy to note that the general legal awareness of people has improved. However, mere knowledge of one's rights and freedoms is not sufficient if there are no corresponding effective mechanisms that can be used to stand up for them. Therefore, several new laws can be said to serve a laudable purpose; for example: the State Legal Aid Act, the Victim Assistance Act, the Gender Equality Act, the Consumer Protection Act, which were passed in connection with Estonia's accession to the European Union on 1 May 2004. Hopefully, Estonia's membership of the EU will help to ensure even better protection of people's fundamental rights and freedoms, in particular in connection with the positive duties of the state and the state's duties to perform.

The present reporting year is an important landmark in the development of the institution of the Chancellor of Justice due to the expansion of the Chancellor's competencies as a result of the amendment of the Chancellor of Justice Act, which is also reflected in the increased number of petitions to the Chancellor. Since 1 January 2004, the Act allows everyone to turn to the Chancellor of Justice with a request to verify the legality of the activities of agencies or persons exercising public functions, and their compliance with the principles of good practice, whereas previously the Act had only provided for such a possibility in connection with the activities of state agencies in ensuring fundamental rights and freedoms.

Although the Chancellor of Justice receives applications concerning a wide range of legal issues, special attention during the present reporting period was given to the issues of personal data protection, the right of people without health insurance to healthcare, and access to education of people with disabilities. As concerns individual cases, the supervised agencies usually comply with the proposals and recommendations made by the Chancellor of Justice. However, in the case of more wide-ranging problems, finding a solution falls beyond my competence and therefore I have tried to formulate them clearly, so that Parliament and the executive bodies could prepare and implement suitable and effective measures to solve them.

I hope the overview will help the Riigikogu to make assessments of principle with regard to issues of constitutionality and the protection of fundamental rights and freedoms.

Yours sincerely,

Allar Jõks

Tallinn, 1 September 2005

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INTRODUCTION

1. Historical overview

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

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

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

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

The institution of the Chancellor of Justice in Estonia is not part of the legislative, executive or judicial powers, it is not a political or a law enforcement body. The institution of the Chancellor of Justice is established by the Constitution and the Chancellor only observes the Constitution and his conscience. The Chancellor of Justice is appointed by the Riigikogu on the proposal of the President of the Republic for a term of seven years. Once a year the Chancellor of Justice submits to the Riigikogu a report with an overview of his activities.

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

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

Another important constitutional task entrusted to the Chancellor of Justice is the function of the ombudsman that was given to him under the Chancellor of Justice Act[1] passed on 25 February 1999. According to this, the Chancellor of Justice monitors whether state agencies comply with people's fundamental rights and freedoms and with the principles of good governance. An amendment to the Act[2] that entered into effect on 1 January 2004 further expanded the functions of the Chancellor as an ombudsman – now the Chancellor of Justice also supervises local governments, legal persons in public law and private persons who exercise public functions.

By exercising these closely related tasks, the Chancellor of Justice focuses on the review of compliance with the fundamental constitutional values – human dignity, democracy, rule of law, social state. Whether a law or a regulation of the Government, Minister, or local government is in conformity

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

with the Constitution can to a large extent be assessed on the basis of information that the Chancellor of Justice obtains when verifying the guarantee of fundamental rights. This is one of the reasons why the report containing an overview of the Chancellor of Justice's activities includes the most important cases of both constitutional review and the ombudsman's proceedings.

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

The status of the Chancellor of Justice as an independent constitutional institution enables him to be free of departmental interests and assess objectively the activities of state agencies. The Chancellor of Justice can adequately react to actions that are not consistent with the general principles of democracy and rule of law, the constitution, laws or other legislation, or the principles of good governance.

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

In the framework of the Chancellor's competence as an ombudsman, everyone who claims that his or her rights have been violated or he or she has been treated contrary to the principles of good governance may file a petition to the Chancellor of Justice asking him to verify whether a state agency or local government body, a legal person in public law, or a natural person or legal person in private law who is exercising public functions complies with the principles of guaranteeing fundamental rights and freedoms and good governance. The task of the Chancellor of Justice as an ombudsman is to protect people against arbitrary treatment by the state authorities.

In exercising the above functions, the Chancellor of Justice also has the right to initiate proceedings on his own initiative if he considers it necessary for the protection of people's rights or for guaranteeing constitutional order. The Chancellor of Justice has raised important issues that concern a large number of people. For example, during the present reporting period he dealt with the issues of personal data protection, access to general health care, and the right of pupils with special needs to education.

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

The Chancellor of Justice will also reject an application if a court judgment has been made in the matter of the application, the matter is concurrently subject to pre-trial complaint proceedings or judicial proceedings (e.g. when a complaint is being reviewed by an individual labour dispute settlement committee or any other similar pre-judicial body). The Chancellor of Justice can not, and is not allowed to duplicate these proceedings. This principle derives from the fact that the possibility of filing an application to the Chancellor of Justice is not considered to be a legal remedy. Rather, the Chancellor of Justice is a petition body, who has no direct possibility to use any means of enforcement and who resolves cases of violation of people's rights if the person lacks legal remedies or he or she cannot use the existing remedies for some reason (e.g. the deadline for filing a complaint to a court of law has passed).

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

The Chancellor of Justice may reject an application if it was filed more than one year after the date on which the person became, or should have become, aware of the violation of his or her rights. The application of the one-year deadline is in the discretion of the Chancellor and it depends on the circumstances of the case – for example, how serious the violation was, what consequences it had, whether the violation affected the rights or duties of third parties, etc.

Upon accepting an application for proceedings, the Chancellor of Justice will inform the applicant and will mention the measures that he has taken or intends to take to resolve the application.

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

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

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

During the more than ten years of his existence the Chancellor of Justice has made more than 400 requests for bringing various legislation into conformity with the Constitution. In most cases the requests were complied with. The Chancellor of Justice has turned to the Supreme Court in 21 cases, and in 16 of them the Court has granted the Chancellor's request. During the present reporting period, the Chancellor made three requests to the Supreme Court. Two of them concerned the parking arrangements for transit transport passing through the city of Narva, a case in which the Chancellor himself later asked the Supreme Court to close the proceedings, since the basis for the request had ceased to exist. The Chancellor of Justice also made a request to verify the constitutionality of imposing a prohibition on the participation of election coalitions in local government council elections. The Supreme Court's decision concerning this case[3] falls under the next reporting period.

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

[3] Supreme Court en banc judgement of 19 Apr 2005, No. 3-4-1-1-05. **RT III 2005, 13, 128.**

In the case of discrimination disputes between private individuals the Chancellor of Justice has the right to carry out conciliation proceedings. The form and outcome of the proceedings are different from the procedure described above. Everyone has the right to apply to the Chancellor of Justice with a request to carry out conciliation proceedings if the person finds that a natural person or legal person in private law has discriminated against him or her on the grounds of sex, race, nationality, colour, language, origin, religious or other conviction, proprietary or social status, age, disability, sexual orientation or other grounds specified in law. The Chancellor does not have the right to initiate conciliation proceedings on his own initiative.

When the Chancellor of Justice is carrying out conciliation proceedings to resolve a discrimination dispute, he will send a copy of the application to the respondent whose activities are contested in the application and shall set a term for the submission of a written response. If the applicant consents to the respondent's proposal to resolve the dispute and such resolution ensures a fair balance in the rights of the parties, the Chancellor of Justice will deem the petition to be resolved and will conclude the proceedings. In the case of disagreement, a hearing is held with the participation of the parties or their representatives. If the applicant and respondent consent to the proposal of the Chancellor of Justice, the Chancellor will approve the agreement. Performance of an agreement approved by the Chancellor of Justice is mandatory to the parties. If an agreement is not performed within the term of thirty days, the applicant or respondent may submit the agreement approved by the Chancellor of Justice to a bailiff for enforcement. If conciliation proceedings are terminated at the request of the parties, or the Chancellor of Justice has declared the failure of the parties to reach an agreement, the applicant has the right of recourse to a court or to an authority conducting pre-trial proceedings, as provided by law for the protection of his or her rights.

The Chancellor of Justice also exercises other functions entrusted to him by law. For example, submitting his opinion to the Supreme Court in constitutional review court proceedings (as provided for by the Constitutional Review Court Procedure Act), or initiating disciplinary proceedings with regard to judges (as provided for by the Courts Act).

4. Structure of the Report

The following parts of the Report provide an overview of the activities that the Chancellor of Justice and his staff have carried out for the protection of fundamental constitutional principles and constitutional rights of persons in 2004, and an analysis of the wider problems that the Chancellor of Justice has begun to tackle. When the Riigikogu and other public authorities, as well as the general public, have acknowledged the problems it is possible to initiate relevant debates and targeted measures to strengthen legality and raise confidence in the state authorities.

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

Part 2 of the Report explores the activities of the Chancellor of Justice in verifying the protection of constitutional rights and freedoms of persons in accordance with section 4(2) of the Chancellor of Justice Act. The purpose of this part is to describe the cases that have been resolved and proceedings that have been initiated on the Chancellor's own initiative, and thus give an overview of the infringements of fundamental rights in Estonia during the reporting period.

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

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

PART 1.

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

I THE SUPRME COURT CONSTITUTIONAL REVIEW PROCEEDINGS

1. Introduction

According to Article 149 paragraph 3 of the Constitution, the Supreme Court is the highest court in the state and it also serves as the court of constitutional review. The Constitution grants the Supreme Court wide-ranging competence to exercise constitutional review: according to Art 152 para 2 of the Constitution, the Supreme Court has the right to declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution. More specifically, the competence of the Supreme Court as the court of constitutional review and the conduct of review proceedings are regulated in the Constitutional Review Court Procedure Act.[4]

During the period of 1 June until 31 December 2004, the Supreme Court heard 17 constitutional review cases; three of them were heard by the Supreme Court sitting en banc and 14 by the Constitutional Review Chamber of the Court.

Opinions of the Supreme Court on the issues subject to constitutional review are binding for everyone, including legislators and implementing bodies. Unfortunately, it must be noted once again that the Riigikogu has not drawn appropriate conclusions based on the Supreme Court judgements. In the reports of the previous year, as well as the year before, the Chancellor of Justice pointed out the judgement of 28 October 2002[5] made by the Supreme Court en banc, in which the Court declared section 7(3) of the Principles of Ownership Reform Act[6] to be in conflict with Art 13 para 2 and Art 14 of the Constitution. It is highly regrettable that the Riigikogu still has been unable to comply with the judgement and establish appropriate legal regulation that would allow the legal issues relating to the property owned by resettled persons to be solved.

2. Lack of the right of discretion in issuing and extending residence permits

On 21 June 2004 the Supreme Court Constitutional Review Chamber declared § 12(4) clause 1 and § 12(5) of the Aliens Act[7] unconstitutional to the extent that the Act fails to give the right of discretion to the competent state agency in deciding the granting of a residence permit if false information has been submitted in the application for the permit.[8]

The Aliens Act, in § 12(4) clause 1, provides that a residence permit shall not be issued to or extended for an alien if he or she has submitted false information (including information concerning his or her earlier activities) in applying for a visa, residence permit or work permit or in applying for their extension. According to § 12(5) of the Aliens Act, as an exception, temporary residence permits may be issued to aliens listed in clauses (4) 5)–8) and 14) of the same section and such residence permits may be extended if the circumstances specified in clauses (4) 1)–4), 9)–13) or 15) of this section have not been ascertained with regard to such aliens. Thus, § 12(4) clause 1 in combination with § 12(5) exclude issuing of a residence permit if any false information was submitted, and in such cases the competent authority lacks the right of discretion concerning the issuing or extending of a residence permit.

According to § 3(2) of the Obligation to Leave and Prohibition on Entry Act[9], an alien is obliged to leave Estonia if the basis for his or her stay in Estonia ends, if it is not extended, and the alien lacks any other basis to stay in the country. Thus, if the person's application for residence permit is refused and they have no other basis to stay in Estonia, they must leave the country.

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4 RT I 2002, 29, 174; 2004, 56, 405.
5 Supreme Court en banc judgement of 28 Oct 2002, No. 3-4-1-5-02, RT III 2002, 28, 308.
6 RT 1991, 21, 257; I 2004, 85, 577.
7 RT I 1993, 44, 637.
8 Supreme Court Constitutional Review Chamber judgement of 21 June 2004, No. 3-4-1-9-04, RT III 2004, 20, 224.
9 RT I 1998, 98/99, 1575; 2004, 53, 369.

The Supreme Court Constitutional Review Chamber noted that the obligation for a person to leave may restrict several fundamental rights and freedoms. Depending on particular circumstances, the refusal to grant a residence permit and imposing an obligation to leave may restrict the right to inviolability of private and family life as stipulated in Art 26 of the Constitution. The constitutional right to the inviolability of family life and privacy requires that the state authorities refrain from interfering in the family life of a person. The scope of protection of this right also includes relations between a child and his or her biological parents.

The right to the inviolability of family life and privacy, however, is not an unlimited one. According to Art 11 of the Constitution, restrictions of fundamental rights must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted, In other words, restriction of a fundamental right can be considered justified only if the principle of proportionality is observed.

The Constitutional Law Chamber referred to an earlier judgement of the Supreme Court Administrative Law Chamber[10] where it was stated that the principle of proportionality is related to the right of discretion. The executive authority needs the right of discretion in order to ensure the implementation of the principle of proportionality. As a rule, the competent authority is required to assess whether the personal and public interests are balanced, i.e. whether the restrictions of fundamental rights are proportionate. In order to assess whether the decision to be made complies with the principle of proportionality, the particular circumstances must be taken into account. The Constitutional Review Chamber also referred to its own earlier judgement on an issue of constitutional review[11], where it had declared § 12(4) clause 10 and § 12(5) of the Aliens Act to be unconstitutional because the said provisions did not allow the behaviour of an alien who had stayed in the country for a long time to be taken into account, although such behaviour could be a basis to assess the alien's threat to national security, the duration of his or her permanent residence, the consequences of expulsion for his or her family members, and the immigrant's and his or her family members' links with their country of origin. The Chamber, nevertheless, noted that the above principle does not necessarily mean that the legislator may not set out situations where the executive authorities lack the right of discretion, and even regulation that does not provide the right of discretion may afford a proportionate result upon implementation.

The Chamber pointed out that in order to decide whether the restriction of the inviolability of family life is constitutional, the executive authority must weigh the opposing interests. In the case of refusal to grant a residence permit to an alien, there is a conflict, on the one hand, between the person's interest to have no interference in his or her private and family life, and, on the other hand, the public interest to guarantee national security. However, if the relevant norm does not allow the decision maker to take into account the circumstances of the particular situation, it can not be guaranteed that interference in the person's family life will be constitutional.

The Chamber also pointed out that if the executive authority lacks the right of discretion in applying § 12(4) clause 1 and § 12(5) of the Aliens Act, it is not possible to assess the alien's behaviour and his or her situation in order to make the right decision. The lack of the right of discretion in respect of § 12(4) clause 1 and § 12(5) of the Aliens Act means that, regardless of the circumstances, the submission of any false data will entail a negative response to the application for a residence permit. The representatives of the executive authority lack the right to weigh whether the application of the disputed provisions in a particular case is proportionate or not.

The Chamber added that even if, in practice, the disputed provisions are applied in the way explained by the Minister of the Interior, i.e. in accordance with the alleged previous administrative practice, where the said provisions were enforced only if the alien had submitted false information

[10] Supreme Court Administrative Law Chamber judgement of 17 March 2003, No. 3-3-1-11-03, RT III 2003, 8, 84.
[11] Supreme Court Constitutional Review Chamber judgement of 5 March 2001, No. 3-4-1-2-01, RT III 2001, 7, 75.

intentionally, the representatives of the executive authority cannot take the applicant's behaviour and the specific situation into account nor can they assess whether the false information was submitted intentionally with regard to the issues that are important for national security.

On the basis of the foregoing, the Supreme Court Constitutional Law Chamber was of the opinion that § 12(4) clause 1 and § 12(5) of the Aliens Act are not compatible with the Constitution.

II SUPERVISORY ACTIVITIES OF THE CHANCELLOR OF JUSTICE

1. Introduction

According to Art 139 of the Constitution, the Chancellor of Justice is, in his activities, an independent official who reviews the legislation of the legislative and executive powers and of local governments for conformity with the Constitution and the laws.

Information concerning the issue of constitutionality of a piece of legislation reaches the Chancellor of Justice first and foremost through applications submitted by people. Section 19 of the Chancellor of Justice Act provides for everyone's right to submit an application to the Chancellor of Justice in order to verify whether a law or other legislation is in conformity with the Constitution and the laws. During the present reporting period, people used this opportunity in 218 cases, i.e. the number of such applications constituted 9.3% of the total number of applications.

The Chancellor of Justice can also start supervision proceedings on his own initiative. More detailed statistics about the verification of constitutionality and legality of legislation are provided under Section XVII of Part 2 of the Report.

The following is an overview of the eight main problem areas that were addressed by the Chancellor of Justice during the reporting period. These are areas where several important shortcomings were found that need quick solutions, sometimes maybe even the amendment of legal regulation. The problems have arisen in the course of supervisory activities conducted by the Chancellor of Justice and often they have also caught the attention of the wider public. In connection with the problem areas, their legal background will be explained, examples of the supervision proceedings of the Chancellor of Justice will be given, and solutions or ways of finding potential solutions will be offered.

The areas to be covered include the right of pupils with special needs to basic education, problems of access to general health care, as well issues concerning the remuneration of public servants. The last problem has been debated for a long time already, including in connection with an urgent need for a new public service regulation. Unfortunately, no solutions have been reached so far.

In the previous report of the Chancellor of Justice, the topic of public services focused on legal problems of organising public transport. This year the focus is on the (intended) regulation of public water and sewerage services. In the case of personal data protection, this time the focus is on the processing of personal data in carrying out research and compiling statistics.

Since 1 January 2004, the Chancellor of Justice can also exercise supervision with regard to natural and legal persons in private law who perform public functions. The Chancellor has already received the first applications concerning these issues. For example, the legal problems related to the collecting of interest on arrears are a vivid example of the fact that, in delegating public functions to natural persons or legal persons in private law, the legislator, in establishing the delegating norm in the law, as well as the implementer, in deciding the delegation of the function and concluding an agreement, should be careful in their approach in order not to infringe the rights of persons and ensure that the principle of legality is observed.

In connection with the entry into force of several new laws concerning court procedure, an important issue is the right to an effective procedure for one's protection, with a focus on misdemeanour and criminal proceedings. The report will also explore the observance of the *vacatio legis* principle, which is definitely an issue for concern for all legislators and causes many problems in practice.

In comparison with the previous reporting period it must be noted that several problems raised by the Chancellor of Justice are still unresolved. For example, no solution has been found to the legal problems concerning the police and law enforcement, and the same is true of the participation of

the members of the Riigikogu in the supervisory councils of companies. However, it is a welcome development that the problems concerning the enforcement of judgements of the European Court of Human Rights will hopefully soon be resolved.[12]

2. Right of pupils with special needs to basic education

According to the first sentence of Art 37 of the Estonian Constitution, everyone has the right to education. The idea is also expressed in various international instruments that Estonia has acceded to. For example, Art 26 para 1 of the UN Universal Declaration of Human Rights, Art 13 para 1 of the UN International Covenant on Economic, Social and Cultural Rights[13] and Art 28 para 1 of the UN Convention on the Rights of the Child[14] provide that everyone has the right to education. According to Art 2 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[15] no one can be deprived of the right to education. With the Treaty of Amsterdam, the preamble of the Treaty Establishing the European Community was amended with a provision according to which the Member States have decided to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating. This principle is also expressed in Art 14 para 1 of the EU Charter of Fundamental Rights[16], according to which, everyone has the right to education. With the incorporation of the provision that recognises the right to education into such important instruments, the states (including Estonia) have laid a positive foundation to the human right[17] that, in turn, serves as a basis for people to be able to exercise other human rights.[18]

In order for everyone to be able to exercise the right to education, it must be viewed in combination with the duties of promotion and welfare.[19] Thus, arising from Art 12, Art 28 para 4 and Art 37 para 1 of the Constitution, the state and local government must ensure that also persons with special needs can legally exercise in practice their right to education. The first of the above-mentioned constitutional provisions requires that equals should be treated equally and unequals unequally; the second provision in essence contains the subjective right and objective duty to ensure that which is indispensable for persons.[20] In combination, Art 12, Art 28 para 4 and Art 37 para 1 of the Constitution mean, on the one hand, that persons with special needs must have equal legal opportunities to exercise their right to education. On the other hand, due to the uniqueness of persons with special needs they must be treated legally differently, guaranteeing them, through the implementation of the necessary measures (the state's positive performance), the opportunity to exercise their right to education in practice.

2.1. Access of pupils with special needs to basic education

Everyone's right to education in the meaning of Art 37 para 1 of the Constitution also means that everyone must be guaranteed access to education. In combination with Art 37 para 2 of the Constitution, according to which the state and local governments shall maintain the necessary

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12 The Draft of Amendment to the Code of Civil Court Procedure, the Code of Administrative Court Procedure, the State Liability Act, the Misdemeanour Procedure Act and the Code of Criminal Procedure, as at April 2005, No. 545 SE, available on the Internet: http://web.riigikogu.ee/ems.

13 RT II 1993, 10/11, 13.

14 RT II 1996, 16, 56.

15 RT II 1996, 11, 34.

16 EU Official Journal C 364, 18.12.2000, pp. 7–22.

17 R. Alexy. Põhiõigused Eesti põhiseaduses. [Fundamental rights in the Estonian Constitution] – special edition of Juridica 2001, p. 16; Committee on Economic, Social and Cultural Rights. Implementation of the International Covenant on Economic, Social and Cultural Rights. General Comment No. 13. The right to education. Twenty-first session 1999, available on the Internet: http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument (04.11.2004).

18 Committee on Economic, Social and Cultural Rights. General Comment No. 13. The right to education. Twenty-first session 1999, available on the Internet : http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument (04.11.2004).; UNESCO. Right to Education, available on the Internet: http://portal.unesco.org/education/en/ev.php-URL_ID=9019&URL_DO=DO_TOPIC&URL_SECTION=201.html (09.11.2004).

19 R. Alexy (reference 31), p. 20.

20 R. Alexy (reference 31), p. 20.

number of educational institutions, it also means the duty of the state and local governments to ensure that everyone has access to education within a reasonable distance or a possibility to gain such access through technological means. In order to make such access possible also for persons with special needs, the state and local government must implement relevant measures in accordance with Art 12 and Art 28 para 4 of the Constitution.

As concerns the substance of such measures, Art 15 clause 1 of the Revised European Social Charter[21] deserves to be mentioned in the context of persons with special needs. According to this, the state must take measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes or, where this is not possible, through specialised public or private bodies. The European Committee of Social Rights has said that ensuring the right to education for children with special needs and other persons with special needs essentially contributes to the promotion of the main rights of persons with special needs that are contained in Art 15 of the European Social Charter – the right to independence, social integration and participation in the life of society. Based on this, Art 15 of the Charter specifically emphasises the exercising of the right to education in the framework of general schemes wherever possible.[22]

In order to ensure effective access of persons with special needs to basic education, the legislator, in section 4(4) of the Basic and Upper Secondary Schools Act[23], has delegated to the Minister of Research and Education the right to pass a regulation on the different number of academic years, the list of subjects and the number of lessons in the schools for pupils with special needs and in sanatorium boarding schools. The Minister of Education has made use of the relevant delegating norm and, on 12 August 2002, issued Regulation No. 64 "The number of academic years, list of subjects, and the number of lessons in special schools for pupils with disabilities and in sanatorium schools".[24]

The above Regulation provides for differences concerning the division of lessons in the basic schools for pupils with physical disability, speech or hearing impairment, deaf pupils or pupils with visual impairment and pupils with severe learning disabilities. For example, according to § 4(1) of the Regulation, the instruction at basic school level for pupils with hearing impairment lasts for 11 academic years and, according to § 7(1), the instruction for pupils with severe learning disabilities lasts for 9 academic years. The Regulation, however, only applies to certain types of schools, i.e. special schools for pupils with disabilities and sanatorium schools, but not to persons with special needs who attend other types of schools. For example, the different length of instruction does not apply to pupils with physical disability who study according to the national curriculum for basic and upper secondary schools, in Tallinn English College for example, while it applies to pupils with physical disabilities who attend special schools for pupils with physical disabilities.

The mandate given for adopting such a regulation fails to take into account Art 12, Art 28 para 4 and Art 37 para 1 of the Constitution: not all pupils with special needs can exercise the right to education equally with other pupils, including on equal terms with pupils with special needs who attend specific types of schools. In addition, such an approach is not in conformity with the principle enshrined in Art 15 para 1 of the Charter, according to which the right to education for persons with special needs should be afforded in the framework of general schemes wherever possible to ensure for these people the effective exercise of the right to independence, social integration and participation in the life of society.

In 2004, the Chancellor of Justice did not draw the attention of the Riigikogu to the discrepancy between this regulation and the Constitution because section 36 of the Draft of Amendment to

21 RT II 2000, 15, 93.

22 Decision of 4 November 2003 of the European Committee of Social Rights in the case No. 13/2002-M-en, *Autism-Europe vs. France*, p 53, available on the Internet: http://hudoc.esc.coe.int/esc/search/default.asp (13.12.2004).

23 RT I 1993, 63, 892; 2004, 56, 404.

24 RTL 2002, 92, 1414.

the Education Act, the Rural Municipality and City Budget Act, the Basic and Upper Secondary Schools Act, the Private Schools Act, the Vocational Educational Institutions Act and the Pre-School Child Care Institutions Act[25] provides for an amendment that will ensure compliance with the Constitution.

In order to ensure that in practice everyone will be able to exercise their right to basic education, Art 37 para 2 of the Constitution provides for the duty of the state and local government to maintain the necessary number of schools to allow access to education. The duty means that the state and local government must guarantee that there is a sufficient number of functioning educational institutions (buildings, teachers, study materials, etc). Therefore, access to basic education for pupils with special needs can also be measured by taking a look at whether the right to education can be exercised in reality, i.e. whether there are educational institutions where also pupils with special needs could study.

In order to ensure unrestricted movement of persons with special needs inside educational institutions, the Minister of Economic Affairs and Communications with his Regulation No. 14 of 28 November 2002 established "The requirements for ensuring the freedom of movement of persons with physical, visual or hearing impairment in public buildings".[26] However, in accordance with section 72(1) of the Building Act[27] these requirements only apply in respect to buildings that have been constructed during the period of validity of the Building Act, and, in accordance with § 19 of the Regulation, in respect to parts of public buildings that are to be reconstructed or extended, or if existing buildings are to be transformed to give them the functions of a public building.

In addition to the Building Act, the requirements for school houses are also provided for in the Minister of Social Affairs Regulation No. 109 of 29 August 2003 on "The health protection requirements for schools"[28], which, according to § 1(1), is aimed at ensuring the conditions to protect and promote the health of pupils during their stay at school. According to subsection 2 of the same section, the regulation is applied with regard to the land, buildings, rooms and equipment in schools that operate on the basis of an education licence.

The above regulation also provides for health protection requirements for schools intended for pupils with special needs. At the same time, the health protection requirements in the regulation fail to take into account the unique situation of pupils with special needs and, therefore, the application of the health protection requirements on such a level fails to ensure a learning environment that corresponds to the needs of special pupils. Due to the absence of the necessary learning environment, pupils with special needs cannot physically attend school, and therefore their opportunities to obtain education are smaller than those of the pupils without special needs. At the same time, in school the possibilities for socialisation are better, the study materials are more diverse, etc.

In principle it can be claimed that the missing provisions exist in the Regulation issued on the basis of the Building Act by the Minister of Economic Affairs and Communications, but such a claim fails to take into account two important facts. First, the provisions of the Building Act do not apply with regard to buildings that existed before the entry into force of the Act, and, second, compliance with the norms contained in the Minister of Social Affairs Regulation No. 109 is a precondition for receiving an education licence[29] in accordance with section 12^1(3) clause 4 of the Basic and Upper

25 Draft of Amendment to the Education Act, the Rural Municipality and City Budget Act, the Basic and Upper Secondary Schools Act, the Private Schools Act, the Vocational Educational Institutions Act and the Pre-School Child Care Institutions Act, as at 23 February 2005, No. 488 SE, available on the Internet: http://web.riigikogu.ee/ems.

26 RTL 2002, 145, 2120 .

27 RT I 2002, 47, 297; 2004, 18, 131.

28 RTL 2003, 99, 1491.

29 According to § 11(2) of the Regulation of the Minister of Social Affairs, there are two conditions to receive an education licence: the school must have a separate territory and the location of the school building must ensure optimum natural lighting of the rooms used for instruction. However, as the remaining requirements must also be complied with, they should also be seen as a precondition for obtaining an education licence.

Secondary Schools Act. As the Minister of Social Affairs Regulation does not contain norms that take into consideration the peculiarities of persons with special needs, local governments do not have an obligation to modify schools for pupils with special needs, or schools that service the pupils with special needs, that are housed in buildings that were in use before the entry into force of the Building Act to meet the conditions suitable for such pupils.

As the majority of schoolhouses were built before the entry into force of the Building Act, it is probable that these buildings are not accessible for persons with special needs. This suspicion was also confirmed by the Minister of Social Affairs in his letter to the Chancellor of Justice, in which the Minister said that 20% of the total 650 general education schools in Estonia are located in old schoolhouses, houses adjusted for schools, or manor houses that were not built in accordance with modern requirements. In addition, the Minister also admitted that the majority of schools do not meet the needs of pupils with special needs.

In the same letter the Minister also deliberated whether "making expenditures for some pupils with biologically different needs" outweighs other social problems, and, by reference to various pieces of legislation, he came to the conclusion that ensuring access to education is, instead, within the competence of local governments. Thus, the state is aware that pupils with special needs often cannot comply with their duty to attend school and, due to the existing circumstances, they must acquire their education by way of home schooling, which deprives them of the opportunity to socialise. This, however, is not in conformity with the interpretations of the Constitution or the European Social Charter, according to which legal (adoption of legislation) as well as factual measures have to be taken.[30]

As a possible legal measure, provisions taking into account the special needs of persons could be added to the Minister of Social Affairs Regulation No. 109 of 29 August 2003 on "The health protection requirements for schools", so that minimum requirements are established for schools that service pupils with special needs. Such an approach would guarantee that pupils with special needs have an opportunity to study at a school that takes into account their special needs and obliges the body in charge of the school to adjust the school to comply with such minimum requirements. So far the Minister of Social Affairs has taken a reluctant approach to the relevant recommendation of the Chancellor of Justice.

2.2. Lack of teaching aids and materials for teaching pupils with special educational needs as an obstacle to access to basic education

According to section 23(2) of the Basic and Upper Secondary Schools Act, textbooks, exercise-books, workbooks and other teaching aids and materials are used in order to ensure and support the completion of the curriculum. In order to ensure uniform quality of education through the use of teaching materials and the compliance of the quality of education to the educational standard established by the state, and allowing transfer from one level of education to another and from one school to another, the legislator in section 23(2) of the Act has delegated to the Minister of Education and Research the right to establish the conditions and procedure for the approval of the conformity of textbooks, exercise-books, workbooks and other educational literature to the national curriculum, and the requirements for such literature. The Minister of Education did that in his regulation No. 65 of 19 November 2001.[31]

When taking a look at the currently effective Regulation No. 50 of 6 September 2004 of the Minister of Education and Research on "The list of textbooks, workbooks and exercise books complying

[30] Decision of the European Committee of Social Rights on 15 Oct 1999 in the case No. 1/1998-M-en, International Commission of Jurists *vs*. Portugal, p 32, available on the Internet: http://hudoc.esc.coe.int/esc/search/default.asp (13.12.2004); Decision of the European Committee of Social Rights on 4 Nov 2003 in the case No. 13/2002-M-en, Autism-Europe *vs.* France, (reference 11), p 53.

[31] RTL 2001, 125, 1803; 2003, 4, 39.

with the national curriculum for the academic year 2004/2005"[32], it appears that there is almost no literature to teach pupils with a slight learning disability. In addition, the Minister of Education and Research and two professional associations of special education teachers and two curriculum subject councils have informed the Chancellor of Justice that even the materials included on the list are not printed in sufficient quantities. Thus, as regards pupils with special needs, the state has failed to ensure the precondition necessary for offering education of equal quality, although this, in turn, would also be the precondition for acquiring education in general. This has not been done because there are not enough authors to produce such literature and, on the other hand, because of the small demand for such books it is not profitable for publishers to print them. Due to the lack of necessary literature, teachers themselves have developed materials necessary for teaching. As the teachers' skills for developing such literature are different, there is no sufficient guarantee that the quality of education offered to pupils on the basis of such teaching materials is good, is in compliance with the requirements of the national curriculum, and ensures that in their future life they will be able to pursue activities compatible with their education.

In addition to the non-compliance of the system of procuring teaching aids with the requirements of Art 12 and Art 28 para 4 of the Constitution, there is also a lack of specific teaching materials need to teach pupils with special educational needs. Specific teaching materials should also be considered a precondition for the provision of education, because, due to their special needs, pupils must have specific materials (such as pictograms, candles, etc) that correspond to their needs and skills in order to acquire education. The school budget sets its limits on the procurement of such materials: based on section 44(3) of the Basic and Upper Secondary Schools Act, support from the state budget is allocated every year to cover the costs of procuring textbooks. Considering the fact that is not possible to procure textbooks for pupils with special educational needs because the suitable textbooks simply are not published in sufficient quantities, the schools cannot use the allocated support to the necessary extent. At the same time, the unused funds cannot be used for procuring other study materials, which, depending on the particular special need, could even replace textbooks. For example, pupils with severe learning disabilities would rather need pictograms etc. instead of textbooks. Thus, in comparison with pupils without special needs, the pupils with special needs have been placed in an unfavourable situation because, in essence, the state's support for acquiring materials necessary for their teaching is smaller. Consequently, the state has failed to comply with its duty arising from Art 12, Art 28 para 4 and Art 37 para 2 of the Constitution.

Currently the Minister of Education and Research has started to solve the problem through a project for developing study materials for pupils with special needs. In addition, the Minister in her letter to the Chancellor of Justice promised that the National Examination and Qualification Centre will employ a specialist for children with special educational needs, who will be launching and coordinating a system for developing and publishing necessary study materials.

2.3. Conclusion

The problem areas described above are only a small part of the challenges facing persons with special needs in order to exercise the right that has been granted to them by the Estonian Constitution. As the problems raised in this section are mostly connected with the implementation of the fundamental right to equality and the special duties of promotion and welfare, the state and local governments must analyse the implementability of the provisions contained in educational regulations with regard to persons with special needs in order to ensure their access to basic education. It is evident that the Draft of Amendments currently pending in the Riigikogu proceeds from such a standpoint. It can only be hoped that the implementers of the draft will also be able to adapt to its requirements.

3. Access to general health care

The aim of this section of the Report is to offer a brief analysis of access to general health care by

[32] RTL 2004, 125, 1954.

comparison of the minimum standards provided for in the Estonian Constitution and other national legislation with the situation of their implementation.

3.1. Minimum access to health care

Pursuant to Art 28 para 1 of the Constitution, everyone has the right to the protection of their health. This provision expresses everyone's subjective right.[33] Everyone's subjective right corresponds to the state's duty to create a functioning health care system and a national mechanism to monitor its functioning. In order to ensure the protection of the fundamental rights of individuals, the state must provide in its legislation the necessary legal solutions, and supervise compliance with the legislation. Article 28 of the Constitution does not stipulate how and to what extent the right to health must be ensured. Thus, it is within the legislator's competence to determine more specifically what exactly everyone's right to the protection of health means. However, the legislator does not have unlimited discretion in defining this fundamental right. In defining the right to the protection of health, the legislator must not exclude from the scope of protection the core elements of the right, nor impose unreasonable criteria on the conditions of exercising the right. If the state has defined the substance of the constitutional right of every person to the protection of their health, then all persons who meet the characteristics provided for by the law must be ensured equal access to health care of equal quality on equal conditions.

Similar principles also derive from various international law instruments to which Estonia has acceded. On the international level, the fundamental right to the protection of health is contained, for example, in the European Charter of Patients' Rights[34]; with regard to less secured population the minimum standards are set out in the Revised European Social Charter, and equal access to the health care service, as a principle, is established by the Convention on Human Rights and Biomedicine.[35]

The legal framework for the organisation of health care in Estonia is established by the Health Services Organisation Act[36]. This Act provides for the minimum level of health protection required by the Constitution – based on § 6(1) of the Act, every person on the territory of Estonia has the right to receive emergency care and, pursuant to § 16(2), everyone is guaranteed access to emergency medical services (ambulance service). Section 5 of the Act provides that emergency care is a health service that health care professionals will provide in situations where postponement of care or failure to provide care may result in the person's death or in permanent damage to their health. In the case of persons with health insurance cover, the provision of such assistance is paid from the health insurance funds. In the case of uninsured persons, the costs are covered from the funds allocated for this from the state budget. Thus, the legislator has defined the minimum level of health protection, i.e. assistance available to everyone, as the provision of emergency care and emergency medical (ambulance) services.

General health care, however, exceeds the minimum level of health protection provided for everyone. According to the Health Services Organisation Act, access to general health care is only provided to persons with health insurance cover. People not covered by health insurance have access to general health care only when they are able to pay for it themselves.[37] Through the health insurance system, the majority of the Estonian population (approximately 94%) are covered by health insurance. Naturally, the provision of general health care for all persons in Estonia involves significant financial

33 The same opinion was expressed by the Supreme Court Administrative Law Chamber by stating that Art 28 para 1 of the Constitution directly reflects the subjective right of the addressee of the fundamental right and that pursuant to Art 15 para 1 of the Constitution its judicial protection should be ensured (Supreme Court Administrative Law Chamber judgement of 10 Nov 2003, No. 3-3-1-65-03, RT III 2003, 34, 349, p 14).

34 Available on the Internet: http://www.activecitizenship.net/health/ec.htm (08.03.2005).

35 RT II 2002, 1, 2.

36 RT I 2001 50, 284; 2004, 56, 400.

37 Financing of general health care
(1) General health care provided to persons covered by health insurance shall be paid for from the funds designated for health insurance in the state budget in the amounts in which the Estonian Health Insurance Fund has assumed the obligation to pay for it.
(2) Persons not covered by health insurance shall pay themselves for general health care.

expenses. In addition to economic aspects, access to general health care is also affected by various elements of the organisation of general health care, such as the number of providers of general health care services (doctors and nurses) and their territorial location (number of places providing the service), the number of persons to be served by the providers of the general health care service, the organisation of activities of the providers of general health care services (incl. the scope and quality of the assistance provided, supervision), etc. Below, we will take a closer look at these factors.

3.2. Territorial and equal access to general professional health care

In 2003 the Ministry of Social Affairs commissioned an assessment of the health care reforms from the Policlinic of the University of Tartu Faculty of Medicine and the Chair of Family Medicine (hereinafter "the analysis")[38]. The aim of the work was to assess the availability of medical care provided by family physicians, both from the geographical aspect, as well as from the patients' perspective; the continuity and coordination of dealing with patients, as well as people's satisfaction with the changes that had taken place in the primary level of health care and the family doctors system. As a result of the analysis, the system of family doctors received a positive assessment. The study highlighted good legislative arrangement, a flexible financing scheme, the professionalism of health care workers, the high standard of the training programme, etc. The summary that is given below is based on the legislative framework and the practical aspects pointed out in the analysis.

Section 7 of the Health Services Organisation Act provides that general health care means out-patient health services that are provided by family physicians and health care professionals working together with them. It is explained in the analysis that the aim of the reform of the primary level of health care was to create a primary-level health care system that covers the whole of Estonia and is based on family physicians who are geographically close to patients, and are properly trained and fully equipped. Thus, on the basis of the Health Services Organisation Act, a constitutionally compatible legal basis for access to general health care was created with the aim to ensure for patients a geographically easily accessible, professional, and high-quality health care.

The number of family physicians in counties is determined by the Minister of Social Affairs in his regulation.[39] According to this, there should be 840 family physicians in Estonia. The number was calculated on the basis of the number of inhabitants and their distribution throughout Estonia. The analysis, however, shows that only four counties (Hiiumaa, Järvamaa, Pärnumaa and Tartumaa) had 100% of the necessary number of family physicians in 2002. In the remaining eleven counties there was a shortage of family physicians, the shortage being the worst in Tallinn, Rapla County and Harju County. The situation has not significantly improved since then. Insufficient access to general health care is also shown by the analyses carried out on the basis of the verification visit of the Chancellor of Justice[40] and the applications received from people, as well as by patient satisfaction analyses referred to above, which also dealt with the issue of accessibility of health care. Therefore, it is highly doubtful whether general health care is accessible to the required extent and on the established conditions to local inhabitants or to people who are temporarily staying within the territory of the respective local governments. In addition, if there is no permanent family physician's office within the territory of the local government, sufficient mobility of the physician must be guaranteed in order to give people on the family physician's list, as well as persons who are temporarily staying within the territory of the local government, a feeling of security, so that, if they fall ill, they will be able to obtain general medical care.

Thus, it must be admitted that the necessary number of family physicians (840) to provide necessary general health care to Estonian population has not been achieved, although the requirement was established already on 1 January 2002. As a result, access to general health care is insufficient to meet the needs of the Estonian population. To solve the situation, a serious analysis of the factors

38 Available on the Internet: Esmatasandi arstiabi tervishoiureformi hinnang, [Assessment of the health care reform in the primary health care] Tartu 2003, http://www.sm.ee/est/pages/index.html (08.03.2005).

39 Minister of Social Affairs Regulation No. 114 of 29 Nov 2001 on "The size of family physicians' practice lists", RTL 2001, 130, 1884.

40 Verification visit of the representatives of the Office of the Chancellor of Justice on 27 October 2003 to the Põlva town family physicians centre to verify that fundamental rights and freedoms of people are ensured.

affecting territorial accessibility of general health care services is needed and the introduction of more flexibility to the organisation and financing of general health care should be considered in order to better take into account the needs of the population. The possibility of reducing the maximum number of patients on a family physician's practice list should also be considered, depending on the situation in a particular region, and perhaps more freedom of decision and choice should be given to county governments, who exercise supervision. The development and implementation of the system of substitute physicians, and their motivation, should also be considered.

Pursuant to the Health Services Organisation Act, general health care means first and foremost the activities of family physicians as professionals and other specialists working with them, such as family nurses (nurses), which should ensure easy access to primary-level health care for Estonian inhabitants. The analysis studied people's satisfaction with family physicians in 1998 and 2002 and it was found that, in general, the number of people satisfied with their family physician was relatively large (87%). At the same time, there were significant fluctuations regionally. The largest number of people who were dissatisfied with the quality of the service provided by family physicians was in Hiiu County, Pärnu city, Tartu County and Tallinn. This demonstrates that it is important to emphasise the professionalism of family physicians and their ability to offer more comprehensive and better quality care. Extension of the area of competence of family physicians and the specialists who work with them could be considered, because family nurses play an important part in providing health related information and guidance to patients. Accessibility of professional general health care has a direct effect on the accessibility of other parts of the health care system, such as emergency medical care and in-patient and out-patient specialist care.

The combined effect of Art 28 para 1 and Art 12 of the Constitution requires that persons in equal situations who meet the characteristics established by the law (persons covered by health insurance and persons considered to be of equal status to them) must have equal access to general health care. The general principle of equality arising from Art 12 of the Constitution also covers the equality of law making. However, in addition to legal equality, factual equality must also be kept in mind – equal persons must have equal access to general health care also in reality. It is not enough that, based on the Health Services Organisation Act and its implementing legislation, all persons are deemed to be equal. In view of the accessibility of general health care the Health Services Organisation Act should also provide for a flexible regulation to ensure that people should not have to make excessive efforts to obtain medical care, because, in essence, the system of general health care should be established with the aim of protecting one of the most fundamental rights of these persons.

3.3. Conclusion

In conclusion, it should be noted that the system of primary health care that is legally based on the Health Services Organisation Act has left an impression of good access to general health in the light of all the positive assessments. Yet, in reality, access to general health care can prove to be problematic for persons who are entitled to it, and not all aspects of the system currently used in Estonia are necessarily compatible with the general fundamental right of equality as stipulated in Art 12 of the Constitution. The current general health care system can be improved and the issue of accessibility of general health care must be dealt with continuously. The Estonian health care system can function effectively and take into account the needs of people only if sufficient attention is given to all parts of the system and the functioning of the individual parts of the system is analysed as an integrated whole.

4. Processing of personal data for statistical and research purposes

Personal data protection continues to be one of the priorities for the Chancellor of Justice[41], and the scope of work in connection with the review of applications, as well as work based on his own initiative is increasing. It is still too early to make generalisations regarding the main problems of personal data protection because, in comparison with other areas of activity, there are still relatively few applications from persons. Regardless of this, some issues that have been raised repeatedly can be highlighted. One topic that the Chancellor of Justice has had to deal with on several occasions within the past years is the use of personal data for statistical and research purposes.

Already in January 2003 the Director General of the Data Protection Inspectorate drew the attention of the Chancellor of Justice to the problems related to the use of personal data in compiling statistics. The problem was the insufficiency of the legal bases for processing of personal data in carrying out national statistical surveys by the Statistical Office. After the intervention of the Chancellor of Justice, illegal data processing was discontinued until the modification of the legal bases, illegal statistical reporting forms were declared invalid, and amendments to the Official Statistics Act[42] were initiated. In 2004 the Chancellor of Justice had to assess the legality of the database being complied by the state for statistical purposes and to ascertain whether the current Personal Data Protection Act[43] imposes any disproportionate restrictions on the processing of personal data for research and statistical purposes. A roundtable on the topic "Is the current Personal Data Protection Act life threatening?"[44], organised by the Social Contract Foundation, showed that the opposition between the statisticians and data protection activists was still very serious and, if necessary, the Chancellor of Justice is prepared to continue dealing with the issue.

4.1. The problem and the fundamental rights relating to it

In the case of any use of personal data (or according to the terminology of the Personal Data Protection Act "processing of personal data") it must be noted that it has an essential relation to the fundamental rights of the person (data subject). Processing of personal data can restrict the person's right to inviolability of private life, which is protected under Art 26 of the Constitution, and, in certain cases, it can also infringe the person's right to informational self-determination, which can be derived from Art 19 of the Constitution. With the development of modern means of information processing, the threat to the inviolability of private life and informational self-determination becomes increasingly serious. The amount of processed data has become so extensive that it is difficult for people themselves to monitor the distribution of data concerning themselves, and it is also more complicated to monitor electronic access to personal data as compared to the era of paper documents. Therefore, the state must restrict processing of personal data through legislation.

As concerns the inviolability of private life, it must be emphasised that merely the weighing of interests is not sufficient to justify interference with this fundamental right, and interference can occur only in the cases provided for in the Constitution (this is the so-called fundamental right that is subject to qualified reservations provided by law). Inviolability of private life can only be restricted for the protection of health, morals, public order or the rights and freedoms of other persons, to prevent the commission of a criminal offence, or to apprehend a criminal. Every measure concerning the processing of personal data must serve a specific legitimate purpose that falls under the list of exemptions stipulated in the Constitution.

Processing of personal data for research and statistical purposes covers various situations and therefore the assessment of their constitutionality is also varying. For example, it is necessary to distinguish between the statistics that are needed for planning the activities of the state and statistics for research work. For example, in the case of health statistics, alongside the protection of privacy, it is possible to refer to another fundamental constitutional value: Art 28 of the Constitution ensures to everyone the right to the protection of health that includes the duty of the state to ensure access to health care, provide the necessary number of doctors and hospitals, take certain measures of preventive medicine, etc. The performance of this duty definitely presumes the existence of certain statistical background

41 See the Developemt plan of the activities of the Chancellor of Justice for 2003-2007 (approved with the Chancellor of Justice decree No. 24 on 21 May 2003, available on the Internet: http://www.oiguskantsler.ee/index.php?lang=est&main_id=54,619) and Part I of the Chancellor of Justice Report in 2003-2004, p 3.8 and Part II p 11.

42 RT I 1997, 51, 822; 2004, 30, 204.

43 RT I 2003, 26, 158; 2004, 30, 208.

44 See http://www.lepe.ee/4063 (14.03.2005).

information, and thus, compiling of such statistics serves a constitutionally legitimate purpose. Here it is difficult for the Chancellor of Justice to give a uniform assessment of what kind of statistical data is required to perform the duty arising from Art 28 of the Constitution, because the exact substance of the right to the protection of health should be defined by the legislator.[45]

On the other hand, besides the state, other persons also have an interest in compiling statistical surveys based on personal data. For example, the use of personal data is sought in the framework of privately initiated research projects, or research conducted at universities, sociological surveys, etc. In those cases it is more difficult to see a constitutional value that would outweigh the requirement of privacy and the right to informational self-determination. Scientific activities and research are related to academic freedom, which should also be guaranteed by the state according to Art 38 of the Constitution. However, academic freedom is also subject to restrictions in order to protect other values.[46] In view of the right to the inviolability of private life and informational self-determination, the underlying presumption must be the private autonomy of the data subject, and persons must not be obliged to participate in research (through the processing of their personal data).

4.2. The main principles of personal data protection

The requirement of the inviolability of private life and restrictions on the processing of personal data must also be complied with in using the data for research and statistical purposes. Processing of personal data must always comply with certain fundamental principles that have also been established in the Personal Data Protection Act, following the example of other European countries.

The principle of legality naturally refers to the requirement to collect data only in an honest and legal manner.[47] In other words, the requirement of legality means that the person's consent or specific authorisation based on law must be obtained to process personal data. From the point of view of the individual (or data subject) the principle means that the person can be compelled to tolerate interference in his or her private life only if the legislator has established the relevant norms in accordance with the democratic procedure. If the state needs to collect statistical data to perform its functions, this must be based on law, and similarly the processing of personal data for scientific purposes must comply with the requirements provided for in law (the underlying presumption being that the person's consent in accordance with the law is obtained).

In accordance with the requirement of purpose-oriented processing, personal data can be processed only for the performance of a previously clearly defined task or to achieve a clearly defined purpose; the processing of personal data for a different purpose than originally defined is not allowed.[48] When the purpose has been achieved the processing of data must be stopped. At the same time, all the personal data that is processed must be necessary to achieve the defined purpose – collecting of personal data "just in case" is prohibited.
In accordance with the principle of minimality, personal data can be collected only to the extent that is necessary to achieve the determined purpose.[49] To do this, it is necessary to answer the question, whether the desired purpose could not be achieved without processing of personal data and whether the personal data that are used do not exceed the extent that is necessary for achieving the purpose.

45 See the Supreme Court Administrative Law Chamber judgement of 10 Nov 2003, No. 3-3-1-65-03, RT III 2003, 34, 349.

46 T. Annus. Kommentaarid §-le 38. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments on § 38. Commented version of the Estonian Constitution] Tallinn 2002, § 38 komm 2.5.

47 See the Personal Data Protection Act § 6(1); Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, EU Official Journal L 281, 23.11.1995, pp. 31–50 (hereinafter the EU data protection directive), Art 6 clause 1 subparagraph a; Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (the data protection convention), RT II 2001, 1, 3, Art 5 subparagraph a.

48 The requirement of purposefulness is also reflected in Art 5 subparagraphs b, c and e of the Council of Europe data protection convention, as well as in subparagraphs b and e of Art 6 of the EU data protection directive. In Estonia the requirement of purposefulness is provided for in § 6 2) of the Personal Data Protection Act.

49 The requirement of minimality arises from § 6 3) of the Personal Data Protection Act, as well as Art 5 subparagraph c of the Council of Europe data protection convention and Art 6(1) subparagraph c of the EU data protection directive.

If the result can be achieved without the use of personal data, the interference in the inviolability of private life in connection with the processing of data cannot be considered to be justified. In other words, the data processor is required to justify why they could not perform the intended tasks without the processing of personal data.

The above principles of data protection should help to ensure that personal data are used only when there is imperative need for this and when the processing of data will not involve unjustified interference in the private life of individuals. The restrictions on the processing of personal data become especially important when particularly sensitive data are processed (e.g. health related data).

4.3. Compatibility of the Personal Data Protection Act with the Constitution

As, in Estonia, the use of personal data – including the use of data in science and statistics – is restricted by the Personal Data Protection Act, and therefore, researchers and statisticians cannot freely process personal data, a group of heads of institutions carrying out health related research and statistical surveys turned to the Chancellor of Justice with a request to verify whether the Personal Data Protection Act is compatible with Art 28 of the Constitution, which provides for everyone's right to the protection of health. In the opinion of the applicants, the Personal Data Protection Act does not allow the creation of databases containing high-quality health information necessary for obtaining reliable statistics, for conducting research with the aim of developing medicine, etc.

In the opinion of the Chancellor of Justice, in view of the constitutional right to the protection of private life, the restrictions on the processing of personal data are indispensable and the Personal Data Protection Act in itself is oriented to achieving constitutional aims. Article 28 of the Constitution requires the state to take active steps to ensure access to medical care. At the same time, in the Chancellor's opinion, Art 28 of the Constitution presumes the establishment of a health care system that also ensures the protection of other fundamental rights.

Section 14(3) clause 2 of the Personal Data Protection Act allows the processing of sensitive personal data without the person's consent for the protection of health. Thus, in the context of health care, the processing of personal data to take individual measures is allowed and it cannot be claimed that the restrictions arising from the Personal Data Protection Act do not enable the protection of people's health.

The state's duties in ensuring the protection of health are definitely not limited to organising access to individual health care; a wider analysis and development work are also necessary. Based on section 14(3) clause 1 of the Personal Data Protection Act, sensitive personal data can also be processed for performance of other obligations prescribed by law. The organisation of the accessibility of health services in Estonia is mainly within the competence of the Ministry of Social Affairs. Various special laws provide a basis for the organisation of the protection of health (e.g. the Health Services Organisation Act, the Public Health Act[50], the Infectious Diseases Prevention and Control Act[51]), and the collection of necessary statistical information can basically be ensured through the use of specific acts. Thanks to the above-mentioned provision, which allows processing of personal data for the performance of obligations prescribed by law, the Personal Data Protection Act is not an obstacle in the case of such special regulations. Therefore, the Chancellor of Justice believes that the Personal Data Protection Act does not establish any unconstitutional restrictions.

As concerns scientific research, it must be emphasised that, as a rule, no one can be compelled to participate in research (including through the indirect processing of one's personal data) and therefore the use of personal data for research purposes has a different weight and meaning than the use of data for the performance of an obligation by the state. Therefore, there must be significantly stricter restrictions on the use of personal data for research, and domestic law must provide for additional guarantees for the protection of data subjects.

50 RT I 1995, 57, 978; 2004, 75, 520.

51 RT I 2003, 23, 160; 2004, 30, 208.

As regards the use of personal data for research and statistical purposes, the Chancellor of Justice was of the opinion that the provisions of the Personal Data Protection Act do not basically impose unjustified restrictions on the processing of personal data; the problem derives rather from the insufficiency of the regulation provided for in specific laws. The Chancellor of Justice did not consider it appropriate to amend the Personal Data Protection Act with a general provision that would allow the processing of data for research and statistical purposes without the consent of the subject. The reason why it would be better to amend the special laws is due to the multitude and variety of research and statistical activities: processing of personal data in different fields requires specific additional guarantees and it would not be justified to provide for them in a general law (the Personal Data Protection Act).

4.4. The collection of statistical data for the functioning of the state – the example of the drug addiction treatment register

In resolving the application described under the previous section, the Chancellor of Justice, thus, expressed an opinion that the collection of statistical information for the purposes of organising health care is constitutionally acceptable. This, nevertheless, does not mean that personal data may be processed without any restrictions for statistical purposes. There was also an example in 2004 where the processing of personal data for statistical purposes intended by the state interfered disproportionately with the principle of inviolability of private life.

The case had to do with the Draft of Amendment to the Narcotic and Psychotropic Substances Act[52] in the Riigikogu. The amendments would have created a legal basis for the establishment of a drug addiction treatment register. The law and the draft Government regulation to be adopted on its basis would have required the entering in the register of a large amount of personal data on all persons seeking drug addiction treatment. Attending physicians would have been required to collect, for the register, data identifiable on the basis of name and personal identification code (e.g. ethnic origin, citizenship, residence, employment, education of the person and information relating to the use of drugs).

The Chancellor of Justice was of the opinion that although collecting of adequate primary data in the fight against drug addiction is a justified public interest in order to allow better planning of preventive measures, the collection of personal data to the intended extent could not be considered a proportionate measure. First, it should be taken into account that the data collected in such a way would be insufficient, because the register would only obtain information about drug addicts who themselves are prepared to turn to a doctor. The register would be insufficient to map the extent of drug addiction in general. Second, as the aim of the register is the collection of statistical data and not the identification of the drug addicts, anonymous processing of personal data should be preferred. Third, considering the amount of the data to be collected, the interference in the privacy of persons would be extremely intensive, while the achieved result would be of questionable value. In addition, it should also be kept in mind that drug addicts turn to the doctor as patients and thus enter into a relationship, the confidentiality of which is widely recognised and protected – drug addicts must also be guaranteed the possibility to obtain medical care without compromising their privacy.

In view of the above arguments and international standards for drug prevention and protection of patients, the Chancellor of Justice expressed the opinion that the creation of the register of drug addicts in the intended form would have disproportionately interfered with everyone's constitutional right to the inviolability of private life. In reply to the Chancellor of Justice's memorandums, the Ministry of Social Affairs, who had drawn up the draft, said that the draft would be amended so that the register would be in a form that would not allow immediate identification of the persons entered in the register, i.e. the data in the register would be encoded. This would allow the purpose of data collection to be achieved and would, at the same time, ensure the protection of the privacy of the data subjects.

[52] RT I 1997, 52, 834; 2003, 88, 591.

4.5. Conclusion

The topic of the legality of the collection of personal data for statistical purposes has arisen once again at the time of writing this report, which shows the continued need to deal with these issues. The Chancellor of Justice within the limits of his competence can certainly contribute to finding a necessary balance between public interests and inviolability of private life of individuals – so that the protection of personal data is ensured while the scientists and statisticians would still be able to do their work.

5. The right to an effective remedy for one's protection

The Supreme Court of Estonia has repeatedly stated that Arts 13, 14 and 15 of the Constitution and Art 13 of the European Convention on Human Rights give rise to the persons' subjective fundamental right to an effective remedy for their protection.[53] Although the legislator has an extensive margin of discretion in shaping the legal norms, it must ensure that the procedural rules provided for in the legislation in respect to deadlines, requirements of form, procedural rights and duties would not become such as to excessively restrict the above right. Thereby, a fair procedure serves not only the purpose of ensuring the substantive correctness. A fair and just procedure, in particular with regard to the relationship between the public authorities and the individual, shows recognition for the participants in the proceedings and treats people not only as procedural subjects but as legally capable citizens.[54]

Although the meaning of the principle of a fair and just procedure is wider, its role in the court proceedings is particularly remarkable. First and foremost, the right of recourse to the court must guarantee a possibly wide and complete protection of the individual's rights.[55] A right without a corresponding effective judicial remedy to protect it is a mere declaration without any substance or meaning.

The first sentence of Art 15 para 1 of the Constitution provides for the overall right of recourse to the court, Art 24 para 5 stipulates everyone's right of appeal to a higher court against the judgment in his or her case pursuant to procedure provided by law. The right of recourse to the court and the right of appeal as fundamental rights are also regulated by several international instruments that are binding on Estonia, the most important of them being the European Convention on Human Rights. The principles provided for in the European Convention on Human Rights and developed by the European Court of Human Rights on the basis of the Convention must definitely be taken into account in shaping national legal norms.

Article 6 of the European Convention on Human Rights provides for everyone's right of recourse to the court in the determination of his civil rights and obligations or of any criminal charge against him, and also sets out the requirements for a fair trial. The referred article and the guarantees provided by it, however, are directly applicable only in respect of the right of recourse to the first instance courts and relevant procedures.[56] The right of appeal is provided for by Additional Protocol No. 7, Art 2 para 1, according to which everyone convicted of a criminal offence by a tribunal shall

[53] E.g. Supreme Court Constitutional Review Chamber judgement of 22 Feb 2001, No. 3-4-1-4-01, RT III 2001, 6, 63, p 11; 17 Feb 2003, No 3-4-1-1-03, RT 2003, 5, 48, p 12; also the following judgements and rulings of the Supreme Court en banc: 22 Dec 2000, No. 3-3-1-38-00, RT III 2001, 2, 14, p 19; 28.10.2002, No. 3-4-1-5-02, RT III 2002, 28, 308, para 30 and 35; 17 March 2003, No. 3-1-3-10-02, RT III 2003, 10, 95, p 17; 28 Apr 2004, No. 3-3-1-69-03, RT III 2004, 12, 143, p 24.

[54] E.g. Supreme Court Administrative Law Chamber ruling of 8 Oct 2002, No. 3-3-1-56-02, RT III 2002, 25, 283, p 9; Supreme Court Administrative Law Chamber judgememt of 13 June 2003, No. 3-3-1-42-03, RT III 2003, 23, 229, p 37.

[55] The importance of this principle was also pointed out in the following judgements and rulings of the Supreme Court en banc: 22 Dec 2000, No. 3-3-1-38-00, para 15 and 19; 17 March 2003, No. 3-1-3-10-02, para 17 and 18; 06 Jan 2004, No. 3-3-2-1-04, RT III 2004, 4, 37, para 26–27; 28 Apr 2004, No. 3-3-1-69-03, p 24; also Supreme Court Constitutional Review Chamber 25 March 2004, No. 3-4-1-1-04, RT III 2004, 9, 96, p 18.

[56] Nevertheless, the provisions of Art 6 are applicable once the appeal has been accepted and the relevant judicial body is required to make a judgement. Thus, for example, the European Court of Human Rights in its decision of 25 March 1998 in the case No. 23103/93 *Belziuk vs. Poland* stated that also higher instance courts must observe the procedural guarantees provided for in the above article of the Convention.

have the right to have conviction or sentence reviewed by a higher tribunal; the exercise of this right, including the grounds on which it may be exercised, shall be governed by law. According to Art 2 para 2, this right may be subject to exceptions with regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

The above articles only refer to conviction for a criminal offence, but as the European Court of Human Rights approaches the issue of punishment on the basis of substantive criteria[57], some of the minor offences should also be included (i.e. as a rule, the definition of the offence in section 3(1) of the Penal Code should be the starting point).[58] The same applies to disciplinary punishments.[59]

5.1. Possibility of restrictions

If an individual thinks that he has suffered injustice, the faith in obtaining truth and justice at least through the court is the last ray of hope for him. Therefore, it is clear that all the restrictions on the right of recourse to the court and the right of appeal seem particularly unjust and seriously raise the issue of the justifiability and constitutionality of the restriction.

Article 24 para 5 of the Constitution contains a simple reservation to be established by law, i.e. the legislator may restrict the relevant fundamental right for any legitimate purposes. The first sentence of Art 15 para 1 of the Constitution does not contain a reservation subject to establishment by law. Restricting of a fundamental right without a reservation is also allowed if it takes place with the aim to protect another fundamental right or constitutional value and complies with the principle of proportionality.

In a situation where the financial resources of the state are limited the legislator must be able to guarantee the effective functioning of the court system as required by Chapter XIII of the Constitution. The right to impartial, independent and adequate trial within a reasonable time that can be ensured through an effective judicial hearing is an essential precondition for the just administration of justice and thus also for the right to an effective procedure. Trial within a reasonable time and a high-quality court judgement increase the authority of the judicial system and improve the protection of the rights and freedoms of individuals.[60]

However, it must also be taken into account that the measures taken to ensure the effective functioning of the judicial system (e.g. procedural deadlines, bases for refusal to review the complaint, etc) may begin to restrict the general right of recourse to the court and the possibilities of appeal, which are also part of the right to effective protection and judicial procedure. In such a case, the assessment of the constitutionality of the restrictions comes down to the weighing of different values. In the following section we will analyse the restrictions of the right of appeal with an emphasis on the criminal and misdemeanour procedure.

5.2. The right of appeal in the criminal and misdemeanour procedure

The right of appeal arising from Art 24 para 5 of the Constitution is one of the subsidiary principles of the right to an effective judicial protection. Judges are also human and they may err. A hierarchical judicial system, on the other hand, guarantees the right of appeal and possibility to rectify the mistakes.

57 The European Court of Human Rights assesses the classification of offences in accordance with national laws, taking into account the nature of the offence and the character and severity of the penalty (for the first time in its decision of 8 June 1976 in the case No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, *Engel et al vs. the Netherlands*)

58 The same opinion: **R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse. [Constitutionalism and the Protection of** Fundamental Rights and Freedoms] Tallinn 2004, p. 395; Supreme Court Constitutional Review Chamber 22 Feb 2001, No. 3-4-1-4-01, p 11; 25.03.2004, No. 3-4-1-1-04, p 19.

59 Supreme Court Constitutional Review Chamber judgement of 11 June 1997, No. 3-4-1-1-97, RT I 1997, 50, 821, p 2.

60 The Supreme Court has also repeatedly stated the need to settle the judicial dispute within a reasonable time, e.g. the Supreme Court Ad Hoc Panel ruling of 10 Apr 2002, No. 3-3-4-2-02, RT III 2002, 13, 138, p 10; Supreme Court en banc judgement of 17 Feb 2004, No. 3-1-1-120-03, RT III 2004, 7, 69, p 18; Supreme Court Administrative Law Chamber judgement of 28 Sept 2004, No. 3-3-1-42-04, RT III 2004, 24, 260, p 22; 08.12.2004, No. 3-3-1-63-04, RT III 2005, 2, 8, p 13.

One of the types of the right of appeal is also the right to initiate the review procedure. This, however, cannot be viewed as an effective alternative to a new substantive hearing of the matter in the protection of the rights of an individual[61], because it does not make it possible to eliminate the damage that has been caused by a potentially incorrect court decision. Namely, review procedure is allowed only in the limited cases that have been provided directly by law (e.g. § 180 of the Code of Misdemeanour Procedure, § 366 of the Code of Criminal Procedure).[62]

5.2.1. Contesting of court rulings

Although Art 24 para 5 of the Constitution covers all court decisions (both judgements and rulings), according to a recognised principle the contestability of court rulings passed during the court procedure can be limited with the aim to ensure the effectiveness of the judicial procedure. This is due to the fact that court rulings are made to settle procedural issues, i.e. normally a ruling does not contain a final decision on the rights and duties of individuals. As the possibility of contesting court rulings separately from the main proceedings may significantly hamper the consistency of conducting the proceedings within a reasonable time, rulings in general can be contested only as part of the appeal against the court judgement or on cassation, i.e. with the substantive decision concerning the matter.

Although in general such an approach can be considered as justified, it should also be kept in mind that excluding the possibility of contesting court rulings may interfere with the general right of recourse to the court; and the restriction on the appeal may render the subsequent rectification of the violation of the person's rights impossible. Therefore, three main criteria can be pointed out based on the case law of the Supreme Court, which the legislator must observe when excluding the independent contesting of procedural actions.[63]

First, an effective procedure is not necessarily guaranteed if the review of legality of the procedural measure imposed by a ruling that interferes with the fundamental rights and freedoms of the person is delayed until the judicial hearing of the criminal case takes place, whereas a significant period of time may lapse from the moment when the ruling is made until the judicial hearing. The damage caused through the violation of the fundamental right or freedom may considerably increase by that time or its rectification may even become impossible. As compensation of such damage is also not possible based on section 15 of the State Liability Act, which provides for the bases of the compensation of damage caused during the administration of justice, the procedural code should provide for adequate guarantees for the protection of the rights of persons.

Second, there is no sufficient protection of the rights in a situation where the procedure, once initiated, never reaches the stage where it would be possible to review the legality of the court ruling that interfered with the rights of the individual. It means that the issue cannot be raised during a substantive hearing. This aspect is particularly important in the case of contesting rulings that are decisive from the point of view of the proceedings.[64]

Unfortunately, the legal regulation contained in the Code of Misdemeanour Procedure does not always ensure the complete protection of the right of recourse to the court. In the course of misdemeanour proceedings an extrajudicial procedure is carried out and the punishment is imposed by an administrative authority. Regardless of the fact that formally such a body is not a court but an executive authority, the activities of the extrajudicial body conducting the proceedings can in essence be viewed as the exercise of the function of the administration of justice.[65] In order to view

61 This has been referred to, for example, by the Supreme Court Criminal Law Chamber in its ruling of 26 May 2003 in the case No. 3-1-1-35-03 (RT III 2003, 20, 191), but at that time § 180 clause 6 of the Code of Misdemeanour Procedure was still in force, which provided for a possibility to use, as a basis for review, another factor that had resulted in the making of an incorrect court decision.

62 RT I 2003, 27, 166; 2004, 54, 387.

63 First of all based on the Supreme Court en banc ruling of 22 Dec 2000, No. 3-3-1-38-00.

64 Supreme Court Criminal Law Chamber judgement of 23 Nov 2004, No. 3-1-1-122-04, RT III 2004, 34, 358, p 12.

65 Supreme Court en banc ruling of 28 Apr 2004, No. 3-3-1-69-03, p 24: „a decision of imposing a sanction for an administrative infringement

the institution carrying out the function of the administration of justice as a court in substantive terms, it must meet certain characteristics. In accordance with the principles recognised in the European legal space, the relevant body must be constituted on the basis of law and be independent and impartial.[66] Although the Code of Misdemeanour Procedure requires that the extrajudicial body conducting the proceedings must be established on the basis of law and it must be impartial, the requirement of independence is not fully ensured as compared to real courts. It ensues that an extrajudicial body conducting the proceedings cannot be seen as court in the meaning of the Constitution. The extrajudicial proceedings carried out by an extrajudicial body also do not always meet all the requirements of judicial proceedings (e.g. there is no oral hearing characteristic of the judicial procedure). The European Court of Human Rights has recognised that there is not necessarily incompatibility with Art 6 of the European Convention on Human Rights when the proceedings concerning a minor offence are conducted and the relevant punishment is imposed by an official or an administrative body. Nevertheless, it is important that the punished person has an opportunity of contesting the decision made with regard to him, so that the rights guaranteed in Art 6 of the European Convention on Human Rights are protected.[67] Therefore it is necessary to ensure the person's right of recourse to the court (arising from Art 15 para 1 of the Constitution) for a judicial review of the case.

Therefore, the provisions of the Code of Misdemeanour Procedure cannot be considered constitutional if they exclude the submitting of an appeal against a ruling in a misdemeanour procedure in a county or city court if such a ruling involved a decision to refuse the review of the complaint[68] or refusal to renew the deadline for complaint. In a situation where the renewal of the deadline for submitting a complaint is decided solely by the county or city court in pre-trial proceedings based only on written documents, the court having extensive margin of appreciation in defining the undefined legal term ("good reason"), and, where the proclamation of a decision by an extrajudicial body within general proceedings, which in turn determines the deadline for submitting a complaint, affects the behaviour and duties of the parties to the proceedings (Code of Misdemeanour Procedure § 70(4) and (5) and § 114(4)), such an exclusion of the possibility of contesting court rulings cannot be considered as proportionate to the desired objective, i.e. ensuring the efficiency of the court proceedings. Such a regulation does not ensure an effective and complete right to judicial protection because in the case of recourse to the court there is no possibility of review of potential mistakes within the court system.

Third, the right to an effective procedure is not guaranteed if the court ruling interferes with the rights and freedoms of the person who is not a participant in the proceedings and cannot therefore invoke the judicial protection in the case of violation of his rights and freedoms. Thus, for example, it cannot be considered as justified if the person who is not a party to the proceedings cannot request a judicial review of the ruling on the basis of which a search is conducted on his premises.

The problems of the protection of the rights of third parties who are not participants to the proceedings are definitely wider than the issue concerning the contesting of court rulings. For example, in misdemeanour proceedings concerning the infringement of the exclusive right of the owner of a trademark also the subjective rights of the owner of the trademark are decided, but the Code of Misdemeanour Procedure does not allow to involve the owner of the trademark as a party to the proceedings.

is not an administrative act in the meaning of the Code of Administrative Court Procedure § 4(1) nor the Administrative Procedure Act § 51(1), because the decision of imposing an administrative sanction has been made in the course of exercising the jurisdictional function of the state authority, not in the framework of exercising administrative functions."

66 For a longer treatment, see: U. Lõhmus (**footnote 57), p. 153 ff; R. Maruste (footnote 58), p. 305. Including also references to the relevant** case law of the European Court of Human Rights.

67 Decision of **2 Sept 1998 of the European Court of Human Rights in the case No. 27061/95,** *Kadubec vs. Slovakia*, p 57; Supreme Court Constitutional Review Chamber judgement of 22 Feb 2001, No. 3-4-1-4-01, p 14; 25 March 2004, No. 3-4-1-1-04, p 20.

68 Supreme Court Constitutional Review Chamber judgement of 25 March 2004, No. 3-4-1-1-04.

5.2.2. Appeal to the circuit court

It ensues from Art 24 para 5 of the Constitution and Art 2 of Protocol No. 7 of the European Convention on Human Rights that in criminal cases, and, as was explained above, in certain cases also in misdemeanour and disciplinary proceedings, the states are required to ensure the single right of appeal. As the result of a conviction can be, for example, the restriction of the person's liberty, the prohibition to hold certain office, suspension or termination of activity licences, etc., it is particularly important to avoid making incorrect decisions.

If the legislator excludes the possibility of a single appeal within the court system justifying it with the aim of ensuring the efficiency of the court system, it must definitely provide for sufficiently effective measures that would minimise the probability of an incorrect decision and the damage arising from such a decision. The European Court of Human Rights has also noted that the member states have a wide margin of appreciation as for how to ensure the rights provided for in Art 2 of Protocol No. 7 to the European Convention on Human Rights. Therefore, the right of appeal can only be restricted on legal grounds; or there can be a procedure of prior authorisation. It is, however, important that all the restrictions have a legitimate aim and the restrictions do not distort the nature of the right of appeal.[69]

For example, unlike in the previously applicable provisions, the second sentence of section 326(2) of the Code of Criminal Procedure provides that a circuit court may refuse to hear an appeal if the court panel hearing the criminal matter unanimously finds that the appeal is clearly unfounded. Such a norm can be considered constitutional only in combination with other provisions of the Code of Criminal Procedure.

First, if pre-trial proceedings in the circuit court are conducted by a circuit court judge sitting alone (second sentence of § 19(1) of the Code of Criminal Procedure), the decision mentioned in the second sentence of § 326(2) of the Code of Criminal Procedure can be made by a panel composed of three circuit court judges. The collegiality ensures wider balance of the decision and raises the likelihood of substantive lawfulness of the decision. Second, differently from the general rules of voting in collegial court panel (§ 23(1), (5) and (6) of the Code of Criminal Procedure, the unanimity of the panel is required, i.e. if one member of the panel finds that the appeal is not manifestly unfounded then the proceedings in the matter will have to be conducted. Third, as the appeal must be manifestly unfounded, the panel must also assess the appeal on its merits (weigh the facts relating to the subject of proof) in order to decide that it indeed lacks any prospect. In doing so, the panel must also provide reasoning for its decision to reject the appeal (§ 145 of the Code of Criminal Procedure). Fourth, the right of appeal is not absolutely limited and the ruling of refusal to review the appeal based on the grounds provided for in the second sentence of § 326(2) of the Code of Criminal Procedure can be contested in the Supreme Court (§ 383 ff of the Code of Criminal Procedure). This ensures judicial review by a court of higher instance. Considering the speed of proceedings in connection with the filing of an appeal against ruling (there are ten days to file an appeal against a court ruling (§ 387(1) of the Code of Criminal Procedure)), the circuit court reviews the appeal against its ruling within five days (§ 389(1) of the Code of Criminal Procedure) and the Supreme Court within ten days (§ 390(1) of the Code of Criminal Procedure), it can be said that no significant procedural delays are involved in reviewing an appeal against a court ruling.

The Code of Misdemeanour Procedure also provides for the restriction of an appeal against a decision of an extra-judicial body carrying out the proceedings. An appeal can only be filed to the county and city court and then to the Supreme Court (the so-called gradual cassation; § 135(8) of the Code of Misdemeanour Procedure). Considering the case overload of the courts, the fact that the law provides for several norms for the protection of individuals, as well as the fact that the Supreme Court in its case law has also felt the importance of restricting the right of appeal, and has thus paid

69 E.g. the decision of 13 Feb 2001 of the European Court of Human Rights **in the case No. 29731/96,** *Krombach vs. France*, p 96.

great attention to the assessment of evidence and reasoning of the judgement by county and city courts[70], this regulation should be seen as currently in compliance with the Constitution.

To give examples of norms for the protection of individuals, we could mention provisions according to which the possibility of written proceedings in the county or city court for review of an appeal against a decision of an extra-judicial body that conducted the proceedings is very limited, and, as a rule, the matter is adjudicated at a court hearing (§ 120 of the Code of Misdemeanour Procedure). This ensures direct assessment of the evidence and increases the substantive correctness of the court judgement.[71] The right of persons to be heard, i.e. informing the persons about the fact that they have such a right (§ 69(6) and § 70(1) of the Code of Misdemeanour Procedure) is also guaranteed in the preceding extra-judicial proceedings. In addition, the county or city court hears a misdemeanour matter in its entirety, regardless of the limits of the appeal filed, and shall verify the factual and legal circumstances on the basis of which the body which conducted the extra-judicial proceedings made its decision (§ 123(2) of the Code of Misdemeanour Procedure). Section 127(4) of the Code also provides that if a county or city court establishes incorrect application of substantive law or a material violation of the law on misdemeanour procedure whereby the situation of the person subject to proceedings has been aggravated, the court shall not accept discontinuance of the appeal. According to section 132 clause 2 of the Code of Misdemeanour Procedure, county and city courts in adjudication of appeals may annul a decision of a body conducting extra-judicial proceedings in full or in part and make a new decision only if this does not aggravate the situation of the person subject to proceedings. Furthermore, if under the new Code of Criminal Procedure the Supreme Court normally reviews appeals in cassation by written procedure (§ 352(1) of the Code of Criminal Procedure), in misdemeanour procedure the principle of oral proceedings still remained in force (§ 165 ff of the Code of Misdemeanour Procedure).

5.2.3. Restrictions on representation

Both the Code of Misdemeanour Procedure and the Code of Criminal Procedure provide for restrictions of the right of appeal (§ 155(2) of the Code of Misdemeanour Procedure, § 344(3) of the Code of Criminal Procedure), according to which the counsel, who is an advocate, of the person subject to proceedings has the right to file an appeal in cassation. The person himself or herself cannot file an appeal in cassation. They can only do it through a representative who is a member of the Bar.

In principle, the scope of protection of Art 24 para 5 of the Constitution also covers the decisions of the circuit court in addition to the decisions of the first instance court. However, this is so only in respect to the provisions contained in the first sentence of Art 149 para 3 of the Constitution, according to which the Supreme Court reviews cases by way of cassation proceedings. This means that only the legal elements of the judgement can be contested in the Supreme Court by way of cassation. Therefore, it is clear that the specificities of the cassation proceedings in the Supreme Court require expert knowledge of legal problems and the skill of presenting the contested issues to the court. In order to have a genuine legal dispute in the Supreme Court, it is necessary that both sides provide an analytical and reasoned overview of their views to the court. This imposes increased requirements on the parties to the judicial proceedings.

First of all, the aim of limiting the range of persons who are entitled to file an appeal in cassation is related to the protection of the rights of persons. The Supreme Court decides the issue of acceptance of an appeal in cassation (§ 160 of the Code of Misdemeanour Procedure, § 349 of the Code of Criminal Procedure). Considering that, as a rule, the Supreme Court reviews the matter only within

70 E.g. the following judgements of the Supreme Court Criminal Law Chamber: **8 Oct 2003, No. 3-1-1-105-03, RT III 2003, 30, 310, p 12;** 6 Apr 2004, No. 3-1-1-19-04, RT III 2004, 11, 134, p 9; 8 June 2004, No. 3-1-1-49-04, RT III 2004, 17, 207, p 6; 21 June 2004, No. 3-1-1-61-04, RT III 2004, 21, 234, p 6; 29 June 2004, No. 3-1-1-63-04, RT III 2004, 21, 238, p 11.

71 About the importance of correctness in notifying the time and place of hearing of a matter in the county or city court, see, e.g., the Supreme Court Criminal Law Chamber judgements **of 5 Apr 2004, No. 3-1-2-3-04, RT III 2004, 11, 132; 8 Apr 2004, No. 3-1-1-21-04, RT III** 2004, 11, 137.

the limits of the appeal in cassation that was filed and that the appellant in cassation does not have the right to exceed the limits of the appeal in cassation (§ 166(2) and (4) of the Code of Misdemeanour Procedure; § 352(4) and (5) of the Code of Criminal Procedure), it may prove pointless to involve a qualified lawyer as a representative in the proceedings if the person was unable to refer to relevant aspects and highlight the necessary issues already at the time of filing an appeal in cassation. It means that the damage has already been caused and the lawyer who joins the proceedings as a representative cannot do anything for the person any more. Moreover, as a rule the Supreme Court also reviews a criminal case by way of written proceedings (§ 352(1) of the Code of Criminal Procedure). Therefore, in view of the above, the contribution of a representative, who is an attorney, in drawing up a competent appeal in cassation cannot be underestimated.

In addition to the above, the restrictions of the rights of appeal and representation are directly related to the effective functioning of the court system. This means the conducting of each individual judicial procedure within reasonable time as well as the overall effective functioning of the court system. The possibility of unlimited appeal would increase the workload of the Supreme Court, which, in turn, may become an obstacle to focusing on solving substantive problem areas, prolong significantly the procedural terms and reduce the effective legal protection of persons in the final court instance.

Based on the specific nature of the appeal in cassation, there is also an internationally recognised principle that states may regulate access to the supreme court differently than access to the first and second instance courts. Thus, for example, Directive No. 98/5/EC of the European Parliament and of the Council[72], in Art 5 para 3, provides: in order to ensure the smooth operation of the justice system, Member States may lay down specific rules for access to supreme courts, such as the use of specialist lawyers. The European Court of Human Rights has also emphasised repeatedly that the conditions of admissibility may be stricter for appeals to the highest courts in the country than in the case of ordinary appeals.[73]

The professional activities of lawyers are regulated by the Bar Association Act[74], which provides for the conditions and procedure of forming the professional association. The law lays down requirements that the lawyers must comply with (and in joining the Bar Association the lawyers are also required to pass the advocate's examination), and the law also provides for the system of supervision over professional activities (incl. disciplinary liability for infringement of legislation regulating the activities of lawyers or for breach of professional rules of ethics). The law also regulates the financial liability of the lawyer for the damage caused to the client and the duty of entering into a professional insurance contract to guarantee compensation of such damage. Extremely important are also the guarantees for the activities of the lawyer provided for by law, such as the independence of the lawyer in providing legal services, the requirement of confidentiality, the integrity of data media related to the provision of the legal counselling service, etc.

Thus, stricter requirements and supervision possibilities apply with regard to lawyers to ensure that they meet these conditions, both by their professional knowledge as well as character. The idea of allowing only persons corresponding to these requirements the right of filing an appeal in cassation and being a representative in the Supreme Court complies with this principle.

Naturally, the legal regulation arising from the combination of the procedural codes and the Bar Association Act must not become such that the constitutionally provided right of appeal to the Supreme Court is deprived of any substance (e.g. due to the scarcity of lawyers, excessive cost of legal aid, etc). Thus, for example, the situation where it is impossible to request an appointed counsel in the review procedure cannot be considered to be legal. Although the review procedure is an exceptional

72 EU Official Journal No. L 077, 14 March 1998, pp. 36-43. The aim of the Directive is to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

73 E.g. The European Court of Human Rights judgement of 23 Oct 1996 in the case No. 23103/93, *Levages Prestations Services vs. France*.

74 RT I 2001, 36, 201; 2004, 30, 208.

type of procedure, in view of the effective protection of the rights of individuals it can be necessary constitutionally. This becomes particularly apparent in the cases of review of court judgements on the basis of the decisions of the European Court of Human Rights, as well as keeping in mind the relatively clear bases for review as provided for in § 366 clauses 1, 2 and 6 of the Code of Criminal Procedure. Therefore, the state must guarantee effective possibilities for implementing such right of recourse to the court. One such guarantee is access to high-quality legal aid and representation. However, for a large proportion of the population the use of a lawyer for recourse to the court for the protection of their rights is an insurmountable obstacle due to the lack of resources. The State Legal Aid Act[75] that entered into force on 1 March 2005 will hopefully help to solve the problem of access to legal aid.

As in the case of proceedings in the Supreme Court the possibilities of legal protection of the parties depend entirely on the lawyer, it also presumes that lawyers should sense the responsibility that lies on them. This increases the role of the Estonian Bar Association in developing the professional skills of their members and in exercising effective control over lawyers. If, for example, without any reason a lawyer fails to meet the term for appeal or fails to take timely and relevant measures for the protection of the interests of his or her client, the person has no possibilities to avoid the damage. They can only turn to the Bar Association with a request to start disciplinary proceedings.

5.3. Conclusion

The above examples concerning the right to effective procedure for one's protection, with an emphasis on the restrictions on the right of appeal in criminal and misdemeanour proceedings, showed vividly that imposing restrictions on procedural rights must be taken seriously. The importance of the procedure in the protection of the rights of persons cannot be underestimated, because both pre-trial procedure as well as judicial procedure plays an extremely important role in the protection of substantive rights of persons in all areas of law.

Articles 13, 14 and 15 of the Constitution and Art 13 of the European Convention on Human Rights require that the legislator should ensure an effective remedy that individuals can use for the protection of their rights. Thus, the regulation must be shaped in a way that enables competent and rapid resolution of all legal disputes, while not restricting disproportionately the procedural rights of persons, incl. the right of appeal.

In conclusion, it should be noted that what should also be taken into account in law making, in addition to the above-mentioned aspects, is the correspondence of procedural rules to the specificities of various legal relationships and that full judicial protection is guaranteed in reality. It should be pointed out that the Supreme Court in some of its judgements delivered at the end of 2004 gave a warning signal to the legislator that the current regulation is not necessarily in compliance with this principle.[76] The regulation dealt with in the referred judgements badly needs modification in order to avoid any infringements of fundamental rights.

[75] RT I 2004, 56, 403.

[76] The Supreme Court en banc judgement of 25 Oct 2004, No. 3-4-1-10-04, RT III 2004,28, 297; 25 Oct 2004, No. 3-3-1-29-04; RT III 2004, 28, 298.

PART 2.

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

I INTRODUCTION

The second part of the report of the Chancellor of Justice will provide a summary of the activities of the Chancellor in the protection of fundamental rights and freedoms in the past year. The aim of the overview of proceedings initiated on the basis of applications as well as on the Chancellor's own initiative is to draw attention to the violations of fundamental rights in Estonia during the reporting period. The overview is divided into chapters, each focusing on a particular topic. Each chapter provides a summary of the main shortcomings in the field and the proposals of the Chancellor of Justice to avoid them.

In the case of most areas, it is possible to identify specific public bodies under whose area of government the topic falls and in whose activities shortcomings and violations were detected. It is important to inform the public about the areas in which there are most problems, and emphasise the importance of political responsibility. Therefore, the overview is aimed first and foremost at the Riigikogu and the bodies specifically responsible for policy implementation in the respective areas. Concrete solutions or ways of finding solutions have also been suggested in relation to the more general problems of fundamental rights and freedoms.

The present section will deal with the issues that have risen in the process of supervision proceedings carried out by the Chancellor of Justice and that concern conformity of legislation with the Constitution and the laws (the so-called constitutional review), as well as ensuring of constitutional rights and freedoms (the ombudsman's activities). Such a combined approach is justified, because the overall objective of both forms of review is to ensure the fundamental rights and freedoms of people. There are frequently cases where it appears during the proceedings that the infringement of a fundamental right was not due to the incorrect application of the law but due to the incompliance of the norm with the Constitution. Verification of the activities of the supervised bodies may reveal gaps in legislation or provisions that are hardly accessible in reality, which is something that might not be identified in the course of a purely formal constitutional review.

There were a total of 218 applications during the reporting period in which people asked to verify the conformity of a piece of legislation with the Constitution and the laws. This constitutes 9.3% of the total number of applications. Conflict with the Constitution or the laws was ascertained in 10 cases. There were 565 applications for the verification of the activities of state agencies, local government bodies, legal persons in public law, or natural persons or legal persons in private law who are exercising public functions, which constitutes 24% of the total number of applications. In 83 of the above cases, the Chancellor of Justice found that the supervised body had infringed the fundamental rights of persons. In addition, supervisory proceedings were also carried out based on the Chancellor's own initiative. In the course of those proceedings, the Chancellor of Justice also took important steps for the protection of the rights of persons or for ensuring constitutional order.

The second part will begin with a summary of the problems. First, we will explore the topic of the rights of the child, followed by the main cases concerning health protection, social welfare and pensions. Labour law proceedings conducted by the Chancellor in 2004 focused on the public service. In the area of social welfare, we can still witness shortcomings in the activities of local governments and county governors in the areas that have been given into their competence by law. In the case of local governments, for example, there were shortcomings in the attitude towards the guardianship responsibility for children without parental care, and the provision of social services and payment of social benefits to people with disabilities. In the case of county governors, there were still gaps in exercising their duty of supervisory control with regard to social welfare institutions for children and the elderly, and resolving complaints concerning the provision of social services, social benefits, emergency social assistance, or other types of assistance.

The Chancellor of Justice continued to review a number of complaints in connection with the state's duty to ensure public order and complaints relating to the activities of the state's power structures.

The report will include examples of supervision proceedings of the Chancellor of Justice over the police both in respect to ensuring public order as well as in applying detention and arrest. There is also a separate chapter on the issues of imprisonment. The overview also deals with the problems of penal law and criminal procedure. For the first time, the report contains a chapter on initiating disciplinary proceedings against judges, which is a competence entrusted to the Chancellor of Justice since 2002.

Important basis for the establishment of confidence between the state and the citizens is the openness and responsiveness of the officials in communicating with people. In this respect, particularly important are the chapters that deal with access to information and memorandums and replying to requests for explanation, but also good governance in general. Observing the fundamental principles of administrative procedure is a topic that ties in with several supervision proceedings conducted by the Chancellor of Justice, and, therefore, a number of these cases could also be classified in parallel under the topic of good governance. Ignoring the principles of investigation, explanation and hearing were the main aspects that emerged in connection with several infringements. Thus, the analysis of an acceptance of an administrative appeal described in the chapter on good governance is an good example of what the human centred behaviour of an official in accordance with the rules of administrative procedure should look like.

Understandably, the Chancellor of Justice received more complaints in connection with those agencies that due to the specificity of their function pass significantly more individual acts. Thus, for example, a number of complaints are related to the decisions of the pension boards in determining pensions, the decisions of the Citizenship and Migration Board on issuing residence permits and other documents, disciplinary punishments in prisons, etc. Nevertheless, based on the received applications, it cannot be said that there are proportionally more problems in these institutions with ensuring fundamental rights and freedoms. Probably, the proportion of the decisions passed by these agencies and the number of complaints filed against them is comparable to other state agencies.

However, two aspects should be pointed out here that would help to resolve such complaints against individual decisions more effectively. In several cases persons have not made use of other opportunities of complaint before addressing the Chancellor of Justice, such as filing an administrative appeal, or departmental supervisory proceedings. This fact was especially evident in the case of complaints against pension boards. It is also important, for example in the case of imprisonment, that in cases of mistreatment the detainees should get assistance and protection first and foremost from the prison itself.

At the same time, the effectiveness of such complaint proceedings is reduced by the confidence of the people towards the institutions that made the decisions (in particular prisons), as well as by the unawareness of the officials themselves about the possibility of filing an administrative appeal. The persons who had turned to the Chancellor of Justice had had problems with filing an administrative appeal in the cases of refusal to grant them a pension or receive a social benefit, because the officials of the pension boards and local governments failed to explain to the people the process of contesting their decisions.

Many infringements that the Chancellor of Justice ascertained are not so much due to maliciousness of the officials rather than the lack of relevant knowledge and skills among them. For example, a problem with allowing access to public information was due to the carelessness of the implementers of the public authority in observing the requirements arising from law; the mistake was rectified as a result of the interference of the Chancellor of Justice. An important problem is the inability of public servants to observe the requirements arising from general legislation, in addition to the legislation governing their own specific field, and to apply all the norms in combination. Such difficulties could be seen, for example, in the case of prison officials in deciding the extent of restriction of the rights of prisoners.

There is also another trend that is related to the above: in ensuring the safety of society and protecting the rights and freedoms of other people, no sufficient attention is given to the principle of proportionality of the measures to be taken. The problem has to do with pre-trial as well as judicial criminal procedure, and also prisons. Article 11 of the Constitution must also be observed in the fight against crime, and restrictions of the fundamental rights and freedoms must be necessary in a democratic society and may not distort the nature of the rights and freedoms restricted.

At the same time, infringements in the course of exercising public authority are not always due to a wrong application of legislation but also to the insufficiency of the regulation itself; i.e. the regulation fails to provide sufficiently clear guidelines for action. Here the reasons could lie in the outdated framework laws that were adopted at the beginning of Estonia's re-independence, or even earlier. A striking example is the Police Act[77] that was passed in 1990, and the Child Protection Act[78] that is in force since 1992. Both of them are characterised by general wording of provisions and lack of specific basic and delegating norms.

With regard to some issues, it is necessary to change the overall concept in drafting the new regulation. For example, the protection of public order, or law enforcement, is currently regulated in several special laws, all of which provide a varying level of detail. However, a vision of law enforcement as an integrated system needs to be developed through a law that would regulate the whole area of police and the rules of law enforcement. Social welfare is another area that needs an integrated revision on the level of a law, in order to meet the modern requirements in implementing fundamental social rights.

At the same time, the Chancellor of Justice in his work also had to address new laws, the adoption of which caused difficulties during the present reporting period. For example, by way of ex-ante verification, the Chancellor of Justice was forced to interfere in the process of reading of the Draft of the Names Act, because he saw a danger in giving the officials of the vital statistics offices extensive discretion in deciding the acceptability of names. There was also confusion with regard to the Persons Repressed by the Occupation Regimes Act[79], because several implementing regulations of the Act were passed and enforced later than the Act itself. In the case of retroactive application, however, the rights granted to the persons by the law can suffer.

The following is a more detailed description of the topics outlined above. There will be descriptions of the cases where the Chancellor of Justice found significant infringements in the course of supervisory proceedings. The cases are presented according to a similar structure, in order to make the text easier for the readers. The main structure of the text consists of the following: (1) introductory sentence; (2) facts; (3) main legal issue; (4) legal justification, and (5) the result. The description of the verification visits is somewhat different from the above structure and is presented as follows: (1) brief description of the facts; (2) suspicion of a violation; (3) brief description of the violation found, and legal assessment; (4) the result.

77 RT 1990, 10, 113; I 2004, 54, 390.
78 RT 1992, 28, 379; I 2004, 27, 180.
79 RT I 2003, 88, 589; 2005, 24, 184.

II CHILDREN

1. General outline

The Chancellor of Justice is glad to note that the rights of the child receive more attention on national level, which is also proved by the debate held in the Riigikogu on 27 January 2004 on "The situation of children and ensuring of the rights of children in Estonia" as an issue of national importance[80], or by the concept of child protection that was drawn up by the Ministry of Social Affairs and was approved by the Government on 27 January 2005[81]. The Chancellor of Justice also continues to consider the rights of the child as one of his priorities.

Prominent among the applications reviewed by the Chancellor of Justice in 2004 were topics that dealt with the right of the child to education; the Chancellor of Justice was also approached with regard to issues of the right of visitation of the parent and the child, various child benefits, claiming of maintenance and start in independent life for children in nursing families. One of the most striking cases that the Chancellor dealt with, and which will be described in more detail below, was concerned with unpedagogic behaviour of one of the schools in Tallinn. A class teacher at the school asked the children to write an essay on the topic why they did not like one of the fellow pupils. The class teacher also lowered the pupil's mark for behaviour because the pupil did not have a best friend in the class.

In addition to applications, the Chancellor of Justice also verified the situation of the rights of the child during his visits to several educational and social welfare institutions for children. One of the priorities of the Chancellor of Justice during the reporting period was the right of children with disabilities to education. Three verification visits were organised in connection with this: to Tallinn Boarding School No. 1, Pärnu Kuniga Street Basic School, and Türi Coping School. The verification visit to Pärnu Kuninga Street Basic Schools confirmed the usefulness, effectiveness and functioning of school-based integration. Pupils of both the ordinary and the support school attend the same school together, and, this way, by studying side by side, the children learn to appreciate the differences between people and to demonstrate tolerance to one another already in early age.

The main consistent problem that emerged during verification visits to schools for pupils with disabilities was the lack of literature and teaching aids that correspond to the curricula. Because of the small circulation of such textbooks, it is not profitable for publishers to print them. Another problem is related to the inflexibility of the financing system. It was also found that the conditions in Tallinn Boarding School No. 1 and Türi Coping School did not meet the requirements established by the Minister of Social Affairs Regulation No. 109 of 29 September 2003 on "The health protection requirements for schools"[82]. Summaries of the verification visits to these schools are given at the end of this chapter.

The Chancellor of Justice also carried out supervision in four children's homes. Supervision over the Voka Children's Home was conducted on the basis of an application. Verification visits to Narva-Jõesuu Children's Home, Tilsi Children's Home and Taheva Children's Sanatorium, which also has a department with a children's home, were based on the Chancellor's own initiative. In the course of the visits, the situation of the rights of children was examined from various aspects: the opportunities of children to communicate with parents and relatives, opportunity to express one's ideas, ensuring the right of children to health, education, privacy, development, free time, etc. The situation of children's homes is very different at different places in Estonia, in particular as regards the living conditions. The conditions at the Tilsi Children's Home and at the Taheva Children's Sanatorium

[80] The Chancellor of Justice participated in the debate with a presentation. The edited transcript of the Riigikogu session on 27 Jan 2004 is available on the Internet: http://web.riigikogu.ee/ems.
[81] Available on the Internet: http://213.184.49.171/lastekaitse/ (20.03.2005)
[82] RTL 2003, 99, 1491.

did not meet the requirements established by the Minister of Social Affairs Regulation No. 4 of 9 January 2001 on "The health protection requirements at social welfare institutions for children"[83]. The main shortcoming in Narva-Jõesuu children's home was the lack of individual development plans of children. This issue will be further described below.

The Chancellor of Justice also carried out a follow-up visit to the Narva Children's Home to verify compliance with the recommendations made after the visit in 2003. It was found that all the recommendations of the Chancellor of Justice had been taken into account. After the reconstruction of the building, a new family was created in the children's home, so that the number of children per one family would not be too high and would be in conformity with the requirements provided for in clause 22 of the Minister of Social Affairs Regulation No. 4 of 14 February 1996 on "The approval of the statutes of children's homes"[84]. The personal towels and bedclothes of the children were also marked as required by § 19(1) of the regulation on health care requirements in children's homes. Now the children also receive pocket money that helps them better prepare for independent life.

A general problem that was noted during the visits to children's homes is the fact that the guardianship authorities (i.e. local governments) do not pay sufficient attention to children in children's homes, thus failing to perform their duty to represent children without parental care on the basis of their interests, to ensure opportunities for their development, to support young people in starting an independent life, etc.

While state supervision over schools deserves recognition, the supervision visits to children's social welfare institutions continuously demonstrate that state supervision in this respect is insufficient. For example, county governors verify the use of financial means allocated by the state, but not the guarantee of fundamental rights and freedoms of children. According to § 7(2) and § 38(1) of the Social Welfare Act[85], the county governor shall exercise supervision over the quality of social welfare services, emergency social care and other assistance provided in the county. According to the county governors themselves, the supervision has been insufficient so far, because there are no clear criteria for it. Although the Chancellor of Justice drew the attention of the Minister of Social Affairs to the concern of the county governors, the Chancellor is of the opinion that the lack of guidelines for carrying out supervision cannot be a justification for not performing the duties arising from the Social Welfare Act. Supervision can be carried out on the basis of various legislation that provides for different requirements.

2. Legality of the activities of Pelgulinna Upper Secondary School and the Tallinn Board of Education

Case No. 7-4/438

(1) An applicant turned to the Chancellor of Justice with a complaint concerning the treatment of the applicant's child in Pelgulinna Upper Secondary School.

(2) A class teacher in Pelgulinna Upper Secondary School let the class write an essay on the topic of what the other pupils thought of their classmate, i.e. the applicant's child. The class teacher also lowered the behaviour mark of the child, because the child did not have any best friends in the class. As a result of a meeting between the parents and the school administration, the administration talked to the class teacher. The class teacher found that her behaviour had been correct and refused to communicate individually with the child. The school punished the class teacher with a written reprimand for unpedagogic behaviour. The applicant, however, was not informed of the talk or the reprimand.

[83] RTL 2001, 8, 119; 2002, 29, 413.
[84] RTL 1996, 24, 162; 2000, 4, 24.
[85] RT I 1995, 21, 323; 2004, 27, 180.

The applicant sent an electronic letter to an official in the Tallinn Board of Education. Based on the application, the Board of Education verified the activities of Pelgulinna Upper Secondary School and found that the school had not dealt with the matter sufficiently consistently and preventively. The Board of Education recommended the school to turn more attention to correct and sufficient formulation of administrative decisions in the future. At the same time, the Board of Education failed to reply to the electronic letter that had been the basis for verification and did not inform the applicant officially about the results of the verification procedures with respect to Pelgulinna Upper Secondary School. The applicant turned to the Chancellor of Justice for help.

The Chancellor of Justice forwarded the applicant's petition to Harju County Governor for resolving and potential verification, as pursuant to § 48(1) of the Basic and Upper Secondary Schools Act[86] county governors should exercise supervision over the teaching and educational activities at schools. According to § 3 of the Minister of Education and Research Regulation No. 42 of 31 July 2003 on "The procedure of state supervision and the criteria for the assessment of the effectiveness of teaching and educational activities at schools"[87], state supervision may also mean resolving of individual issues.

To resolve the application, there was a meeting with the director of Pelgulinna Upper Secondary School in the county government, as a result of which it was found that the actions of the class teacher had been absolutely deplorable and the teacher had to apologise both to the pupil and the parents.

A month later the applicant again turned to the Chancellor of Justice because the school had not apologised.

(3) The Chancellor of Justice had to give an assessment of the lawfulness of the activities of both Pelgulinna Upper Secondary School as well as the Tallinn Board of Education.

(4.1) The activities of the teacher of Pelgulinna Upper Secondary School were in contradiction of § 13 and § 31(3) of the Child Protection Act. According to § 13 of the Child Protection Act, every child has the right to privacy, acquaintances and friends, which shall not be subjected to arbitrary or unlawful interference that harms the child's honour, dignity, convictions or reputation. According to § 31(1) of the Child Protection Act, every child shall at all times be treated as an individual with consideration for his or her character, and it is prohibited to humiliate, frighten or punish the child in any way which abuses the child, causes bodily harm or otherwise endangers his or her mental or physical health.

The school's activities also failed to comply with the fundamental educational principles provided for in § 2(1) of the Education Act[88] and § 39-41 of the Child Protection Act. Both § 2(1) of the Education Act and § 39 and 41 of the Child Protection Act stipulate that a recognition and development of an integrated personality should be a guiding value in ensuring the right to education. According to § 40 of the Child Protection Act, instruction shall not involve physical violence or mental abuse. By using one pupil as a topic for an essay and lowering the pupil's mark because of the absence of friends, the class teacher depreciated the personality of the pupil and endangered the pupil's mental health.

As the applicant was not informed of the conversation that had been held with the class teacher and the reprimand given to the teacher, and later apologies to the applicant were delayed contrary to what had been promised, the school violated the principle of good governance.

[86] RT I 1993, 63, 892; 2003, 21, 125.
[87] RTL 2003, 92, 1372.
[88] RT 1992, 12, 192; I 2004, 75, 524.

(4.2) The activities of the Tallinn Board of Education were contrary to § 3(1) of the Response to Applications Act[89], according to which state agencies, local governments and their officials are required to register the memorandums addressed to them and to reply to them within one month at the latest. According to § 7(1) of the Response to Applications Act, applications can be submitted by post, fax and electronic mail. failure to reply to the applicant cannot be justified with a fact that the letter was addressed directly to a particular official in the Board of Education and not to the establishment, because § 3(1) of the Response to Petitions Act also requires that specific officials should register the applications in accordance with the general procedure. The applicant, indeed, had not drawn up the electronic letter as an application, but in essence it constituted an application, which is also demonstrated by the fact that the Board of Education used it as a basis for investigating the activities of Pelgulinna Upper Secondary School. If there are deficiencies in an application and it does not correspond to all the requirements provided for in § 7 of the Response to Applications Act, in accordance with the principles of good governance the official is required to contact the applicant with a request to eliminate the deficiencies.

Thus, both Pelgulinna Upper Secondary School as well as the Tallinn Board of Education failed to observe the principles of good governance in communicating with the applicant, and the Board of Education also breached the provisions of the Response to Applications Act.

(5) The Chancellor of Justice sent a letter to the director of Pelgulinna Upper Secondary School in which he reminded that the school had not apologised to the applicant. The Chancellor also sent a letter to the Tallinn Board of Education in which he pointed out the obligations arising from the Response to Applications Act.

As a result of the reminder by the Chancellor of Justice, the director of Pelgulinna Upper Secondary School and the class teacher apologised in writing to the pupil and the parents. The Board of Education informed the applicant in writing about the results of supervision carried out with respect to Pelgulinna Upper Secondary School and apologised to the applicant for having failed to reply in time.

3. Ensuring of the privacy and security of children at the Voka Children's Home

Case No. 9-4/514

(1) The applicant complained that the children at the Voka Children's home and the inhabitants of the municipal flats in the same house use common rooms, which does not guarantee the rights of children.

(2) The applicant turned to the Chancellor of Justice and claimed that a hotel was opened in the building of the Voka Children's Home administered by Toila rural municipality and the hotel guests were using the same rooms as the children at the children's home. Based on the application, a representative of the Chancellor of Justice visited the children's home on 5 April 2004. As a result of the verification visit, it was found that there are municipal flats in the same building as the children's home. Although the flats are in separate wings of the buildings, the children at the children's home and the inhabitants of the municipal flats were using a common entrance and hallway. It was also possible to pass through the corridors joining the flats and the rooms of the children's home. The rooms of the children's home are locked only for the night, but during the daytime it is possible for anyone to have access to the children's rooms that are alongside the corridor. According to the director of the children's home, there had been no thefts or other incidents.

Based on the application and the verification visit, the Chancellor of Justice turned to Ida-Virumaa county governor on 21 April 2004. In accordance with § 7(2) and § 38 of the Social Welfare Act,

[89] RT I 1994, 51, 857; 2001, 58, 354.

the country governor is responsible for supervision over the quality of social services provided in the county. The Chancellor of Justice asked the county governor to exercise supervision over Voka Children's Home in order to find out whether the situation in the children's home complied with the requirement of privacy, safety and health of the children and there was an environment supportive of development of the children, and, if necessary, to find a reasonable solution with regard to the rooms of the children's home and the municipal flats.

The acting Ida-Virumaa county governor sent an inquiry to Toila rural municipality mayor and to Ida-Viru County Department of Virumaa Health Protection Service. As a result of the inquiry, a health inspection verification visit was carried out in the children's home on 27 April 2004. The visit mainly demonstrated the need for renovations and for improving the equipment in the rooms. Toila rural municipality mayor announced in his reply of 29 April 2004 that a solution would be found with regard to the rooms of the children's home: the entrance to the children's home and the corridors would be closed, so that they are no longer passable. In autumn 2004, Ida-Viru county governor also carried out supervision in the children's home. According to the report of the visit, the rural municipality had done nothing to change the situation.

(3) It was important to determine whether the privacy and safety of children was sufficiently guaranteed in the case of commonly used rooms.

(4) According to Art 20 para 1 of the UN Convention on the Rights of the Child[90], a child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the State. Thus, in the case of alternative care it must be ensured that the children can enjoy all the fundamental rights and freedoms that secure their well-being, support their development and protect them from mistreatment.

In view of the above, the conditions in children's home should imitate the family as much as possible. According to clause 22 of the Minister of Social Affairs Regulation No. 4 of 14 February 1996 on "The approval of the statutes of children's homes", and § 4(1) of the Minister of Social Affairs Regulation No. 106 of 4 August 2003 on "The requirements for providing care of children in social welfare institutions"[91], the daily life of children in children's homes should be arranged on the basis of the family principle, where children live in families of up to 10 persons. Clause 16 of the statutes of Voka Children's Home[92], approved by Toila rural municipality council regulation No. 9 of 21 February 2001, enshrines the same principle. According to clause 1 of the statutes of children's homes, the substitute home for children deprived of parental care is the children's home, and, accordingly, more specifically, it includes the rooms that the child shares with the family created in the children's home.

According to the first sentence of Art 26 of the Constitution, everyone has the right to the inviolability of family and private life, while the first sentence of Art 33 stipulates the inviolability of home. Although in general these provisions are aimed at protecting individuals against arbitrary interference by the state authorities, they can also entail positive obligations of the state for recognition of private and family life and for respect for home.[93] Thus, in the present case, Art 13 of the Constitution and Art 20 para 1 of the Convention on the Rights of the Child in combination provide for the right of individuals to the protection of the state against the acts of other persons as regards ensuring the inviolability of the private life and home.

In a situation where the children live in rooms that cannot be locked and the inhabitants of municipal flats in the same building regularly pass by their doors and have free access to the rooms of the

90 RT II 1996, 16, 56.
91 RTL 2003, 92, 1375.
92 KO 2001, 23, 467.
93 U. Lõhmus. Kommentaarid §-dele 26 ja 33. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments on § 26 and 33 of the Estonian Constitution] Tallinn 2002, § 28 comment 9 and § 33 comment 1.

children, it is not guaranteed that the children can enjoy their right to the inviolability of the home provided for in the first sentence of Art 33 of the Constitution, or inviolability of private life and privacy, provided for in the first sentence of Art 26 of the Constitution and Art 13 of the Convention on the Rights of the Child. With such an arrangement, the rural municipality government has failed to make the best interests of children as a primary consideration, as required by Art 3 para 1 of the Convention on the Rights of the Child and section 3 of the Child Protection Act. It also fails to take into consideration the aim of ensuring mental and social security of the children in the children's home, as set forth in clause 7 of the statutes of Voka Children's Home.
(5) Ida-Viru county governor in his supervision report proposed to the Toila rural municipality government that they should find a solution to the problem raised by the Chancellor of Justice, so that the inhabitants of municipal housing and the children living in the children's home would not be using the same entrance to the building. The director of Voka Children's Home has been notified of the report but has maintained a dissenting opinion and finds that having a common entrance and common stairways with other residents does not threaten the well-being of the children.

The issue was also discussed at the meeting of the representatives of the Office of the Chancellor of Justice and officials of the social and health care department of Ida-Viru County Government on 24 November 2004. The official who had exercised supervision was unable to provide information about the plans of the previous management of the children's home to install doorbells at the front doors of family rooms in order to ensure the privacy of the children; this had been announced as one of the aims in the development plan of Voka Children's Home for 2001-2005.

The Chancellor of Justice emphasised to the county governor that it is important to monitor that the proposal made to Voka Children's Home in the supervision report is complied with within reasonable time.

4. Verification visit to Tallinn Boarding School No. 1

(1) The verification visit to Tallinn Boarding School No.1 on 6 April 2004 was carried out on the Chancellor's own initiative in accordance with § 33 and 34 of the Chancellor of Justice Act.

Tallinn Boarding School No. 1 is an establishment (basic school) administered by the city of Tallinn and it includes classes for support school, coping school, maintenance school, and autistic children. The school has three buildings that are located at Tondi Street 40, Käo Street 53 and Mooni Street 109. The school also has boarding school facilities at Tondi Street 40.

(2) The Chancellor of Justice verified whether Tallinn Boarding School No. 1 ensures equal access to education and the right to benefit from the provided education.

(3.1) During the verification visit it was found that it was complicated for children with physical disabilities to participate in the studies, because their special needs arising from reduced mobility had not been taken into account. For example, at the opening of the schoolhouse at Mooni Street 109 on 1 September 2003, there was no ramp, and at the time of the verification the rooms were not suitable for teaching, either due to their architecture, interior design or lack of wheelchair access.

Besides the Building Act[94], the requirements for school houses are regulated by § 12^1(4) of the Basic and Upper Secondary Schools Act[95] and the Minister of Social Affairs Regulation No. 109 of 29 August 2003 on "The health requirements for schools", which was adopted on the basis of § 8(2) of the Public Health Act[96] and which, in accordance with its § 1(1) and (2), is aimed at ensuring the conditions that protect and promote the health of children at school. The requirements of the

94 RT I 2002, 47, 297; 2004, 18, 131.
95 RT I 1993, 63, 892; 2003, 21, 125.
96 RT I 1995, 57, 978; 2004, 75, 520.

Regulation are applied with regard to the territory, buildings, rooms and equipment of the schools operating on the basis of an education licence.

The owner of the school had not infringed the health protection norms. In laying down the health protection requirements for schools, the attention was on children with special needs, but the uniqueness of pupils with special needs was not taken into account, and therefore the application of the health protection requirements does not guarantee the learning environment that meets the needs of pupils with special needs.
There are no statutory rules for lifts and toilets used by pupils with special needs, etc. Due to the absence of adequate lifts and toilets, it is not possible for pupils with special needs to attend the school and, therefore, their opportunities to acquire education are more restricted in comparison to ordinary pupils (as a rule, opportunities of socialisation are better at school, teaching aids are more diverse, etc). On the final level of study it means that pupils must be subjected to home schooling although the parents do not wish it and the health of the pupil does not directly necessitate it.

For example, the Minister of Social Affairs has established a requirement, in § 3(4) of the regulation on health protection requirements, that the cover material of stairs should not be slippery, but at the same time there is no requirement that it should be possible to move around the school with the help of technical aids (crutches, wheelchair, stick).

The requirements established in § 4(1) and (2) of the health protection requirements for schools also fail to meet the needs of pupils with special needs. According to subsection 1, the rooms used for teaching must be safe and the activities carried out in the rooms should be in conformity with the size, equipment and conditions of the room. If the regulation is complied with, the rooms impose a limit on what kinds of activities can be pursued there, and, therefore, there are no real possibilities for teaching pupils with special needs due to the inadequacy of the rooms (e.g. due to the rooms being unsuitable for moving around in a wheelchair). In reality, the rooms should correspond to the conditions that allow carrying out teaching activities. In the case of subsection 2, it should be pointed out that in establishing any minimum conditions it should also be taken into account that the norms should conform to the regulation's objective to ensure the protection of health for all pupils.

It is necessary to stipulate the relevant requirements because otherwise the person who has established the school for pupils with special needs (i.e. the local government) is not obliged to equip the school according to the needs of such pupils. The provisions are contained in the Minister of Economic Affairs and Communications Regulation No. 14 of 28 November 2002 on "The requirements for ensuring the possibilities of movement for persons with physical, visual or hearing disability in public buildings"[97], but it does not apply to buildings that had been built before the entry into force of the Building Act. Although compliance with the health protection requirements for schools is a precondition for receiving an education licence, as is prescribed by § 12^1(3) clause 4 of the Basic and Upper Secondary Schools Act[98], based on the current provisions it is possible to grant an education licence to a school servicing pupils with physical disabilities without the schoolhouse being actually accessible for such pupils, so that they could use it in reality. Therefore, it is necessary that the provisions which serve as a precondition for receiving an education licence should also contain the relevant requirements. The absence of such requirements is not in conformity with the first sentence of Art 12 para 1 of the Constitution (the general fundamental right to equality, according to which equals should be treated equally, and unequals unequally), nor Art 28 para 4 of the Constitution (the obligation of the state and local government to take measures to ensure the fundamental right of equality for disabled persons) in combination with Art 37 para 1 of the Constitution: persons with special needs lack the opportunity to exercise their fundamental right to education equally with others in accordance with Art 37 of the Constitution.

97 RTL 2002, 145, 2120.

98 According to § 11(2) of the regulation on health protection requirements for schools, there are two conditions for receiving an education licence: the school should have a separate territory and the location of the school building should ensure optimum natural lighting in the teaching rooms, but considering that all the other requirements should also be fulfilled, compliance with them should also be seen as a precondition for granting an education licence.

(3.2) Besides the poor learning environment, the Tallinn Boarding School No. 1 also lacks adequate textbooks, because publishers do not print them. Textbooks for coping schools are not published due to their small circulation, and the state does not order enough textbooks that are needed in support schools. At the same time, the money initially allocated for purchasing textbooks cannot be reallocated to procure other teaching aids.

According to § 23(2) of the Basic and Upper Secondary Schools Act, textbooks, exercise-books, workbooks and other teaching aids and materials are used in order to ensure and support the completion of the curriculum. In order to ensure that the teaching aids meet a certain level and that their use guarantees a more or less equal quality of education, allowing transfer from one level of education to another and from one school to another within the same level of education, the legislator in § 23(2) of the Basic and Upper Secondary Schools Act has delegated to the Minister of Education the duty to establish the conditions and procedure for the approval of the conformity of textbooks, exercise-books, workbooks and other educational literature to the national curriculum, and the requirements for such literature. The Minister of Education did that in his regulation No. 65 of 19 November 2001[99]. In order to know which educational literature meets the requirements of the national curriculum, the Minister of Education and Research, according to § 23(4) of the Basic and Upper Secondary Schools Act approves a list of all textbooks, exercise-books and workbooks which conform to the national curriculum for each academic year.

The list contains very few textbooks for pupils with special needs. Moreover, it is known that even the teaching materials contained in the list are not published in sufficient quantities, and therefore it should be concluded that the relevant teaching materials are lacking. Currently, there is absolutely no literature for teaching pupils in maintenance schools and coping schools, and, as the list contains no textbooks for pupils with visual impairments, it can be concluded that there is no sufficient number of textbooks for them either.

Based on the foregoing, it is evident that the state has failed to ensure the preconditions necessary for offering education of equal quality, although this in turn would also be a precondition for acquiring education in general. Due to the lack of necessary literature, teachers themselves have developed materials for teaching. As the teachers' skills for developing such literature are different, there is no sufficient guarantee that the quality of education offered to pupils on the basis of such teaching materials is good, is in compliance with the requirements of the national curriculum and that such education will be useful for them in their future life. It means that the state has treated a group of pupils with special needs unequally as compared to others, which is contrary to Art 12 of the Constitution, and the state has failed to perform its duty arising from Art 28 para 4 of the Constitution to take measures to ensure the rights of persons with special needs.

According to § 44(3) of the Basic and Upper Secondary Schools Act, the state supports the procurement of textbooks in municipal schools. It is clear that pupils with certain types of disabilities are unable to use textbooks as study aids and there are also disabilities that limit the use of textbooks in the study process. Therefore, some pupils with learning disabilities are completely deprived of the support of the state, and other receive significantly less support than pupils with special needs. In the light of Art 12 and Art 28 para 4 of the Constitution, the above regulation is extremely problematic because the state treats unequals equally with others and does not demonstrate particular care for people with disabilities.

Specific teaching materials should also be considered a precondition for the provision of education, because due to their special needs pupils must have specific materials (e.g. pictograms, candles, etc) that correspond to their needs and abilities in order to acquire education. The school budget sets its limits on the procurement of such materials. Based on section 44(3) of the Basic and Upper Secondary Schools Act, support from the state budget is allocated every year to cover the costs

99 RTL 2001, 125, 1803; 2003, 4, 39.

of procuring textbooks. Considering the fact that is not possible to procure textbooks for pupils with special educational needs because the suitable textbooks simply are not published in sufficient quantities, the schools cannot use the allocated support to the necessary extent. At the same time, the unused funds cannot be used for procuring other teaching materials, which, depending on the particular disability, could even replace textbooks. Thus, in comparison with pupils without special needs, the pupils with special needs have been placed in an unfavourable situation because, in essence, the state's support for acquiring materials necessary for their teaching is smaller. Consequently, the state has failed to comply with its duty arising from Art 12, Art 28 para 4 and Art 37 para 2 of the Constitution.

(3.3) When verifying whether the education acquired in Tallinn Boarding School No. 1 is useful for pupils, it was found that the Minister of Education Regulation No. 64 of 12 August 2002 on "The number of academic years, list of subjects and the number of lessons in special schools for pupils with disabilities and in sanatorium schools"[100] does not correspond to real-life needs, because the nine-year teaching period is not sufficient to teach pupils with learning disabilities.

Considering the fact that the school attendance is compulsory until the age of 17, the state should make it possible for pupils to acquire education until that time. Such regulation, however, is too inflexible and does not take into account the abilities and needs of persons with special needs, and therefore pupils with learning disabilities cannot fulfil the requirement of compulsory school attendance to the same extent as other pupils. Children with special needs might require more time to complete the programme, or, in certain cases, their development may start later. Therefore, pupils with learning disabilities do not benefit sufficiently from the education provided to them (their education has been incomplete due to the reasons beyond the control of the pupils). Thus, the legislator has infringed Art 12, Art 28 para 4 and Art 37 para 1 of the Constitution: not all pupils with disabilities can exercise their right to education equally with others, including equally with other pupils with disabilities who attend special schools for pupils with the particular disability.

It was also found that after finishing the basic school persons with severe and profound learning disabilities are referred to institutional care, because open care has not been developed. At the same time, the person may have developed significantly and would continuously need access to services that help them to develop further, ensure them life opportunities corresponding to their abilities and provide opportunities for self-realisation. In the case of institutional care, persons do not make use of the acquired education, and, therefore, the completion of obligatory school attendance is of no use to them in reality. As due to the state's policies persons with special educational needs cannot benefit from the acquired basic education, the state has violated the general fundamental right to equality arising from the first sentence of Art 12 para 1 of the Constitution and the special obligation of support arising from Art 28(4) of the Constitution.

(4) The Chancellor of Justice considered it necessary to point out the above problems to the Minister of Social Affairs, the Minister of Education and Research and the Mayor of Tallinn in the form of memorandums in accordance with § 35^1 of the Chancellor of Justice Act. Pursuant to § 35^2(2) of the Act, the Chancellor of Justice verified the solving of the problems on 5 January 2005. The Minister of Social Affairs admitted that he was aware of the problem concerning the building requirements, but said he was unable to solve the problem by himself. The Minister also pointed out to the Chancellor of Justice that the State Real Estate Company has started reconstruction of the schools. In doing the reconstruction work, however, the new requirements of the Building Act need to be complied with.

The Minister of Education and Research informed the Chancellor of Justice that a project for preparing teaching materials for pupils with special educational needs would be launched in 2005, which would lay a foundation for the development of a coordinated system. In addition, the Draft of Amendments to the Education Act, the Rural Municipality and City Budget Act, the Basic and

[100] RTL 2002, 92, 1414.

Upper Secondary School Act, the Private School Act, the Vocational Educational Institutions Act, and the Pre-School Educational Establishments Act[101] has been sent to the Riigikogu. According to the amendments, the purpose of state-allocated funds will no longer be specified and, thus, the schools will be able to purchase teaching materials according to the needs, not just within the limits of nationally approved teaching literature.

Deputy Mayor of Tallinn informed the Chancellor of Justice that 500 000 EEK of additional funds had been allocated to Tallinn Boarding School No. 1 in 2005 for improving the learning environment. With the help of the budgetary means and additional allocations, ramps with handrails were built to facilitate access to the school buildings at Tondi Street 40 and Mooni Street 109. In the house at Mooni 109, a ramp for moving from one floor to another was also installed, a computer network was built, the teachers' room and a small kitchen where renovated, and the equipment in the rooms was improved. Various technical and teaching aids were also procured.

[101] The Draft of Amendments to the Education Act, the Rural Municipality and City Budget Act, the Basic and Upper Secondary School Act, the Private School Act, the Vocational Educational Institutions Act, and the Pre-School Educational Establishments Act, as at 10 February 2005, No 488 SE, available on the Internet: http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=043000009&login= proov&password =&system=ems&server=ragne1 (11.02.2005).

III HEALTH PROTECTION AND MEDICAL CARE

1. General outline

Art 28 para 1 of the Constitution stipulates everyone's right to the protection of health. In the system of fundamental rights, this right has a meaning both as an independent fundamental right as well as a value. The object of protection of the norm – the health – is in itself an essential value, without which it is impossible to exercise most of the other fundamental rights. Therefore, the right to the protection of health is one of the most important fundamental rights that needs to be ensured also in order to be able to ensure other fundamental rights.

The Supreme Court in its case law has expressed the opinion that the right to the protection of health, as provided for by Art 28 para 1 of the Constitution, is everyone's subjective right that can be invoked in court. However, today there is still no common opinion as to what the subjective right to health exactly contains. In the protection of health, good results can only be achieved if health has the same clear meaning for everyone. The question is the scope of the right, or, more specifically, the limits of this right. The Constitution gives wide-ranging discretion to the legislator in defining the right to the protection of health, because the scope of ensuring this right depends to a large extent on the economic resources available to the state, and the legislator is the one who has the right of disposal of those resources. This view has also been emphasised by the Supreme Court in several of its judgements. In the judgement of 10 November 2003, the Supreme Court Administrative Law Chamber was of the opinion that, inter alia, the scope of the right to the protection of health as a fundamental social right is also determined in more detail by the economic situation of the state.[102] However, the Court also stressed that this does not mean that the system of health insurance established by the state could be in contradiction with the Constitution, because this would deprive Art 28 of the Constitution of its substance. In defining the concept of health, we should observe the definition provided for in the constitution of the World Health Organisation[103], i.e. health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity.

During the reporting period, the Chancellor of Justice received approximately 30 applications concerning this range of issues. The Chancellor also dealt with the issues of health protection on his own initiative, focusing on the analysis of access to general health care. The Chancellor also made a verification visit to the family health centre of Põlva town. As a result of the visit, it can be said that the rights of patients had been ensured and the detected shortcomings were insignificant. Based on the verification visit, the received applications and the analysis, it can be claimed that the system of family physicians is functioning well and the patients are satisfied with the system in general. Despite this, some shortcomings can still be pointed out. Considering the central role of county governors in ensuring access to health care provided by family physicians, the lack of clarity regarding the competence of county governors in this respect is an important organisational problem. Alongside the competence of county governors, also the competence of local governments in ensuring access to general health care needs to be specified. Financing of health care provided by family physicians by local governments in their respective territories is uneven, and this, in turn, leads to varying access to general health care for inhabitants in different local governments.

A considerable number of applications during the reporting period were received in connection with the interpretation and application of the Health Insurance Act[104]. Several provisions of the Act have proved to be contrary to the Constitution. Based on the applications received from people, it can be concluded that both the Ministry of Social Affairs and the Estonian Health Insurance Fund should

[102] Supreme Court Administrative Law Chamber judgement of 10 Nov 2003, No. 3-3-1-65-03. RT III 2003, 34, 349.
[103] Available on the Internet: http://policy.who.int/cgi-bin/om_isapi.dll?hitsperheading=on&infobase=basicdoc&record={9D5}&softpage=Document42 (21.03.2005)
[104] RT I 2002, 62, 377; 2004, 56, 400.

raise people's awareness in order to ensure the rights protected by the Health Insurance Act, because people do not always understand the rights and duties arising from the Act. Due to the low level of awareness of the patients, effective legal protection is not always ensured.

During the reporting period, the Chancellor of Justice also analysed the access to emergency medical care ensured to seafarers by the Seafarers Act[105], and found important infringements in the activities of the Ministry of Social Affairs.

The Chancellor of Justice also analysed the protection of the rights ensured to persons with mental disorders by the Mental Health Act[106], and also analysed the activities of the Health Care Board in connection with it. The Chancellor of Justice considers the protection of the rights of patients in need of psychiatric treatment, in particular patients subjected to compulsory psychiatric treatment, a very important issue, because the opportunities of persons in closed or semi-closed institutions to defend their own rights are considerably more limited in comparison to ordinary citizens.

2. The legality of the activities of Ida-Viru county governor and Vaivara rural municipality council in ensuring access to general health care

Case No. 9-4/442

(1) An applicant turned to the Chancellor of Justice with a request to verify whether the fact that the place of provision of health services on the territory of Vaivara rural municipality was closed would not endanger access to general health care on the required level.

(2) The undertaking (family health centre) that provided general health care services was forced to end the provision of health care in Sinimäe settlement in Vaivara rural municipality in autumn 2003. The family health centre claimed that due to lack of funds it was impossible for them to comply with the precepts of Ida-Viru county governor and Virumaa Health Protection Service to bring the rooms and equipment into conformity with the requirements.

(3) The applicant turned to the Chancellor of Justice because he found that in connection with the closing of the establishment of the provider of general health services in his place of residence, general health care was not accessible to the same extent as previously, and access to health care had deteriorated. In order to be able to use general health services, the applicant now had to incur significant additional expenses: to use general health services, including more simple treatment procedures, he now had to go to Sillamäe or Narva at his own expense, or pay 50 EEK for a home visit of the provider of general health care, while due to his poor state of health the applicant needed frequent care.

In order to form his opinion, the Chancellor of Justice asked explanations from Vaivara rural municipality mayor, Ida-Viru county governor and the Minister of Social Affairs. The rural municipality mayor and the county governor explained the reasons behind the situation and claimed that access to general health care was guaranteed through home visits according to the agreement concluded with the provider of the general health service, and that, if necessary, the rural municipality government would organise transport at the expense of the municipality for elderly people and others. The Minister of Social Affairs was of the opinion that the county governor, when determining the service area of the provider of general health service (the family physician), should also take into account the proximity of the service provider's location to people for whom the service is meant, and, in determining the service area, the county governor proceeds from the assumption that general health care should be accessible for all inhabitants of the particular territory. At the same time, the place of establishment of a family physician should also comply with all the

[105] RT I 2001, 21, 114; 2003, 88, 594.
[106] RT I 1997, 16, 260; 2002, 64, 392.

requirements for premises, equipment and instruments, as provided for in the Minister of Social Affairs regulation[107].

(3) To resolve the application, it was necessary to answer the question whether Ida-Viru county governor and Vaivara rural municipality mayor had acted in accordance with the law in ensuring access to general health care.

(4.1) First, the conformity of the activities of Ida-Viru county governor to the laws and the Constitution had to be ascertained.

According to the applicant, the main reasons complicating access to general health care were the distance of the family physician's establishment and the applicant's possibilities, which forced him to take account of the public transport to obtain access to health care, and to incur considerable additional expenses (e.g. expenses for a bus fare and for home visits). It was also found that there was no transport at the expense of the local government although it had been promised.

Art 28 para 1 of the Constitution provides that everyone has the right to the protection of health. This provision constitutes a subjective right.[108] Everyone's subjective right is matched with the state's duty to create a functioning health care system and a mechanism to supervise its quality. The right to the protection of health is not absolute. It is recognised internationally that the guarantee of social rights, incl. the right to the protection of health, depends directly on the financial means available to the state – it is not possible to demand more from the state than it is capable to offer. To exercise the right to health, the state's financial resources need to be reallocated and organised.[109] Article 28 of the Constitution does not stipulate how and to what extent the right to health should be protected. Thus, it is within the legislator's competence to determine more specifically what exactly everyone's right to health contains, but, in doing so, the legislator must not exclude from the scope of protection the core elements of the right nor impose unreasonable criteria on the conditions of exercising the right.

Article 14 of the Constitution stipulates that the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. With this, the Constitution obliges both the legislative and executive authorities, as well as local governments, to guarantee fundamental rights. As was said before, Art 28 para 1 provides for everyone's right to the protection of health, which can be guaranteed with active measures by the state, including its legislative and executive arms, and by ensuring that the exercise of the right would not become impossible or be hampered due to the lack of sufficient procedural norms or insufficient procedure. Art 28 para 1 and Art 14 of the Constitution in combination also require that the legislative authorities should provide legal solutions to guarantee access to general health care as part of the overall health system.

In order to guarantee the protection of fundamental rights, the state must provide for necessary legal solutions in its legislation and must supervise compliance with the legislation. The Constitution does not exclude the possibility of delegating some of the functions of the state to persons in private law for the protection of fundamental rights. But the state should guarantee that thereby the fundamental rights of individuals are not essentially damaged. According to this principle, in delegating public functions to persons in private law, it should be guaranteed that the functions will be performed duly and that upon termination of performing the functions there would be no situation where the function is no longer sufficiently performed on certain territories. It is important to note that in

[107] Minister of Social Affairs Regulation No. 116 of 29 Nov 2001 "The requirements for the premises, equipment and instruments in the establishments of family physicians" (RTL 2001, 130, 1886).

[108] Such a view was expressed by the Supreme Court Administrative Law Chamber in its judgement of 10 Nov 2003, No. 3-3-1-65-03, RT III 2003, 34, 349. The Court stated that Art 28 para 1 directly expresses the subjective right of the addressee of the fundamental right, and according to Art 15 para 1 of the Constitution it must be possible to seek judicial protection of the right.

[109] Cf. Supreme Court Constitutional Review Chamber judgement of **21 Jan 2004, No. 3-4-1-7-03, RT III 2004, 5, 45; Supreme Court** Administrative Law Chamber judgement of 10 Nov 2003, No. 3-3-1-65-03, RT III 2003, 34, 349.

general the Constitution gives rise to the requirement that in the case of social rights the principle of legitimate expectations should be observed, i.e. in principle everyone has the right to expect that the benefits received by them will not be reduced.

According to the Health Services Organisation Act, access to general health care is organised and supervised by the county governor.[110] The county governor is required to ensure access to general health care in accordance with the objectives and procedure provided for by the Act. The county governor approves the practice lists of family physicians (based on the list of persons who have registered with a particular family physician) and determines their service territories. When approving the lists and determining the service area, the county governor should be able to assess whether persons registered on the list, as well as other persons who are staying temporarily within the territory of a local government, have in reality access to general health care under the approved conditions.

In the present case there was a situation where access to general health care for the inhabitants of Vaivara rural municipality had deteriorated, and the neither the provider of the general health care services nor the county governor or local government found a possibility to ensure access to general health care for Vaivara inhabitants at their place of residence. The Health Services Organisation Act does not specifically provide for an obligation of the provider of general health services, the county governor or local government to ensure access to general health care for persons on the family physician's list at their place of residence or based on other essential considerations. Only the Minister of Social Affairs Regulation No. 113 of 29 November 2001 on "The maximum service list of family physicians, the bases and procedure for compiling, changing and comparing the service lists of family physicians"[111], in section 2, provides for a possibility that the county governor, with the approval of the Estonian Health Insurance Fund, will allow deviations from the approved size of lists (1600±400 persons), depending of the peculiarities of the respective territory. Therefore, the county governor can also approve a smaller of larger size of service lists for family physicians in certain areas in order to ensure access to general health care. However, in that case a suitable place for providing the services should also be guaranteed. Such an obligation rests on the provider of the general health service. The provider of the general health service, however, is compelled to take into consideration its financial possibilities.

According to Art 28 para 1 of the Constitution in combination with Art 14, guaranteeing access to general health care is the duty of the executive authorities. It should also be pointed out that the state is not allowed to relieve itself from the obligation to observe fundamental rights by escaping to the area of private law. The state that is based on the Constitution has no right to arbitrary behaviour in any area of activity, and, accordingly, the public authorities must always observe fundamental rights. Public authorities cannot relieve themselves from this obligation, either by resorting to private law forms of activity or by delegating public functions to persons in private law. The executive authorities are thereby bound by the Constitution and the laws.[112]

In view of the fact that the Health Services Organisation Act imposes the duty of organisation and supervision of general health care on the county governor, the Chancellor of Justice found that the county governor is obliged to make use of all the legal means at his disposal to ensure access to general health care. In the present case an important aspect was also related to the fact that, in launching the system of family physicians, the governor had to be aware of the situation at the place of establishment of the provider of general health services in Vaivara municipality. The premises where general health services were provided belonged to the municipality. Thus, in the present case, Ida-Viru county governor had been aware from the very beginning that the premises, equipment and instruments at the disposal of the provider of general health services were not in conformity with

[110] Health Services Organisation Act, § 8(4), § 9; § 34–38; § 58, § 60–62.

[111] RTL 2001, 130, 1883.

[112] M. Ernits. Kommentaarid §-dele 13 ja 14. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments on § 13 and 14. – Ministry of Justice. Commented edition of the Estonian Constitution] Tallinn 2002, pp. 124–133.

the established requirements. It can also be presumed that the county governor is informed about the economic and social situation in the towns and rural municipalities in his county, and thus the governor could be expected to exercise foresight and planning in ensuring access to general health care. When the county governor for the first time exercised supervision over the family health centre in Sinimäe small town in Vaivara municipality and became aware of its situation, he could have found possibilities to ensure that accessibility of general health care would not deteriorate.

Thus, arising from his obligations, the county governor had to be aware of the situation of providers of general health services and their ability to invest in the premises, equipment and instruments at their place of operation. From the precept issued by the county governor to the family physicians it was evident that the governor considered it important to continue providing general health services at the present location. But, at the same time, the available information also suggests that the governor did not make sufficient efforts to resolve the situation in a way that would have been satisfactory for all the parties concerned.

(4.2) Next, it was necessary to ascertain whether Vaivara rural municipality council had acted in accordance with the laws and the Constitution, and whether the municipality had possibilities to ensure access to general health care to its inhabitants on the same conditions as previously.

Local governments are bound by fundamental rights both when performing their duties in the meaning of Art 154 para 2 of the Constitution, or when independently deciding and organising local issues pursuant to Art 154 para 1. According to Art 14, local governments are required to ensure fundamental rights, including the fundamental right to health.

Based on § 3 of the Local Government Organisation Act, local government is based on the following principles:

1) the independent and final resolution of local issues, and organisation thereof;
2) mandatory guarantee of everyone's lawful rights and freedoms in the rural municipality or city;
3) observance of law in the performance of functions and duties;
4) the right of the residents of a rural municipality or city to participate in the exercise of local government;
5) responsibility for the performance of functions;
6) transparency of activities;
7) provision of public services under the most favourable terms.

According to § 6(1) and (2) of the Local Government Organisation Act, the functions of a local government include the organisation of social assistance and services, welfare services for the elderly, youth work, housing and utilities, the supply of water and sewerage, the provision of public services and amenities, physical planning, public transportation within the rural municipality or city, and the maintenance of rural municipality roads and city streets unless such functions are assigned by law to other persons. In addition, the functions of a local government also include the maintenance of pre-school child care institutions, basic schools, secondary schools, hobby schools, libraries, community centres, museums, sports facilities, shelters, care homes, health care institutions and other local agencies if such agencies are in the ownership of the local government.

The Health Services Organisation Act does not provide for an explicit obligation of local governments to organise access to general health care. However, section 53 of the Act stipulates that the provision of health services and other expenses related to health care shall be financed from rural municipality or city budgets on the basis of the decisions of the rural municipality and city councils.

The right to resolve all issues of local life excludes the possibility of providing for an exhaustive list of local issues by the law. Local governments should also have the right to resolve those issues of local life which are not explicitly mentioned by law. Therefore, local governments must have the right to decide to what extent they contribute to ensuring access to general health care for the inhabitants in

their respective jurisdictions. The possibility of resolving an issue on local government level depends on whether the decisions that concern only the territory of the particular local government and its community are sufficient to achieve the intended aim and whether there are sufficient resources to resolve the issue. Keeping in mind the requirement of effectiveness and efficiency, it is expedient to resolve an issue on the basis of a local government decision if the solution depends on local circumstances.

The issue of organisation of health care is definitely first of all a national issue. But the legislator has provided for a possibility of local governments to finance the provision of health services and cover the health care expenses. The Chancellor of Justice concluded that despite the fact that the duties of local governments with regard to ensuring access to general health care are not sufficiently regulated in the law, it could not be an obstacle to local governments in ensuring better access to general health care for their inhabitants.

The Chancellor of Justice was of the opinion that accessibility of general health care should be viewed as one of the most important parts of the system of guaranteeing fundamental rights. Therefore, the Chancellor concluded that, arising from the Constitution and the above-mentioned principles of functioning of the local government (the protection of fundamental rights, independent decision-making on local issues, common life and common interests of members of the community, the guarantee of legal rights and duties of all persons, etc.), the local governments are required to contribute to ensuring better access to general health care within the means available to them.

In the present case it was found that Vaivara rural municipality government was prepared to transport elderly inhabitants to family health centres located in other local government units. However, from the applicant's explanations it was clear that no such transport was provided in reality.

According to the assessment of the Chancellor of Justice, such a manner of support is not necessarily very expedient and efficient for ensuring access to general health care. The distance between local governments can also be an obstacle for mothers of small children or other inhabitants due to the frequency of public transport. It was also not clear from the information provided by Vaivara rural municipality under what conditions and procedure the transport is available. It was not clear whom, how often and during which period the municipality government is prepared to transport to the family health centre. The Chancellor of Justice found that the local government, being informed of the living conditions of its citizens and local circumstances, is obliged to guarantee that accessibility of social rights, including the right to health, is ensured for people without them having to make unreasonable efforts. The Chancellor of Justice was of the opinion that if people have to make excessive efforts to have access to general health care, there is actually no guarantee of the protection of health as required by the Constitution and the laws. The Chancellor was of the opinion that based on the Constitution, the Local Government Organisation Act and the Health Services Organisation Act the local government is required to guarantee access to general health care within the means available to it.

(5) On 6 December 2004, the Chancellor of Justice sent a memorandum to Ida-Viru county governor, drawing the attention of the governor to the above problem, and asked for an explanation, within one month, as to what specific steps the governor had taken or intended to take in order to ensure accessibility of general health care. On 5 January 2005, Ida-Viru county governor asked for an extension of the deadline by one month to reply to the Chancellor of Justice's memorandum. On 17 March 2005, the governor had not forwarded his explanations to the Chancellor of Justice and had also not asked for the extension of the deadline to reply.

On 6 December 2004, the Chancellor of Justice also sent a memorandum to the chairman of Vaivara rural municipality council, because, according to the Local Government Organisation Act and the Health Services Organisation Act, deciding the above issues is within the competence of the rural municipality council. In his memorandum the Chancellor of Justice highlighted the problem. The Chancellor asked the chairman of Vaivara rural municipality council to provide explanations within one month as to whether and what measures had been taken to ensure access to general health

care. On 28 January 2005, the Chancellor of Justice received a reply in which it was explained that Vaivara rural municipality provides free transport to persons who need to visit a family health centre. The chairman of the rural municipality council also promised to inform the inhabitants via the local paper about the possibilities of access to general health care and the use of transport, and about the support provided by the municipality for this. The chairman of the municipality council also explained that efforts had been made to cover the operating expenses of family health centres and the premises had been provided free of charge to family physicians. Vaivara rural municipality development plan provides for covering the expenses of the places of provision of medical care, and on the proposal of Vaivara municipality council's social and education committee the municipality government will analyse the possibility to bring the closed establishment of the provider of general health services into conformity with the requirements.

IV SOCIAL WELFARE

Art 28 para 2 of the Constitution stipulates the right of people to state assistance in the case of old age, incapacity for work, loss of a provider, or need. The categories and extent of assistance, and the conditions and procedure for the receipt of assistance, shall be provided by law. Art 28 para 4 of the Constitution requires that families with many children and persons with disabilities should be under the special care of the state and local governments. This provision shows that the right to the state's assistance in the case of old age, incapacity for work, loss of a provider, or need is a subjective right of persons.

Similarly to the previous reporting period, the Chancellor of Justice resolved applications connected with the right to the state's assistance in the case of need, and also verified on his own initiative the guarantee of fundamental rights and freedoms of persons by social welfare institutions pursuant to the action plan of the Office of the Chancellor of Justice or based on the previously received information.

In 2004, the Chancellor of Justice received approximately 50 applications concerning the rights of people with disabilities. In addition, approximately 40 persons came to the reception of the Chancellor of Justice with problems of social welfare. This constitutes more than 5% of the total number of persons who came to the Chancellor's reception.

Just like in the previous reporting period, the majority of such referrals were complaints against local governments in connection with the granting of social assistance, and requests to explain the rights of persons in social welfare institutions. Some complaints were concerned with the fact that the county governor had not carried out adequate supervision over the granting of social assistance.

The state's duty is not only to take care of disabled people by paying them social benefits and providing social welfare services, but the state should also create opportunities for persons to exercise the right to the protection of the state. At the same time, the Chancellor of Justice points out that based on the Social Welfare Act the county governors have an important role in exercising supervision over the provision of social welfare services, social benefits, emergency social assistance or other assistance, because the target group of this type of assistance are less secured persons who usually have no possibilities to defend themselves in the court.

Based on the received applications, a general conclusion can be drawn that one of the problems relating to the protection of the rights of people with disabilities is the attitude of some local governments, which try to restrict or reduce the provision of social services and the payment of social benefits to people.

Besides resolving the applications, the Chancellor of Justice also verified the guarantee of fundamental rights and freedoms in social welfare institutions and in institutions exercising supervision over them. During the reporting period, the Chancellor of Justice visited Narva-Jõesuu Nursing Home, Narva City Social Assistance Board and Ida-Viru County Government.

In the process of resolving people's applications and carrying out verification visits to social welfare institutions, it was found that there were shortcomings in the implementation of social welfare legislation by county governments, local governments and social welfare institutions. Often the dissatisfaction among people is due to the lack of information. This is particularly true in the case of persons staying in social welfare institutions. For example, as a result of the visit to Narva-Jõesuu Nursing Home the Chancellor of Justice found that the persons staying in the nursing home were not sufficiently informed about their right of complaint.

V PENSIONS

According to Art 28 para 2 of the Constitution, people have the right to state assistance in the case of old age, incapacity for work, loss of a provider, or need. The categories and extent of assistance, and the conditions and procedure for the receipt of assistance shall be provided by law. This provision leaves a wide margin of discretion to the legislator to decide how the Estonian pension system should be developed to ensure access to necessary assistance for persons who need it.

In general, the right to a pension is regulated in the State Pension Insurance Act[113], which the applicants asked the Chancellor of Justice to verify mainly with regard to early-retirement pensions and the qualifying period for pension. The Riigikogu amended the provisions on early-retirement pensions on 15 December 2004 with the Act of Amendments to Section 43 of the State Pension Insurance Act[114], by which it abolished the unconstitutional prohibition of work for subjects of early-retirement pension who had reached general pension age. The Chancellor of Justice did not find any unconstitutionality of the requirements for qualifying period for pension.

In addition to provisions concerning pensions in general, the legislator, based on its right of discretion, has also established various special pensions that guarantee higher pensions for certain groups of persons. With regard to special pensions, the review of constitutionality of some provisions of the Police Service Act[115] was requested. The Chancellor of Justice found the provisions to be in conformity with the Constitution.

Applications were mainly received from persons who, in the course of interpretation of norms, had found that they had the right to a higher pension (e.g. members of the Defence Forces who had been assigned to reserve, former militia workers and police officials, and persons who had suffered under the repressions of the occupation regimes). As the most active applicants were members of the Defence Forces.

It should also be noted that several applicants contested the activities of the pension boards only when they addressed the Chancellor of Justice, although the above mentioned pension legislation gives them more effective remedies in the form of the right of submitting an administrative appeal or the right of recourse to the court. The Chancellor of Justice accepted such applications for proceedings only if it was apparent that the Pension Board had provided incorrect information to people, as the people themselves would not necessarily be able to verify the correctness of such information, and the proceedings carried out by the Chancellor of Justice would be an effective means for the protection of fundamental rights of persons and ensuring compliance with the principles of good governance.

[113] RT I 2001, 100, 648; 2004, 89, 608.
[114] RT I 2004, 89, 608.
[115] RT I 1998, 50, 753; 2004, 54, 390.

VI WORK AND PUBLIC SERVICE

Article 29 of the Constitution stipulates the right to freely choose one's area of activity, profession and place of work. The right and opportunity to work and earn income within the chosen profession is a very important fundamental freedom, which also serves as a basis for the functioning of society. Pursuing a profession chosen by oneself and earning income from such activity can manifest itself in various ways: one can produce and sell goods, offer services and receive remuneration, but one can also work in someone else's interests and receive remuneration for it. Working for someone else can take place in the private or public sector. Article 30 of the Constitution contains a special norm concerning work in the public sector; however, after a systematic analysis of the provisions of Arts 29 and 30 of the Constitution it should be concluded that the general labour law principles, such as the right to work, are also applicable to people working in the public sector.

Working in either the public or private sector is often the main source of income for persons and, therefore, also the main means of securing decent life. Consequently, it is clearly in the interests of working persons that their employment relationship and its conditions, including the remuneration received for work, are as secure and stable as possible.

Article 29 para 4 of the Constitution stipulates that working conditions shall be under state supervision, and according to the first sentence of Art 13 everyone has the right to the protection of the state and the law. When reading Art 29 paras 1 and 4 and the first sentence of Art 13 in combination, it should be concluded that the legislator has an obligation to establish certain compulsory conditions for employment relationships in order to protect workers, because the state can only supervise the existing conditions, i.e. the conditions that have been established. However, in adopting norms for the protection of workers, it should also be taken into account that the norms should not unjustifiably restrict the rights of employers or damage the functioning of the state.

The Constitution or its explanatory comments do not provide clearly what specific working conditions are meant by Art 29 para 4. Based on the wording and purpose of the provision, it can be concluded that it concerns conditions that exist during the period of an employment relationship and the safety and protection of the person doing the work, as well as conditions that help to ensure the stability of the employment relationship. Definitely this includes working and rest time norms, occupational health and safety rules, as well as rules aimed at ensuring the right of working persons to regular income, protection against unjustified dismissal, etc. Besides establishing the relevant legal norms, it is also necessary to supervise that the established requirements and rules are complied with in practice, and the state itself in the role of an employer must also observe them.

In 2004, several public servants turned to the Chancellor of Justice with complaints that their agencies did not observe the norms established for the protection of public servants by law.

The State Public Servants Official Titles and Salary Scale Act[116] and the Government regulations on the remuneration of public servants, issued on the basis of the Act, provide that differentiated levels of the salary scale and additional remuneration can be established and abolished only in justified cases. As long as the bases for the differentiation of salary levels or additional remuneration continue to exist, i.e. their payment is justified and possible in reality, it is not allowed to deprive the person of them.

The Chancellor of Justice received several applications where persons employed in public service complained that the heads of their agencies had unjustifiably reduced the remuneration for their work. On several occasions, the Chancellor of Justice had to explain to the applicants the bases for reducing various salary components. The Chancellor also sent memorandums to state authorities where he explained the importance of differentiation of the salary scale and justification of payment

[116] RT I 1996, 15, 265; 2004, 54, 390.

of additional remuneration from the point of view of the protection of employment rights of public servants.

The functions and duties that persons are required to perform must be clear to them. If the duties of a person are not clear to them, there can be a situation where a person fails to perform a duty which is expected of them, because they simply do not know that they have to perform it. Failure to perform work duties, however, can lead to dismissal of a person both in the public and private sector.

Such a situation can arise when an employee must substitute for someone else who is absent from work, i.e. the person must perform someone else's duties. If the person is not aware whose duties and to what extent they should perform, there can easily be a situation where the person fails to do the work and will thereby endanger the stability of their employment relationship. To avoid such a situation, there is a rule in public service that a public servant should perform the duties of another absent public servant only when they receive an order to do so from a person who is authorised to appoint the absent official (§ 64(1) of the Public Service Act[117]).

This provision can not be circumvented by establishing a general abstract rule by an internal act of the agency, stating that in case of necessity officials must substitute for each other without any specific order to do so. In such a case the duties and functions are not sufficiently clear to the person, which, in turn, could compromise the person's ability to perform the work duties properly.

[117] RT I 1995, 16, 228; 2004, 29, 194.

VII PUBLIC ORDER

1. General outline

The state is required to ensure law and order and safety in society in order to reduce risks to people's life, health and property. Art 14 of the Constitution imposes an obligation on the legislative, executive and judicial authorities to guarantee rights and freedoms. Guaranteeing of public order and safety is the function of various law enforcement authorities (e.g. the Environment Inspectorate with regard to environmental threats) and the police. The police is a general law enforcement body under the area of government of the Ministry of Internal Affairs, and the competence of the police in controlling threats is subsidiary to specific law enforcement bodies. The police protects public order to the extent and in the cases when special law enforcement bodies are unable to respond in time or sufficiently effectively. The direct competence of the police is first and foremost to prevent misdemeanours and to conduct proceedings to detect them.

In the process of guaranteeing public order, it is often inevitable that fundamental rights and freedoms of persons need to be interfered with, but such interference must not be arbitrary. According to the first sentence of Art 3 para 1 of the Constitution, the state authority shall be exercised solely pursuant to the Constitution and laws that are in conformity therewith. Thus, there must be a legal basis for the police to interfere with fundamental freedoms in the process of the protection of public order, and interference itself has to be proportional.

The main shortcoming in the work of the police is that they often have difficulties with ascertaining – even in retrospect – the legal basis on which they acted. Persons, whose rights and freedoms were interfered with often did not understand on what basis it was done (i.e. based on which law and provision), e.g. whether it was done to ascertain the facts relating to an offence or whether the police interfered with the aim to protect public order and prevent threats.

Another problem in connection with the activities of the police is the disproportionality of the means used. If the police has a basis to act and to apply measures with regard to a person, they often fail to use a measure that is least burdensome for the person, and unjustifiably prefer the more burdensome means. A more detailed overview of the problems will be provided in the cases described below.

Both of the above problems can be said to be due to the insufficiency of the legislation on which the police activities are based. The police mostly bases its activities on the Police Act that was passed in 1990. The Act has been repeatedly amended but its wording is outdated, vague and too general in order to meet the requirements arising from the Constitution. The law lacks criteria based on which the police could decide the necessity and proportionality of the restriction of fundamental rights in specific cases, there are also no clearly defined basic or delegating norms.

The protection of public order and safety is disintegrated, the tasks and competencies of various law enforcement bodies are regulated in many special acts and the regulation is inconsistent, the law enforcement is not seen as an integrated system. There is a need for a law that regulates the activities of the police and law enforcement more systematically.

The Chancellor of Justice has repeatedly drawn the attention of the Minister of Internal Affairs and the Minister of Justice to the need to bring the police and law enforcement legislation into conformity with the modern requirements of the rule of law. In spring 2004, the Chancellor of Justice organised a conference with the aim to highlight the problems of the police and law enforcement.

Since 1997 the Ministry of Justice has been drawing up the general law enforcement draft. So far the drafting process has not been as successful as expected, mainly due to the inability to decide whether to revise and amend the existing laws or pass a new law. In summer 2004, the Ministry of Justice resumed the activities to this end. A project was launched within which an expert group

would prepare a concept for a Law Enforcement Draft. The group of experts also includes a representative of the Chancellor of Justice.

2. The legality of taking minors to a health care institution for the establishment of the state of intoxication

Case No. 7-4/651

(1) The applicants turned to the Chancellor of Justice with a question whether the taking of their minor daughter to a health care institution for the establishment of the state of intoxication had been legal.

(2) On 18 March 2004, a police operation was carried out in Narva Humanitaargümnaasium (Narva Upper Secondary School of Humanities). In the course of the operation, the police took some minors, including the daughter of the applicants, to a health care institution for the establishment of the state of intoxication. The parents had not been informed of this and their consent was not asked for taking measures restricting the personal freedom of the child. As no intoxication of the child was ascertained she was taken back to school. The parents were not notified of the police operation even afterwards.

In conducting his proceedings, the Chancellor of Justice asked information from the Director General of the Police Board, and also asked him to specify the legal basis for the actions of the police. In his reply, the Director General did not refer to any legal bases. He admitted that, by failing to inform the parents about taking the minor to the health care institution, the police officials had infringed the principles approved by the Director General in his decree No. 217 of 7 October 2002 on the guidelines of treatment of children who have committed an offence and are in need of assistance. The guidelines do not contain a special procedure for the establishment of the state of intoxication of minors. There is also no other legal act that provides for any special procedure for the protection of the rights of a child in the process of establishment of the state of intoxication. The Director General of the Police Board admitted that the failure of the police to inform the parents about taking the child to a health care institution for the establishment of the state of intoxication had been illegal. The Director General confirmed that disciplinary proceedings would be carried out to ascertain the facts of the case, and based on it a circular would be drawn up to develop uniform procedures to be observed by all police departments in such situations in order to avoid similar problems in the future.

(3) The main issue was whether the taking of a minor to the health care institution for the establishment of the state of intoxication had been legal.

(4) When establishing the state of intoxication, the police oblige a child to subject himself or herself to the procedures for the establishment of intoxication, by which the police will restrict the liberty of person of the child. However, the Police Board was unable to give a legal basis for performing the above measures that restrict the liberty of person.

According to Art 20 of the Constitution, everyone has the right to liberty and the security of person. According to the first sentence of Art 11 of the Constitution, rights and freedoms may be restricted only in accordance with the Constitution. Pursuant to the first sentence of Art 3 para 1 of the Constitution, the state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. In the light of the above, police officials may take measures that restrict the liberty of person only on the basis of legislation that is in conformity with the Constitution. According to § 4(1) of the Police Act, one of the main guiding principles for the police is the principle of legality. Currently, the establishment of the state of intoxication in the cases of non-traffic offences is done on the basis of analogy based on the Government Regulation No. 120 of

2 April 2001 on "The establishment of the state of intoxication and the level of intoxication, and the procedure for contesting the decision on the establishment of the level of intoxication".[118]

Section 13(7) of the Police Act provides that the police have the right to take persons who, due to alcohol or narcotic intoxication, might present a danger to themselves or to other persons, and also persons who have violated public order, to a medical or police institution for the identification of such persons and, where necessary, for the preparation of a misdemeanour report. In order for the police officials to be able to take a person to a medical institution or to an institution for sobering up, pursuant to § 13(7) of the Police Act, the state of intoxication must have been established. Thus, the police cannot base their actions on § 13(7) of the Police Act when taking a person to a health care institution for the establishment of the state of intoxication.

The Director General of the Police Board admitted that, by failing to inform the parents about taking the minor to the health care institution, the police officials infringed the principles approved by the Director General in his decree No. 217 of 7 October 2002 on the guidelines of treatment of children who have committed an offence or are in need of assistance. The guidelines do not contain a special procedure for the establishment of the state of intoxication of minors. There is no special regulation for the protection of the rights of children in the proceedings for the establishment of the state of intoxication.

In conclusion, the Chancellor of Justice was of the opinion that the failure of the police to inform the parents about the taking of the child to the health care institution for the establishment of the state of intoxication had been illegal.

(5) The Chancellor of Justice pointed out the above problems in his memorandum to the Police Board and the Minister of Internal Affairs. The Chancellor of Justice asked the Minister of Internal Affairs to ensure that the establishment of the state of intoxication by the police is carried out in accordance with legal bases and that the rights of children in such proceedings are protected.

The Director General of the Police Board informed the Chancellor that, similarly to the guidelines for the treatment of children who have committed an offence and who need assistance, he would issue guidelines for the treatment of minors in the establishment of the state of intoxication.

In his reply to the Chancellor of Justice, the Minister of Internal Affairs admitted that there were shortcomings in the provisions concerning the establishment of the state of intoxication. The Minister confirmed that he intended to revise the provisions regulating the establishment of the state of intoxication to bring them into conformity with the principle of legality. The Minister also said that the Ministry of Internal Affairs would verify that the Police Board indeed adopts the procedures that regulate the activities of police officers in establishing the state of intoxication of minors. The Ministry also intends to verify the implementation of the procedures in practice.

3. Legal use of the Central Law Enforcement Police during large public events

Case No. 7-4/626

(1) The applicant turned to the Chancellor of Justice with a request to verify the legality and justifiability of the activities of the rapid reaction service (riot police) of the law enforcement department of the Central Law Enforcement Police.

(2) The Central Law Enforcement Police with its reinforcements was securing order at the finals of the Estonian ice hockey championships in Premia ice hall, because they had received advance information about potential conflicts between the supporters of rival teams, and the supporters

[118] The Government of the Republic Regulation No. 121 of 2 Apr 2001 (RT I 2001, 35, 196).

of both groups had also previously demonstrated aggressive behaviour and heavy consumption of alcohol. After the game, the police first let the supporters of the home team HC Panter/Hansasport to leave the venue. The supporters of the visiting team Narva PSK, among them the applicant, were kept as a group in the ice hall until the supporters of the rival team had left, in order to prevent potential conflicts and offences.

The Chancellor of Justice turned to the Director General of the Police with a request for information about the incident. The Chancellor also asked what measures were usually taken to resolve such conflicts.

The Director General replied that a decision had been made to restrict the movement of the groups because the police had received advance information about possible conflicts, and during the previous game in the finals the supporters of the team had also acted aggressively. The police normally use the so-called crowd control methods to separate the conflicting parties from one another and to prevent conflicts. As alternative measures, reinforced patrols are used, or escorting of the groups of supporters, and separation and detention of offenders. The use of particular measures is decided on the spot. The Police Board was of the opinion that the activities of the police in this case had been legally correct, proportional and necessary in the particular situation.

(3) In order to resolve the application, it was necessary to find an answer to the question in which cases the Central Law Enforcement Police are allowed to restrain the movement of crowds at public events.

(4) According to Art 34 of the Constitution, everyone who is legally staying in Estonia has the right to the freedom of movement. This right may be restricted in the cases and pursuant to procedure provided by law to protect the rights and freedoms of others. According to Art 11 of the Constitution, such restrictions must be adequate, necessary and proportional to the objective sought.

During large public events the police have the right and duty to protect public order and to take preventive measures to avoid offences and unrest. Thereby, it is important in each case to assess the proportionality of the measures to the level of threat and to the objective sought. The freedom of movement of groups can only be restricted if less burdensome measures (e.g. reinforced patrolling, escorting of the groups of supporters, separation of offenders from the crowd) have not provided or would not provide the desired results.

The Chancellor of Justice found that restraining the movement of groups of supporters after the game inevitably also entails negative consequences for a large number of peaceful and law-abiding people. For them, holding of persons as a group after the game seems as an unfair and unjust punishment for the acts of persons who, with their aggressive behaviour, had probably already disturbed the peaceful viewers during the game. Therefore, the police should proceed from the premise that the freedom of movement of those who pose a major source of threat would be restrained most. In a situation where one sector behaves relatively peacefully and another significantly more aggressively, the more peaceful groups should be allowed to leave first. Restraining the freedom of movement of peaceful supporters who do not pose a threat to public order is justified only if it is impossible to separate them sufficiently effectively from the aggressive supporters.

It should also be considered important that the holding of persons as a group after the game should not come as a surprise to peaceful spectators, and that information about possible restrictions would reach them within reasonable time before the restriction of their movement, so that they could either agree to the restriction or leave the event if they wish.

Based on the foregoing, the Chancellor of Justice concluded that the restriction of the freedom of movement of a group of persons can be considered proportional and compatible with Art 11 of the Constitution only if the following conditions are observed:

- The decision to restrain the freedom of movement of a group of people cannot be of general deterrent nature. The decision should be made by the police official who is in charge of the police activities on the spot, and the decision should be based on the specific situation, behaviour of the spectators and risks to public order.
- In applying the restriction, the police should be convinced that other less burdensome preventive measures are not sufficiently effective. The freedom of movement of groups can only be restricted as an extraordinary measure for the protection of public order.
- If possible, potential offenders are separated from peaceful spectators who do not pose a threat to public order, and no restrictions of movement are applied with regard to the latter.
- Persons present at the event are always informed about the application of the restriction as much in advance as possible, allowing the peaceful persons who do not threaten public order to leave the event.

(5) The Chancellor of Justice forwarded these recommendations to the Director General of the Police Board. The Director General accepted the Chancellor's recommendations and considered them as useful guidelines for developing police practice in Estonia. The police started a dialogue with the Estonian Ice-Hockey Association to find common solutions to ensure order at ice-hockey matches.

VIII THE ESTONIAN LANGUAGE AND CITIZENSHIP

Article 51 of the Constitution stipulates that everyone has the right to address state agencies, local governments, and their officials in Estonian and to receive responses in Estonian. In localities where at least one-half of the permanent residents belong to a national minority, everyone also has the right to receive responses from state agencies, local governments, and their officials in the language of the national minority. According to Art 52 of the Constitution, the official language of state agencies and local governments is Estonian. In localities where the language of the majority of the residents is not Estonian, local governments may, to the extent and pursuant to procedure provided by law, use the language of the majority of the permanent residents of the locality as an internal working language. The use of foreign languages, including the languages of national minorities, in state agencies and in court and pre-trial procedure shall be provided by law.

Applications submitted to the Chancellor of Justice were mainly concerned with the right to receive information in Estonian and the justifiability of language proficiency requirements. For example, the Chancellor of Justice received an application from a person in connection with the activities of the Language Inspectorate in verifying the proficiency of the official language of Narva-Jõesuu deputy mayor, and raised the issue whether the Language Inspectorate had used all the means available to it in order to ensure compliance with the requirements of the Language Act[119] by the Narva-Jõesuu City Government. At the same time, the Chancellor of Justice also received applications in which the applicants found that the required level of proficiency was too high or that the Language Inspectorate had violated the law in assessing the language proficiency for professional purposes in establishing correspondence between the current language proficiency certificates and the earlier proficiency category certificates.

As a result of the proceedings carried out by the Chancellor of Justice, a problem was identified that the Language Inspectorate currently lacks a legal basis for assessing the Estonian language proficiency of public servants and workers. The first sentence of Art 3 para 1 of the Constitution provides for a principle of legality, according to which the state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. However, currently the legislator has failed to regulate, on the basis of a law, the competence of the Language Inspectorate in exercising state supervision. The procedure for the supervision of compliance with the Language Act has been established with a Government Regulation. The Chancellor of Justice sent a memorandum to the Ministry of Education and Research, in which he pointed out the insufficiency of the regulation of the supervisory competence of the Language Inspectorate. To solve the problem, a draft of amendments to the Language Act has been drafted, which will also regulate the supervisory procedures for the verification of compliance with the Language Act.[120]

The Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, in his report of 12 February 2004, also raised questions with regard to the Language Inspectorate's activities in verifying the actual Estonian language proficiency regardless of whether a person holds a valid language proficiency certificate.[121] In connection with the reform of the provision of education in Russian, the Commissioner also noted the need to lay more emphasis on language learning programmes, in order to avoid potential risks for students whose knowledge of Estonian is not sufficient to be admitted to universities. Difficulties in connection with studying in another language can cause students to drop out or fail at national examinations, which, in turn, would cause problems with acquiring higher education. This could entail a risk of increased social exclusion. Therefore, it is extremely important to analyse the potential risks and ways how to avoid them.[122]

119 RT I 1995, 23, 334; 2003, 82, 551.

120 The Draft of Amendments to the Language Act, as at 9 March 2005, No. 597 SE, available on the Internet: http://web.riigikogu.ee/ems.

121 Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Estonia 27th-30th October 2003 for the attention of the Committee of Ministers and the Parliamentary Assembly. Strasbourg, 12 February 2004, CommDH(2004)5, p. 22.

122 Ibid, p. 20.

As one of the problems, the Commissioner also pointed out that there are still a very large number of stateless persons in Estonia, and the number of persons who have acquired citizenship by naturalisation is growing slowly. He also noted that persons without citizenship cannot exercise many of the civil rights, which, in turn, could lead to their social exclusion. The Commissioner indicated various practical steps that could help to solve the problem of citizenship. First of all, attention should be paid to the implementation of the right of children without citizenship to be able to acquire citizenship, additional measures also need to be taken to improve access to language learning, so that the Estonian language examination would not be a problem in acquiring citizenship, and to make citizenship more available to elderly people and persons with special needs.[123]

123 Ibid., pp. 9-15

IX NAME

1. General outline

On 15 December 2004, the Riigikogu passed the Names Act[124] that entered into force on 31 March 2005. Until then, giving of forenames to persons, and changing of names was regulated by the Family Law Act and the Organisation of Family Names Act that had been established with the decree of the state elder on 22 October 1934. There are very few areas of law where the regulation dating back to the 1930s would still be effective in the year 2005. The need for updating the law and brining it into conformity with the requirements of the Constitution was obvious. Another reason for the adoption of the new Names Act was the Estonian names tradition that started to change rapidly with the *perestroika* and the re-independence that followed it. The effect of Western culture and the English language has brought along the proliferation of peculiar names that are not suitable to the Estonian language.

Proceedings of the new Names Act in the Ministry of Internal Affairs, the Government of the Republic and the Riigikogu lasted for more than three and a half years, and the final regulation is definitely a compromise between opposite constitutional values. On the one hand, there should be respect for the right of people to self-realisation (the right to change one's name) and to the inviolability of family and private life (the freedom to give one's child a name that one pleases). On the other hand, we should not underestimate public interest in the maintenance of the Estonian nation and language and in passing it on to future generations.

What is also important is the future implementation of the Names Act. Already during the proceedings of the draft on the level of executive authorities, as well as in the Riigikogu, the Chancellor of Justice pointed out the risks that may arise from giving too extensive discretion to officials of vital statistics offices. As the suitability or unsuitability of a name should be approved by a vital statistics official, there is a risk of unequal treatment. The Chancellor of Justice intends to keep a close eye on the relevant practice – in a state governed by the rule of law, there should be no situation where one name is approved in Tartu but is rejected by officials in Tallinn. The wish of the person himself or herself, or the person's parents in giving a name, is a law for public servants until the Names Act does not prohibit the implementation of such a wish.

2. Conformity of the Names Act with the Constitution

Case No. 6-4/90

(1) The Chancellor of Justice, on his own initiative, carried out ex-ante review with regard to the Draft of the Names Act.

(2) The Draft of the Names Act was initiated by the Government of the Republic and it was drawn up by the Ministry of Internal Affairs.[125] The main objective of the draft was to establish the bases, restrictions and procedure for the giving of names.

Before submitting the draft to the Riigikogu, the Ministry of Internal Affairs significantly revised the explanatory memorandum to the draft, and changed the provisions of the draft on the proposal of the Chancellor of Justice. An important modification in the explanatory memorandum was the addition of the principle that regulation of personal names constitutes the restriction of fundamental rights enshrined in Arts 19 and 26 of the Constitution, and the arguments for imposing such a restriction were given. The Ministry of Internal Affairs also specified the authority for establishing the list of too widely spread family names, and the competencies of the personal names committee.

[124] RT I 2005, 1, 1.

[125] The Draft of the Names Act as at 11 May 2004, No. 369 SE, available on the Internet: http://web.riigikogu.ee/ems.

As regards giving a new family name, the draft was brought into line with the relevant judgement of the Supreme Court concerning the right to give names.[126]

The Ministry of Internal Affairs, however, refused to change § 7(2) and § 16(4) of the draft.

Section 7(2) of the draft was worded as follows: "A person cannot be given a forename or forenames that separately, or in combination with the family name, are not in conformity with good manners or the Estonian name tradition."

Section 16(4) of the draft was worded as follows: "For reasons provided in sections 17 and 19 [i.e. on the person's own wish], a person is given a new forename, family name or personal name only once."

(3) An answer needed to be found to the question whether the intended regulation was in conformity with Arts 19 and 26 of the Constitution.

(4) According to the draft, a person cannot be given a forename or forenames that separately, or in combination with the family name, are not in conformity with good manners or the Estonian name tradition. The Chancellor of Justice was of the opinion that such a requirement is not legally clear and allows unequal treatment of persons, and very poor interpretation. The drafters of the draft were unable to explain the content of this provision more specifically. Such a restriction of a fundamental right cannot be considered to be proportional to the objectives of the draft, and, therefore, such a measure would be inadmissible.

The Chancellor of Justice also pointed out that there was actually another provision in the draft, according to which it would be prohibited to give to a person, without a good reason, an unusual name that due to its complicated spelling or spelling that does not correspond to the prevailing linguistic custom, or due to its pronunciation or general meaning in the language, is not suitable as a forename. The Chancellor was of the opinion that this provision was sufficient to protect the rights of the child, and it is not necessary to impose an additional requirement that the name should be in the nominative.

Another problem was the provision that prohibited to change one's name more than once during one's lifetime (except in connection with a marriage, adoption, or changing of the sex). According to the assessment of the Chancellor of Justice, such interference by the state restricts the right to the freedom of self-realisation that is ensured by Art 19 of the Constitution. Such a restriction probably concerns very few people, but it is very intensive and inflexible by its nature. The need to change one's name several times can be both subjective and objective. The Chancellor of Justice believes that it is almost impossible to overestimate the importance and meaning of a name for a person. It is also impossible to describe the life of a person who, for some reason, is unable to positively identify himself or herself through a name, or who feels complete alienation and disgust towards his or her name. The Chancellor of Justice finds that there is no overwhelming constitutional or other argument that would justify the refusal to change a person's name in such a case. The Chancellor of Justice believes that such a prohibition is not in compliance with the arguments contained in the above-mentioned judgement of the Supreme Court: the Court was of the opinion that nowadays the protection of national identity should not rule out the possibility of changing one's name.

The draft listed the bases when a person can change his or her name. The bases, together with the restrictions on choosing a new name, and the provisions, according to which the changing of a name is decided by the Minister of Regional Affairs in each and every case, are a sufficient guarantee to rule out repeated arbitrary changing of one's name and to establish control over the changing of names. In conclusion, the Chancellor of Justice was of the opinion that the restriction on the number of

[126] Supreme Court Constitutional Review Chamber judgement of 3 May 2001, No. 3-4-1-6-01, RT III 2001, 15, 154.

times persons can change their name lacked a legitimate aim or any constitutional value that would justify the restriction.

(5) The Chancellor of Justice continued to exercise ex-ante control of the draft in the Riigikogu, and turned to the Riigikogu legal affairs committee with regard to the issues of § 7(2) and § 16(4). In the Chancellor's opinion, interference of the state in the right of persons to give their child a name, and the right of persons to change their name, constitutes a too extensive restriction of the right to the freedom of self-realisation provided for in Art 19 of the Constitution, and the right to the inviolability of family and private life protected under Art 26 of the Constitution. A representative of the Chancellor of Justice also attended the debate on this topic in the Riigikogu legal affairs committee.

The legal affairs committee agreed with the arguments of the Chancellor of Justice and omitted from the draft the provision according to which it would have been prohibited to give to a person a forename or forenames that separately, or in combination with the family name, are not in conformity with the Estonian name tradition.

With regard to the restriction of the number of times that persons could change their name, the legal affairs committee was of the opinion that if there is a need to change one's name several times then it is not right to prohibit it completely by law. The relevant provision of the law was worded as follows: "Based on the present section, as a rule, a person is given a new forename, family name or personal name only once. A person is given a new forename, family name or personal name more than once only on a good reason."

X PENAL LAW AND CRIMINAL PROCEDURE

One of the state's functions is to protect internal peace and public order in the state. Through the activities of its bodies, the state should be able to prevent and reduce the commission of offences, including crime, in order to protect the general social system, and thus also the individuals.

In a state governed by the rule of law, the fight against crime cannot proceed from the principle that the end justifies the means. It is true that, according to the Constitution, fundamental rights can be restricted to protect public order, the rights or freedoms of other people, to prevent a crime or to apprehend a criminal (e.g. Art 20, 26 and 33). However, the principle of proportionality, or the prohibition of excessiveness, should always be observed: the restrictions of the rights and freedoms should be necessary in a democratic society and may not distort the nature of the rights and freedoms restricted. This should be taken into account by the legislator in shaping the legal norms, as well as by the implementer in carrying out the legislation.

Criminal procedure, as the means for the enforcement of state authority, should be shaped in a way that, on the one hand, it would ensure effective fight against crime (the detection, prevention and deterrence of offences), and, on the other hand, would respect the fundamental rights of persons subject to proceedings and person who otherwise come into contact with the proceedings. The word "effective" is used for such a procedure in judicial practice as well as in theory of law: the procedure should be shaped in a way that allows achieving a maximum result in the fight against crime, while restricting the rights of persons in the least burdensome way. The procedure should be effective both in the pre-trial as well as in the judicial phase.

In the course of criminal proceedings, primarily the rights of persons subject to the proceedings are restricted. Therefore, the Constitution provides for various guarantees for such persons, e.g. the presumption of innocence and the prohibition of giving statements against oneself or against persons close to one (Art 22 para 1 and 3), *ne bis in idem* principle or the prohibition of double punishment (Art 23 para 3), several rights in the judicial procedure, incl. the right of appeal to a court of higher instance (Art 24), etc. The importance of the right of recourse to the court and the right of appeal cannot be underestimated for the effective protection of the rights of persons. The opportunities for legal aid also form an inseparable part of the right of recourse to the courts.

In addition to the protection of persons subject to the proceedings, it is also important to protect the rights of other persons. Therefore, both the legislator and the body conducting the criminal proceedings should observe that the procedural norms and measures are shaped in a way as to respect the rights and freedoms of witnesses, victims, or persons outside the proceedings. For example, merely associating a person with criminal proceedings is noticeable and could shed negative light on the person. In order to damage the rights of a person who is a witness in the proceedings, it might be sufficient to notify the person's employer about this fact.

An effective fight against crime, which is the objective of criminal procedure, definitely proceeds from essential public interest. However, the proceedings that conform to the principle of the rule of law should be shaped in a manner that respects the rights and freedoms of all the participants to the proceedings. It is often difficult for the legislator to predict whether a legal act contains all the relevant and necessary regulations. Therefore, it is important to have close cooperation between the implementers of the norm and the lawmakers, in order to ensure conformity of the legislation and legal practice with the requirements of the Constitution and international human rights instruments.

XI DETENTION AND ARREST

1. General outline

A detainee is a person with regard to whom detention has been applied as a preventive measure and who is held in pre-trial detention in the pre-trial detention department of a closed prison, or in a jail.

In 2004, the Chancellor of Justice received applications from detainees in which they complained about the conditions in jails, or about the fact that detainees had not been given a copy of the decision imposing a disciplinary punishment on them, although they had made a relevant written request.

Previously, the Chancellor of Justice had repeatedly drawn the attention of the Ministry of Internal Affairs to the fact that the living conditions in jails were not in conformity with the requirements. The Minister of Internal Affairs admits the problem but says that the lack of money is an obstacle to improving the conditions in jails.

The Chancellor of Justice is still of the opinion that living conditions in jails, where detainees and other persons are held together, constitute degrading treatment which is prohibited pursuant to Art 18 of the Constitution.

2. The right of detainees to read national daily newspapers in the jail

Case No. 7-4/326

(1) A detainee turned to the Chancellor of Justice, claiming that he had not been given national daily papers for reading in the jail.

(2) The applicant was held in the jail of Kuressaare Police Department in the West Police Prefecture. While staying in the jail, the applicant wished to read national daily newspapers. The inspector in charge of the jail refused to grant the applicant's wish.

In February 2004, the applicant turned to the Chancellor of Justice with a complaint that, regardless of his wish, he had not been given national daily papers in the jail. In the course of the proceedings, the Chancellor of Justice sent a request for information to the West Police Prefecture. In his reply, the police prefect noted that during the referred period Kuressaare police prefecture's jail had not subscribed to national daily papers. There was only a subscription for one copy of the local paper *Meie Maa*.

(3) In the case of the application, the legal issue was whether detainees in the police jail have the right to receive national daily papers for reading.

(4) According to § 93(3) of the Imprisonment Act[127], detainees should have access to national daily papers and books and magazines in the library. The same requirement is repeated in the Minister of Internal Affairs Regulation No. 71 of 1 December 2000 on "The internal rules of jails"[128], in § 15(1) clause 9. It is evident from the reply of the West Police Prefecture that this requirement was not complied with in the jail of Kuressaare police department, and, thus, the detainees had been deprived of one of the rights provided by law.

(5) The Chancellor of Justice made a recommendation to the West Police Prefecture to take measures

[127] RT I 2000, 58, 376; 2003, 78, 524.
[128] RTL 2000, 125, 2004; 2003, 99, 1490.

to ensure that the jail of Kuressaare police department complies with the right of detainees to have access to national daily newspapers. In reply to the Chancellor's recommendation, the West Police Prefecture said that since August 2004 national daily papers were available in the jail of Kuressaare police department.

3. Presenting the order of disciplinary punishment to detainees

Case No. 7-4/1354

(1) The Chancellor of Justice received an application from a detainee who complained that he had not been given a copy of the order imposing a disciplinary punishment on him.

(2) The applicant was held in detention in the Pärnu Prison. The applicant had been playing chess in his cell together with the cellmates at 23.55 on 19 August 2004.

As according to the rules, 23.55 is already the time for the night curfew, the director of the Pärnu Prison in his order of 27 August 2004 made a reprimand as a disciplinary punishment to the applicant. The order of the director was presented to the applicant against signature. On 30 August 2004, the applicant made a written request to the Pärnu Prison to receive a copy of the order by which the prison director had issued a reprimand in respect to him. In his reply of 2 September 2004, the director of the Pärnu Prison rejected the request.

The applicant contested the disciplinary punishment by way of administrative appeal proceedings, and turned to the Chancellor of Justice with a complaint against refusal to issue him a copy of the reprimand.

In connection with the proceedings of the application, the Chancellor of Justice requested information from the director of the Pärnu Prison who explained in his reply that detainees are informed about the disciplinary punishment by presenting to them, against signature, the end result of the disciplinary proceedings, i.e. the order imposing a disciplinary punishment. The director relies on § 64(4) of the Imprisonment Act, according to which a prisoner shall be allowed to examine, against signature, the order by which a disciplinary sanction is imposed. It is also explained who and when have the right to examine the personal file. It is explained that if a detainee wishes to contest the legal act then a copy of it will be given to him based on a relevant request.

(3) In resolving the case, the Chancellor of Justice had to answer the question whether the Pärnu Prison had correctly interpreted § 64(4) of the Imprisonment Act, according to which detainees are allowed to examine, against signature, the order imposing a disciplinary sanction.

(4) Disciplinary sanctions against detainees are regulated by sections 64, 100 and 101 of the Imprisonment Act, as well as Chapter 18 of the Minister of Justice Regulation No. 72 of 30 November 2000 on "The internal rules of prisons"[129]. According to § 1^1(1) of the Imprisonment Act, the provisions of the Administrative Procedure Act apply to administrative proceedings prescribed in the Imprisonment Act or to administrative proceedings provided for on the basis of this Act, taking account of the specifications provided for in the Imprisonment Act. Thus, all the principles of administrative procedure should also apply to disciplinary proceedings, unless they are regulated differently in the Imprisonment Act. Section 1(2) of the internal rules of prisons provides that provisions applicable to prisoners shall also apply to detainees, unless otherwise prescribed in the Imprisonment Act or in internal rules of the prison.

According to § 37(1) of the Administrative Procedure Act, everyone has the right, in all stages of administrative proceedings, to examine documents and files, if such exist, which are relevant in the

[129] RTL 2000, 134, 2139; 2004, 8, 120.

proceedings and which are preserved with an administrative authority. Subsection 4 of the same section stipulates that extracts from and copies of documents shall be made and related costs shall be compensated pursuant to the procedure provided for in the Public Information Act[130].

According to § 64(5) of the Imprisonment Act, materials concerning an imposed disciplinary sanction shall be annexed to the personal file of a prisoner. According to § 37(2) of the Administrative Procedure Act, an administrative authority shall prohibit the examination of a file, document or a part thereof if disclosure of information contained in it is prohibited by an Act or on the basis of an Act. According to § 29(2) of the internal rules for prisons, detainees and their counsel, members of the prison committee, prison workers, prosecutor and criminal probation officers have the right to examine personal files on the basis of justified requests and based on the permission of the prison director or person authorised by him. On 30 August 2004, the applicant submitted a request to the prison to receive a copy of the director's order imposing the disciplinary sanction on him. In essence, this was a request for information in the meaning of the Public Information Act. According to § 18(1) of the Act, a request for information shall be complied with promptly, but not later than within five working days. The Pärnu Prison, however, refused to comply with the information request based on its letter of 2 September 2004. The Public Information Act, in § 23(3) stipulates that the holder of information shall notify the person making the request for information of refusal to comply with the request within five working days, and shall refer to the bases provided for in subsections (1) or (2) of this section and justify the refusal. The prison refused to issue a copy of the order to the detainee because it had already allowed the detainee to examine the requested order against signature. It was also explained to the detainee that the materials of disciplinary proceedings are annexed to the personal file and, based on an application, it is possible to examine the personal file if the director or persons authorised by him give a permission for this.

According to § 29 subs 2^1 of the internal rules for prisons, the prison director or person authorised by him decides granting the permission to examine the personal file within one month from the receipt of the relevant application. However, if the permission is granted one month later, timely exercise of the right of appeal becomes impossible, or at least it is substantially more difficult. The Chancellor of Justice found that such a restriction is unproportional.

According to § 3(1) of the Administrative Procedure Act, in administrative procedure, the fundamental rights and freedoms or other subjective rights of a person may be restricted only pursuant to law. In this regard, it has to be kept in mind that the restriction of fundamental rights and freedoms can take place only on the basis of a law, and it cannot be done by lower level legislation.[131] Therefore, in the present case, the provisions of internal prison rules with regard to the examination of a personal file can not be applied. In refusing to comply with the detainee's information request, the prison had not referred to any bases arising from the Public Information Act. The Public Information Act or other legislation do not provide for specific conditions for the examination of personal files by detainees. Thus, all materials must be available to them.

Detainees should be able to examine the materials of disciplinary proceedings, because otherwise they would be unable to submit objections or appeals. Partly, the right of examination can be guaranteed by making copies of the materials of disciplinary proceedings. Based on § 25(2) of the Public Information Act, making of paper copies starting from the 21st page is for a fee. In the present case, the applicant only requested a copy of the disciplinary sanction which should have been provided to him for free.

According to § 64(4) of the Imprisonment Act, a detainee shall be allowed to examine, against signature, the order by which a disciplinary sanction is imposed. The procedures provided for in a special law should be in conformity with the principles of good governance. Based on the principles

130 RT I 2000, 92, 597; 2003, 26, 158.

131 K. Merusk. Menetlusosaliste õigused haldusmenetluse seaduses. [The rights of participants to the proceedings in the Administrative Procedure Act.] – Juridica 2001, No. 8, pp. 519-528.

of good governance, the minimum requirement is to inform the person about the proceedings in respect to him and give the person an opportunity to submit objections. Arising from the principles of good governance and § 61(1) of the Administrative Procedure Act, legal consequences with respect to a person can be produced by an administrative act that was notified or delivered to the person.[132] Section 25 of the Administrative Procedure Act provides for the manners of delivery; notification is regulated by § 62 of the same Act. Pursuant to § 62(2) clause 1, persons whose rights are restricted by an administrative act shall be notified of an administrative act by delivery. As the imposition of a punishment in any case restricts the rights of a detainee, then pursuant to the Administrative Procedure Act the order of imposing a sanction has to be delivered to a person. For this purpose, an original document or its officially certified copy should be delivered to the detainee. The Imprisonment Act provides for allowing the persons to examine an order against signature. This, however, cannot be interpreted as meaning that the order of imposing a disciplinary sanction or a copy thereof should not be delivered to a detainee.

The Supreme Court Administrative Law Chamber has expressed an opinion that notification of an administrative act should take place in a manner that allows the person to make a complete assessment of the administrative act and decide whether the act violates his rights or not.[133] In notifying the person, it is not always important whether the addressee actually examines the content of the administrative act.[134] The failure to deliver the order of imposing a sanction to a detainee is not justified. It is not probable that a person could make a decision concerning the violation of his rights only within a few minutes – when he is examining the order. The person should determine whether an administrative act violates his rights and interests within the deadline prescribed by law, also using professional assistance if necessary.[135] In order to assess the legality of an administrative act, the person needs the act itself.

The Pärnu Prison failed to comply with the detainee's request for information, by referring to irrelevant provisions. In resolving the request for information, the Pärnu Prison also failed to observe the principles of good governance, and disproportionately restricted the rights of the person. The fact that the person contested the sanction by way of administrative appeal does not mean that the prison correctly resolved the information request.

(5) In the light of the above, the Chancellor of Justice made the following recommendations to the director of the Pärnu Prison: first, to comply with the detainee's request for information, and, second, to deliver the orders of disciplinary sanctions to all detainees in the future. The Chancellor of Justice also informed the Ministry of Justice about the recommendations. In reply to the Chancellor of Justice, the Pärnu Prison said that they had complied with the detainee's request for information and in the future would deliver orders of imposing disciplinary sanctions to all detainees.

4. Verification visit to jails in Ida-Viru Police Prefecture

(1) International organisations, first of all the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), have repeatedly pointed out the situation in Estonian jails.[136] The Chancellor of Justice has also found several violations in jails. Particularly problematic have been jails in Narva and Kohtla-Järve.

On 30 August 2004, the *Põhjarannik* newspaper published an article on its Internet site about seven persons detained in Narva jail, who had collectively tried to cut their veins in order to protest against overpopulation in the cells.

132 Supreme Court Administrative Law Chamber judgement of 23 Feb 2004, No. 3-3-1-1-04, RT III 2004, 7, 73.

133 Supreme Court Administrative Law Chamber ruling of 21 Dec 2000, No. 3-3-1-52-00, RT III 2001, 1, 4.

134 Supreme Court Administrative Law Chamber ruling of 3 March 2004, No. 3-3-1-10-04, RT III 2004, 8, 83.

135 Supreme Court Administrative Law Chamber ruling of 1 Oct 2002, No. 3-3-1-57-02, RT III 2002, 24, 26.

136 The reports of the CPT visits to Estonia on 13-23 July 1997 and 15-31 December 1999 are available on the Internet: http://www.cpt.coe.int/en/states/est.htm (22.02.2005).

Based on the article, the Chancellor of Justice decided to initiate proceedings on his own initiative pursuant to § 34(1) of the Chancellor of Justice Act, and, on 20-21 September, organised a verification visit to Narva, Kohtla-Järve and Rakvere jails, which belong under the East Police Prefecture.

(2) According to § 156(1) of the Imprisonment Act, jails are custodial institutions which are units of police prefectures and organise the execution of detention pending trial and arrest. According to § 86(1) of the Act, the imprisonment of up to three months is also served in a jail. In addition, based on § 15(2) of the Police Act, persons who due to their state of intoxication could pose a danger to others or themselves or could become victims of crime can also be taken to jail for sobering up.

The aim of the Chancellor's proceedings was to find out whether the Police Board and the police prefectures ensured the fundamental rights and freedoms of persons in jails when executing the above mentioned functions, and to verify the living conditions and the problem of overpopulation.

(3.1) During the verification visit, there were 67 detainees in the Narva jail and 49 detainees in the Kohtla-Järve jail. The total floor area of the cells in Narva jail is 138.48 m^2 and, accordingly, each detainee had 2.07 m^2 of floor space. The total floor area of the cells in Kohtla-Järve jail is 81 m^2 and, thus, each detainee had only 1.65 m^2 of floor space.

Based on the table drawn up by the Police Board to reflect the occupancy of Narva jail in July and August 2004, it could be seen that there had been 36 days when more than 55 persons had been staying in the jail. During the referred period there were approximately 3-8 persons per day in Narva jail who were persons under arrest in the meaning of § 3 of the Imprisonment Act. The rest of the persons were detainees and convicted persons who were waiting to be escorted to prison. During the verification visits, only two of the detained persons in Narva jail were persons under arrest.

In Kohtla-Järve jail, only detainees or convicted persons who were waiting for escort to prison were held during the verification visit. The register of detained persons in Kohtla-Järve jail showed that two detainees had been in the jail for one month or longer, and six persons for two months or longer. According to the same register, the person who had stayed longest in the jail by the time of the verification visit had been there for three months and three days.
This demonstrates that overpopulation in Kohtla-Järve and Narva jails is caused first and foremost by detainees who spend a long time in jail.

In the letter of the Police Board to the Minister of Internal Affairs that was forwarded to the Chancellor of Justice by the East Police Prefecture, it is noted that the problem of overpopulation of the jails appeared after the closing of the Central Prison. The pre-trial detention departments of Tartu, Tallinn and Pärnu prison do not have enough places for detainees. There are often periods of several weeks when prisons do not accept any more detainees than are escorted out of the prisons to jails. There is exchange person for person. In the Tartu Prison the situation is almost permanently so.

The Police Board forwarded to the Chancellor of Justice the schedule of escorting that reflects the period from June until August 2004. This confirms that during that period mostly the same number of persons were escorted from Narva jail to Tartu Prison as were brought from the Tartu Prison to Narva jail.

The overpopulation in Narva and Kohtla-Järve jails is also due to the need to disregard, for security reasons, the principle of segregation, as provided for in § 12 of the Imprisonment Act. For example, during the verification visit minors and adults were kept in the same cell in Kohtla-Järve jail.

Based on the recommendation of the CPT that there should be at least 4 m^2 of floor space per one detained person, the capacity of the Narva jail would be approximately 34 persons, and Kohtla-Järve jail 20 persons. The Chancellor of Justice is of the opinion that without any exceptions all persons

under arrest and detainees should have at least 2.5 m^2 floor space, as is required by § 6(6) of the internal prison rules. Based on the minimum floor space for detainees and prisoners in prisons, maximum 55 persons could be held in Narva jail and 32 in Kohtla-Järve jail.

The Chancellor of Justice was of the opinion that Narva and Kohtla-Järve jails were overcrowded during the verification visits, and minimum floor space was not ensured for detained persons.

According to § 2(1) of the Minister of Justice Regulation No. 55 of 29 November 2000 on "The plan of implementation"[137], detainees with regard to whom preventive detention in criminal proceedings has been imposed by the Ida-Viru County Court and the Narva City Court are placed in the Tartu Prison. Also detainees with regard to whom pre-trial detention was imposed by the Jõgeva County Court, Põlva County Court, Tartu County Court, Valga County Court, Viljandi County Court, Võru County Court and Järva County Court are placed in the Tartu Prison.

The Chancellor of Justice made a recommendation to the Minister of Internal Affairs and the Minister of Justice to examine whether changing of the implementation plan would enable to place in prison more detainees with regard to whom detention pending trial is imposed by the Ida-Viru County Court and the Narva City Court and who serve pre-trial detention in Narva and Kohtla-Järve jails.

Reducing the overpopulation of jails would enable to eliminate problems concerning the principle of segregation.

The Minister of Justice in his reply explained that the problem of overpopulation of the jails had been discussed at several meetings with the Ministry of Internal Affairs and agencies under its area of administration. Unfortunately, the Minister of Justice had to admit that pre-trial detention departments in Tartu, Tallinn and Pärnu Prisons do not have enough places for detainees in order to increase the number of detainees there. The plan of implementation provides for the general rules of placement of detainees, and, in exceptional circumstances, it is possible to deviate from the general rules. This has also been done when necessary and possible. Therefore, the Minister of Justice did not consider it necessary to change the implementation plan. Cooperation with the Ministry of Internal Affairs on this issue will continue in order to find solutions to alleviate the situation in jails.

The response by the Ministry of Internal Affairs showed that after the proposal of the Chancellor of Justice the Police Board made a request to the Ministry of Justice for the extraordinary placement in prison of the persons in jails in the service area of the Tartu Prison. The Ministry of Internal Affairs will continue cooperation with the Ministry of Justice to solve the problem of overpopulation of the jails and ensure the placement in prison first of all of persons who have been convicted and of detainees with regard to whom procedural actions have been taken.

(3.2) During the verification visit, it was found that some cells in Narva and Kohtla-Järve jails lacked windows. In cells with a window it did not ensure adequate lighting of the cell, because the windows were made of dim glass blocks.

In Nara jail, incandescent bulbs were used to light the cells. According to the assessment of the Chancellor of Justice, such lamps do not ensure lighting that would be sufficient for reading, in particular in cells without a window.

In Kohtla-Järve jail, the level of artificial lighting was better but in some cells the persons held in them could unscrew the bulbs and thus make the whole cell dark. In Kohtla-Järve jail it was not possible to electronically monitor the persons in the cells and, therefore, the police have no way of checking the activities of the persons in them when the cell is darkened. This endangers the security of persons in the cells because it is not always possible to detect an incident of violence in a dark cell.

[137] RTL 2000, 126, 2016; 2004, 20, 314.

Opening of the door of a dark cell also poses a threat to police officers.

According to § 90(3) of the Imprisonment Act, cells where detainees are lodged shall be in compliance with the conditions provided for in subsection 45 (1) of the Act. Based on § 86(1) of the Imprisonment Act, the requirements for cells of prisoners as provided in § 45 of the Act also extend to the cells of persons under arrest. Section 45(1) of the Imprisonment Act stipulates that dwellings of prisoners shall be in conformity with the requirements of construction technology, health and hygiene. The dwellings of prisoners shall have windows to ensure suitable lighting of the premises.

According to the combined effect of § 90(1), § 86(1) and § 7(2) of the Imprisonment Act, the cells in a jail should enable constant visual or electronic surveillance of the detainees and persons under arrest.

The Chancellor of Justice made the following proposals to the Minister of Internal Affairs in connection with the lighting of cells in jails:

- to verify whether jails in all the police prefectures have lighting that enables the detained persons to read in the cell;
- to take measures in Narva jail and other jails where it is necessary to bring the artificial lighting in the cells to the level that would enable the persons in the cells to read;
- to verify whether in the jails of all the police prefectures, where detained persons can only be monitored visually, technical measures have been taken to prevent that the persons in the could cells to darken the cells;
- to take technical measures in Kohtla-Järve jail and other jails, where detainees and persons under arrest can arbitrarily darken the cell and they can only be monitored visually, in order to make it impossible for persons in the cells to darken the cells arbitrarily.

According to the reply of the Ministry of Internal Affairs, immediately after the verification visit of the Chancellor of Justice, searching of possibilities and solutions to improve the artificial lighting in Narva jail began. By 17 December 2004, new lamps to provide additional lighting had been installed in all the cells; ten of the new lamps are covered with a special metal grid. However, the lighting devices used in jails of the East Police Prefecture are not protected against darkening because the ceilings of the cells are low and, in order to receive the best effect, the lamps had to be placed above sleeping places. Price calculations for improving the artificial lighting in the jails in Pärnu, Tallinn, Haapsalu, Viljandi, Valga and Võru is being made.

(3.3) All the jails in the East Police Prefecture lack walking areas, and persons detained in the jails do not have a possibility to spend time in open air, although according to § 55(2) and § 93(5) of the Imprisonment Act they have the right to spend at least one hour in open air every day.

During the verification visit, it was ascertained that the living conditions in Narva and Kohtla-Järve jails were partly unacceptable. For example, each cell in Kohtla-Järve jail only has one tap that is approximately 0.5-1 m above the toilet. There is no sink below the tap and the tap is aimed directly towards the toilet. The same tap is used for drinking water and for washing, and it is also used for flushing the toilet. The toilet is not in any way segregated from the cell. Persons staying in the cell are forced to use the toilet by being visible to the others, and at the same time the smells from the toilet can freely spread in the cell. It is particularly problematic in the cells without ventilation.

Art 18 of the Constitution and Art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that was ratified by the Riigikogu on 13 March 1996 prohibit inhuman, cruel or degrading treatment and punishment. Inter alia, detention of a person in inhuman conditions can also constitute a violation of the prohibition.

For example, the European Court of Human Rights in the case *Peers vs Greece*[138] found that the conditions of detention in one the Greek prisons had been degrading, and awarded a financial compensation to the applicant.

The cell that the applicant had been sharing with another prisoner was small, and when the door was closed there was barely any space to move between the two beds. In summer, the cell was hot and there was no ventilation. The cell had a window that could not be opened and that was dirty, and therefore not transparent. Artificial light in the cell was not sufficient for reading. The toilet was not separated from the cell, and when using it the prisoner was visible to other persons in the cell.

The European Court of Human Rights was of the opinion that the lack of intention to treat prisoners in a degrading manner did not exclude a violation of the prohibition provided for in Art 3 of the Convention. In the above case, the Court found a violation, because the responsible authorities had failed to take any steps to improve the unacceptable situation.

According to the assessment of the Chancellor of Justice, the conditions of detention in Kohtla-Järve and Narva cells are not considerably different from the situation described in the above case. The Chancellor finds that detainees and persons under arrest are treated in a degrading manner in Narva and Kohtla-Järve jails.

Problematic living conditions and the lack of walking areas have also been pointed out by the CPT delegations that have visited Estonia. The proceedings conducted by the Chancellor of Justice have revealed that the lack of walking areas and a poor state of repair of the jails is not only a problem in the jails in the East Police Prefecture. The same problems, for example, occur in Kuressaare jail.

The Minister of Internal Affairs in his letter of 5 March 2004 promised to forward to the Chancellor of Justice a copy of the national action plan to improve the living conditions in jails, which provides for the elimination of shortcomings pointed out by the CPT, as well as for the development of jails in general. The Ministry of Internal Affairs informed the Chancellor of Justice in his letter of 12 May 2004 that a final version of the above-mentioned action plan would be drawn up after an analysis of the possibilities to eliminate the problems noted by the CPT.

On the basis of the letters of the Ministry of Internal Affairs it could be assumed that the intended action plan for improving the conditions in jails would provide for measures to improve the walking opportunities of detainees and persons under arrest and to solve the problem of poor living conditions. Therefore, the Chancellor of Justice did not consider it necessary to make any further proposals at the moment, but only reminded the Minister of Justice the earlier promise to forward to him the plan of improving the conditions in jails. By the time of the referral, six months had passed from the last relevant letter of the Ministry of Internal Affairs and it could be presumed that a detailed analysis of eliminating the deficiencies had been carried out and the plan had been drawn up.

The Ministry of Internal Affairs did not enclose to its letter a plan of improving the conditions in jails. Later, it was found that drawing up of the plan was still in the phase of mapping the problems.

(3.4) During the verification visit, it was found that in all the jails in the East Police Prefecture, the detained persons had no opportunity of using a phone.

According to § 96(1) of the Imprisonment Act, detainees have the right of correspondence and the use of telephone (except mobile phone) if relevant technical conditions exist. According to subsection 3, the right of detainees to correspondence and the use of telephone can be restricted only on the permission of a preliminary investigator, prosecutor or court if this is necessary to ensure the conducting of criminal proceedings. It is prohibited to restrict the right of a detainee to

[138] European Court of Human Rights decision of 19 April 2001 in the case No. 28524/95 *Peers vs. Greece*.

correspondence or use of telephone for communication with state agencies, local governments or their officials or the person's defence counsel. Based on § 86(1) and § 28 of the Imprisonment Act, similar provisions apply to persons under arrest.

The scope of protection of the general right of liberty stipulated by Art 19 para 1 of the Constitution also includes the freedom of detainees and persons under arrest to choose the means of communication they use to communicate with persons in liberty. The fact that persons detained in Narva, Kohtla-Järve and Rakvere jails do not have an opportunity to use a telephone to communicate with persons outside the jail constitutes an infringement of the general right to liberty.

The right of detainees to use a telephone is subject to a reservation provided by the law, according to which the detainees have the right only if relevant technical conditions exist. Thus, detainees cannot request the use of a telephone if there is no phone in the jail. However, the reservation provided for in § 96(1) of the Imprisonment Act does not justify the failure of the police prefecture to take measures to create such technical conditions.

The telephone is the most widespread means of communication nowadays, and without it communicating with close ones and with state agencies is considerably more complicated. Art 14 of the Constitution provides that the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. When interpreting § 96(1) of the Imprisonment Act in the light of the above constitutional provision, the Chancellor of Justice concluded that detainees can not request the use of a telephone until there is no phone in the jail, but at the same time the police prefecture should look for possibilities to create the conditions for using the phone.

In connection with creating technical conditions in jails for using the telephone, the Chancellor of Justice made the following proposals to the Minister of Internal Affairs:

- to verify whether detainees and persons under arrest in all the jails have technical conditions for using the telephone;
- to take measures to create technical conditions for using the telephone in Narva, Kohtla-Järve and Rakvere jail, as well as in all the other jails where the technical conditions are currently lacking, so that the detainees and persons under arrest whose right of using the phone is not restricted under § 96(3) of the Imprisonment Act would be able to use it. The Chancellor of Justice recommended installing pay phones in the above-mentioned jails.

The Minister of Internal Affairs in his reply noted that not all the jails have the necessary technical conditions. However, if persons detained in the jail wish to contact the body conducting the proceedings of the offence, or their defence counsel, officials of the jail make the relevant phone call based on a written application. Detained persons are also allowed to use the means of communication of the jail to inform somebody about their detention (one phone call is allowed). The Police Board has also made an application to the phone company Elion Ettevõtted AS to install pay phones in jails.

(3.5) During the verification visit, it was found that in Narva and Kohtla-Järve jails detainees were allowed to have a radio in he cell only if the detainee was escorted to the jail from prison and they had a radio with them that was approved during the security inspection in prison. Detainees and persons under arrest who are initially admitted to the jail, can not use a radio that they had with them at the moment of admission or that was brought to them later by visitors. This is because it is not possible to carry out security inspections of radio and television sets in jails, because there is no specialist who has appropriate knowledge and skills. Therefore, there can be cases where there is no radio in some of the cells and persons in the cell have no access to information over the radio.

Detainees and persons under arrest in Narva and Kohtla-Järve jails have no opportunity to read national daily newspapers. According to the officials of the East Police Prefecture, newspapers had been distributed to detained persons earlier, but they were often torn up in the first cell. The East Police Prefecture lacks sufficient financial resources to subscribe to a separate paper for each cell. In Rakvere jail, detainees and persons under arrest are given the papers that have been already read at the police department.

Art 44(1) of the Constitution provides that everyone has the right to freely obtain information disseminated for public use. Information disseminated for public use is the information that is intended for an individually unspecified group of persons.[139] Most of the information for public use is disseminated through newspapers and via broadcasting.

In comparison with persons in liberty, access to newspapers and broadcasting is more limited for detainees and persons under arrest. Therefore, the combined effect of § 31(1) and § 86(1) of the Imprisonment Act requires that persons in jails should be able to follow radio and television programmes. With the permission of the executive officer of the jail, in accordance with § 156(4), § 31(2) and § 93(3) of the Imprisonment Act, detainees and persons under arrest may have a radio or television in the cell, the costs of which will be covered by the persons themselves. The combined effect of § 93(3), § 30(1) and § 86(1) of the Imprisonment Act also requires that national daily newspapers should be accessible for detainees and persons under arrest.

Thus, in accordance with the referred provisions of the Imprisonment Act, detainees and persons under arrest should be guaranteed access to three media channels: radio, television and national newspapers.

According to § 85(1) of the Imprisonment Act, persons under arrest can be held in a jail for up to three months. The law does not impose any restrictions on the period of holding detainees in a jail, and, as was noted above, detainees stay in jails for weeks. A situation where detained persons have no access to publicly disseminated information via media channels for a longer period, is unacceptable. Therefore, the Chancellor of Justice made the following proposals to the Minister of Internal Affairs:

- to verify whether detainees and persons under arrest in all the jails have an opportunity to read national newspapers; also whether persons admitted to the jail have an opportunity to use the radio that they had with them at the time of apprehension or that was brought to them later;
- to take measures to create an opportunity to read newspapers for detainees and persons under arrest in Narva and Kohtla-Järve jails, as well as other jails, if there is no such opportunity at the moment;
- to take measures to create preconditions that detainees in Narva and Kohtla-Järve jails, and in other jails where there are no such preconditions at the moment, could receive radio sets from their friends or relatives outside the jail; as well as measures to create opportunities for detainees and persons under arrest to use in the cell the radio that they had with them upon admission to the jail.

According to the response of the Ministry of Internal Affairs, all the jails had confirmed orally that all the detained persons have an opportunity to read national newspapers. As a rule, the newspapers subscribed to for the police prefecture are used for this, and papers are brought to jails at least once or twice a week. In addition, the East Police Prefecture has also made an oral agreement with the office of the Estonian Press Distribution in Jõhvi that provides the police prefecture with the papers of the previous week.

In jails, persons are allowed to take into the cells the radio equipment that has undergone security checks in prison and has been marked with a relevant sticker. As one possible solution, the East Police Prefecture suggested allowing in the cells small radio sets that work on batteries and that can

[139] P. Roosma. Kommentaarid §.le 44. – Justiitsministeerium. Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. [Comments on § 44. – Ministry of Justice. Commented edition of the Estonian Constitution] Tallinn 2002, § 44, comment 2.

be listened through earphones. It is easy to check small radio sets and they would not increase the electricity costs of the police prefecture.

(4) The measures taken by the Ministry of Internal Affairs, the Police Board and the East Police Prefecture on the basis of the proposals of the Chancellor of Justice help to improve the situation of persons detained in jails, but they are far from being sufficient to put an end to the degrading treatment of persons serving pre-trial detention or imprisonment in Narva and Kohtla-Järve jails. The Ministry of Internal Affairs has not found a solution to inhuman living conditions and to the lack of walking areas, which is the biggest problem in Narva and Kohtla-Järve jails, alongside the problem of overpopulation, although the Ministry claims that searching for a solution has been going on for a long time already, as could also be assumed on the basis of intentions to draw up a plan for improving the living conditions in jails.

Based on the foregoing, the Chancellor of Justice considers it necessary to continue monitoring closely what steps the Ministry of Internal Affairs and the Police Board take in order to prevent degrading detention of persons in jails. If necessary, the Chancellor of Justice will initiate new proceedings to verify whether the Police Board and police prefectures comply with the duty to ensure the protection of the fundamental rights and freedoms of persons in jails.

XII IMPRISONMENT

1. General outline

The aim of imprisonment, arrest and pre-trial detention is to guide a person towards law-abiding behaviour. This is a particularly difficult task, because it takes place in the conditions where persons have been deprived of their liberty and have been placed in an environment that differs considerably from the normal situation. Prison workers, similarly to all the other public servants, should strictly observe the law, other legislation and the principles of good governance in executing imprisonment. The aim of imprisonment can only be achieved if the prison workers fulfil their duties in an honest and humane manner, by making use of all their skills.

The conditions of imprisonment should not be degrading to human dignity nor damaging to health. During the imprisonment, the sense of responsibility of the prisoners has to be developed, as well as skills that they need in order to return to society and cope with their life and live in a law-abiding manner. In the treatment of prisoners and detainees, the prison staff should carefully observe that the rights of prisoners and detainees are not restricted more than is permitted by law. On the other hand, it should also be ensured that imprisoned persons could fully exercise the rights provided to them by law. The complaints received by the Chancellor of Justice show that these requirements are not always complied with.

In 2004, prisoners and detainees submitted 331 complaints about the activities of prisons. Five of the complaints were forwarded to relevant authorities. The Chancellor of Justice initiated proceedings with regard to 116 complaints to ascertain a violation of law or of principles of good governance; in 37 of these cases, a finding of violation was made. In 210 cases, the Chancellor of Justice decided to confine himself to giving explanations about the legal solution to the problem raised in the application. In addition, the Chancellor provided replies to six requests for explanation.

Many of the applications received from prisoners and detainees in 2004 dealt with the problems of the execution of imprisonment. Most complaints were related to the issues of transfer of prisoners to another prison, the living conditions and health protection in prisons, the employment of prisoners, the use of personal accounts, disciplinary sanctions of prisoners, application of additional security measures with regard to them, and issues of release on parole.

Most violations were ascertained by the Chancellor in the following areas of prison work: legal remedies of prisoners and detainees, conditions of detention, search of the dwellings and personal belongings of prisoners, imposing measures in the case of offences committed by prisoners, release on parole, and payment of release allowance to prisoners. With regard to some problems, the Chancellor of Justice found that the solution depended on the measures to be taken by the Ministry of Justice or by another competent ministry.

The proceedings initiated by the Chancellor of Justice on the basis of applications from prisoners demonstrate that prisons as institutions of the executive authority do not always comply with the obligation arising from Article 14 of the Constitution to guarantee the rights and duties of imprisoned persons. According to the Constitution and the Imprisonment Act, the prisons should also help prisoners with arranging essential legal relations outside the prison. Considering the conditions of imprisonment, prisoners themselves do not always have resources for recourse to the court, and, therefore, the prisons should provide indispensable legal aid to persons in the framework of social welfare, as well as technical assistance with drawing up actions, at least to the extent that courts would have no reason to reject the actions due to their incompliance with the formal criteria.

Due to a legislative gap, there is currently a situation where the documents issued to prisoners by the Citizenship and Migration Board, including personal identity cards, are not forwarded to prisons. Such a situation is contrary to the principle of the protection of the rights of prisoners. The prisons

have found a temporary solution to the problem by taking the prisoners to the nearest bank office to receive the document, but in view of the expenses and security risks involved in the transport of prisoners, it is definitely not the best solution. Finding of a less burdensome solution has been delayed due to the Ministry of Justice and the Ministry of Internal Affairs.

The proceedings of complaints have demonstrated that prison officials are unable to analyse the Imprisonment Act and other legislation regarding the legal status of prisoners in combination, i.e. in resolving a problem they only proceed from one specific provision, and fail to take into account other provisions that are also relevant to the particular case. Such an approach was particularly evident in the case of proceedings of a complaint where a prisoner who had been in the punishment cell had been refused a writing paper with reference to § 60(1) of the Minister of Justice Regulation No. 72 on "The internal rules of prisons", stating that the said provision did not provide for allowing writing paper to persons in punishment cells. In this case, the prisoner was deprived of the right to make use of the adequate remedies in the case of violation of his rights, e.g. to have recourse to the court, the Chancellor of Justice, or to other state agencies. With regard to this case, the Chancellor of Justice emphasised that in the case of mistreatment by the prison the prisoners should have an opportunity to obtain assistance and protection first of all from the prison itself in order to enable them the use of suitable legal remedies.

Several complaints were concerned with the use of language by prison officers, some of which also indicated violation of the Language Act and the Constitution. For example, in one case the chief specialist of a prison failed to reply to the prisoner in Estonian, thus violating the requirements of Art 51 para 1 and Art 52 para 1 of the Constitution, and § 5(2) of the Language Act. This was an indication of the fact that the official did not conform to the requirements for holding such a post.

According to the law, it is important to have public supervision over the activities of prisons. Such supervision is exercised through the prison committee. However, the proceedings conducted by the Chancellor revealed that the provision of § 108 of the Imprisonment Act did not function in practice. In the opinion of the Ministry of Justice, there is not a sufficient number of active people to form a prison committee, and, moreover, the activities of the prison committee under the conditions currently provided for by law would not be expedient. Nevertheless, such a situation has lasted for years, which is an indication of the passive attitude of the Ministry of Justice towards preparing a relevant legislative amendment.

In verifying the complaints concerning the overpopulation in prisons, it was found that the norms pertaining to the size of the dwelling of prisoners were violated when the number of prisoners was getting close to the maximum capacity of the prison. In such conditions, it is difficult for the prison to place prisoners in a way that the dwelling norm is complied with and the security of the prison is maintained. To avoid such a situation, the Ministry of Justice should analyse more carefully the occupancy of the prisons and try to balance it.

Among the complaints about the poor conditions of imprisonment (lack of hot water, or lack or insufficiency of ventilation, etc.), there was a striking example in the tuberculosis department of the Central Hospital of Prisons where neither the temperature nor air humidity corresponded to the norm. Naturally, such a situation is not conducive to the recovery of patients. The situation of prisoners and detainees who need hospital treatment will hopefully improve after the transfer of the treatment of imprisoned persons to the Maardu section of the Tallinn Prison in the near future.

Failure to give sufficient attention to the protection of the health of prisoners was also found in a case where an order for search of personal belongings of prisoners had been given. It was found that in the course of conducting the search, prison officials had used the same gloves to search the foodstuffs of prisoners and other items. In that case the prison director mistakenly concluded that the use of gloves in conducting the search was only a measure for the protection of the health of prisoner workers. Therefore, the Chancellor of Justice pointed out to the prison director that it is not

allowed to endanger the health of prisoners by searching the foodstuffs of the prisoners in a way that disregards hygiene requirements.

In several complaints, the prisoners explained that they had been required to provide urine or blood samples to establish narcotic or alcohol intoxication, and in the case of refusal they had been imposed a disciplinary punishment. The case that is described below shows the clear opinion of the Chancellor of Justice on this issue: according to § 331 of the Penal Code, the use of a narcotic substance by a prisoner without a doctor's prescription is an offence. Therefore, if there are doubts about a prisoner being in a state of narcotic intoxication, proceedings have to be initiated on the basis of the rules of criminal procedure, which allow compulsory taking of samples and ordering an expert assessment to ascertain the use of a narcotic substance. The same applies in the cases described in § 330 of the Penal Code, when a prisoner is suspected of having consumed alcohol.

In the case of complaints concerning disciplinary proceedings with regard to prisoners and detainees, and release of prisoners on parole, it was found on several occasions that the main principles of administrative proceedings had been infringed. All the general principles provided for in the Administrative Procedure Code are applicable when prison officials issue acts or take measures with regard to prisoners and detainees. However, it was found that these principles had not always been complied with. Primarily, the principle of investigation in administrative proceedings and the duty of administrative bodies to provide explanations were disregarded. Prisoners and detainees have the right to fair procedure in the ascertainment of the facts of a disciplinary offence and imposition of a punishment. It is important to take into account the explanations of the person to be punished if there is conflicting information about his actions. In the process of review of applications for release on parole, there have also been cases where the decision was made without providing the prisoner the right to be heard. Furthermore, the statements of prison departments on the issues of release on parole sometimes contain conflicting information that has not been analysed, although such a duty exists on the basis of the principles of investigation.

Among other issues, the Chancellor of Justice has also expressed his opinion about the re-socialisation of prisoners. The Chancellor found that the release allowance provided for by the Imprisonment Act should also be paid to the prisoner if they did not leave the prison after serving the sentence. For example, there was case, where a former prisoner stayed in a prison as a detainee who was suspected of the commission of another offence. After the conviction for the relevant act, the court released the person in the courtroom, because he had already served the punishment during the preliminary investigation.

The Chancellor of Justice also expressed his view with regard to the issue of the start of time when the right to release on parole arises. According to the Penal Code, the time of release on parole depends on the seriousness of the criminal offence. The Chancellor of Justice was of the opinion that release on parole is an issue of procedural law, not of substantive law, and, therefore, determination of the severity of a crime also has a procedural character in the context of release on parole. Accordingly, in deciding the release on parole, the provisions of the Penal Code that are in force at the particular moment should be observed, as they determine the time when the possibility of a release on parole arises.

2. The right of prisoners to receive replies in Estonian to their enquiries

Case No. 7-4/1192

(1) The Chancellor of Justice received an application from a prisoner who had failed to receive replies in Estonian to the enquiries he had made to a prison official.

(2) The applicant was staying at the central hospital of prisons of the Tallinn Prison. He turned to the chief specialist of the supervision department in Estonian, but failed to receive a reply in Estonian.

The applicant then turned to the Chancellor of Justice.

In the course of proceedings, the Chancellor of Justice sent a request for information to the Tallinn Prison. According to the reply given by the prison, the advanced proficiency in Estonian is required to hold the above position. The prison official has passed the intermediate level proficiency examination in Estonian, and the Language Inspectorate has made a precept to the official to pass the advanced level proficiency examination in Estonian. The official has not presented to the prison a certificate of advanced proficiency.

(3) To resolve the application, it was necessary to answer the question whether the right of the prisoner to receive replies in Estonian to his enquiry had been violated.

(4) Art 52 para 1 and Art 51 para 1 of the Constitution stipulate the subjective right of every person to communicate in the official language, which, in turn, obliges the public authorities to make it possible to exercise this constitutional right.

Section 5(2) of the Language Act provides that public servants must be able to understand and use Estonian at the level that is necessary to perform their service or employment duties. Prison officials are also public servants. Thus, the Language Act requires them to have the level of proficiency in Estonian that enables them to perform their service duties.

The complaint was against a chief specialist who, pursuant to the ranks of prison officials, was a category I prison official. According to the certification requirements for ranks of prison officials, prison officials of category I are required to have the advanced proficiency in Estonian. The reply submitted by the prison indicated that the official had passed the intermediate level proficiency examination, but not the advanced level. The Language Inspectorate has made a precept to the official to pass the required level of proficiency examination, which the official has failed to do. The report on the verification of the language proficiency also revealed that, in reality, the official's knowledge of Estonian corresponded to weak intermediate level proficiency. Based on the above, it can be concluded that the prison official did not correspond to the certification requirements for this post and was unable to perform the service duties in Estonian.

Due to the prison official's inability to communicate in Estonian, the prisoner's right to receive information in Estonian had been violated.

(5) The Chancellor of Justice made a proposal to the Tallinn Prison to consider release of the official from service due to incompliance with the Estonian language proficiency requirements for the particular rank of officials, or transfer of the person to a post where the official's current level of language proficiency would be sufficient. In its reply of 13 January 2005, the Tallinn Prison informed the Chancellor of Justice that, as of 15 January 2005, the official would be transferred to a post with the requirements of which the official complies.

3. Taking a urine sample from a prisoner in the case of suspicion of consumption of a narcotic substance

Case No. 7-4/59

(1) A prisoner did not agree to the taking of a urine sample.

(2) The applicant who was serving his sentence in the Ämari Prison was taken to the medical department where he was ordered to give a urine sample. The applicant refused to give urine for the drug test, and the prison director qualified his act as an infringement of the requirements of § 67(1) of the Imprisonment Act and, with his order of 31 December 2003, imposed a disciplinary punishment

on the basis of § 64(4) of the Imprisonment Act, in the form of placement in a punishment cell for 45 days.

The applicant then submitted an application to the Chancellor of Justice, claiming that the measures taken in respect of him had been illegal. In his complaint, the prisoner claims that he had been taken to the prison's medical department without any cause, and there he was told to provide a urine sample in the presence of a female doctor and two guards. According to the prisoner, he would have agreed to provide an urine sample if his rights had been respected in the process.

To specify the facts given in the complaint and to ascertain the reasons of action by the prison, the Chancellor of Justice requested relevant information from the director of the Ämari Prison. In his reply, the director explained that, on 29 December 2003, in the course of visual inspection, the prison officials had a suspicion that the applicant was in a state of narcotic intoxication. In verifying the suspicion of narcotic intoxication, the prison officials proceeded from § 66(1) of the Imprisonment Act, according to which supervision of prisoners should be organised in a way that ensures compliance with the Imprisonment Act and the Minister of Justice Regulation No. 72 of 30 November 2000 on "The internal rules of prisons", and the general security of the prison. In his reply, the prison director referred to the fact that besides the above bases the measure was also based on § 9(1) of the internal prison rules, pursuant to which physical and mental health of prisoners is checked according to the need, and § 9(3) clause 1 of the rules, pursuant to which clinical examination of prisoners is conducted to ascertain the need for treatment and their ability to work.

In the reply of the prison, it was also explained that drug tests in the Ämari Prison are made in a separate room in the medical department. Prison officials have to be present in giving the urine sample, in order to ensure that the procedures are observed. To ensure the objectivity of the test, medical staff also participate at making the test. In the Ämari Prison, only female staff are employed in the medical department. According to the prison director, male prisoners can request that female persons should leave the room while the prisoner is providing the sample.

(3) In the present case, the main issue was whether the refusal to provide a urine sample could be seen as failure to comply with a legal order of the prison official, for which the prison director can impose a disciplinary punishment on the basis of § 63 and 64 of the Imprisonment Act.

(4) According to § 331 of the Penal Code, preparation, acquisition and possession of narcotic drugs or psychotropic substances by prisoner or person under arrest or in detention, and the consumption of such drugs or substances without prescription is an offence. Thus, if there was a suspicion that the prisoner had used narcotic substances without the prescription of the doctor, § 3(1) of the Code of Criminal Procedure that was in effect at the time of the refusal to do the drug test by the applicant should have been applied. According to this, after the elements of a criminal offence have become evident, a preliminary investigator or prosecutor shall, within the limits of his or her competence, commence criminal proceedings and take the measures prescribed by law to establish that a criminal act has taken place, and to identify the person who committed the criminal offence. According to § 105(3) clause 1 of the Code, prison officials with the authority of a preliminary investigator conduct pre-trial investigation of the offences that have been committed within the prison territory. Thus, the prison officials with the authority of a preliminary investigator had the obligation to initiate criminal proceedings with regard to the prisoner in whose case there was reason to suspect, on the basis of previously obtained information, that he had used a narcotic substance without the doctor's prescription. In the course of criminal proceedings, the investigator can take samples for tests from the suspect (also under compulsion, if necessary) and order an expert examination to detect the use of a narcotic substance.

In the course of criminal proceedings, the investigator should ensure that procedural rights of the suspect are observed. In the course of the criminal proceedings, the investigator had the right to use only those investigative methods and techniques that had been provided for in the Code of Criminal

Procedure, i.e. criminal procedural means; and not administrative means, which include disciplinary punishment of a prisoner. Thus, under the circumstances described in this case, criminal proceedings with regard to the suspect should have been initiated and, in the taking of the sample, the rules of criminal procedure, and not the rules of administrative procedure, should have been observed.

The Chancellor of Justice drew the attention of the prison director to the fact that, even though the health of a prisoner can be examined on the basis of § 9 of the internal prison rules, in the present case there was no suspicion of illness of the prisoner nor the need for treatment or ascertainment of the ability to work; instead, there was a suspicion of a criminal offence, because on the basis of visual inspection the prison administration had reason to suspect that the prisoner had used a narcotic substance without the doctor's prescription. Such an act, as was explained above, entails liability on the basis of the Penal Code. As the facts of the commission of an offence can only be ascertained in the course of criminal proceedings, administrative measures with regard to a prisoner who is suspected of having used a narcotic substance are inappropriate. Therefore, in this case the prisoner's refusal to undergo a drug test cannot be seen as a refusal to comply with an order issued on the basis of § 9 of the internal prison rules, which, under certain conditions, could entail a disciplinary punishment.

Consequently, the Chancellor of Justice was of the opinion that the director of the Ämari Prison did not have a legal right to issue the order by which he imposed a disciplinary punishment on the applicant in the form of placement in the punishment cell.

(5) The Chancellor of Justice made a proposal to the prison director to annul the order of 31 December 2003, and to provide the necessary guidelines to prison officials to avoid similar cases in the future.

The director of the Ämari Prison informed the Chancellor of Justice that his order imposing a disciplinary punishment on the prisoner had been annulled, and prison officials had been instructed about the measures to be taken in the case of suspicion of narcotic or alcohol intoxication. All the public servants who have a suspicion that a prisoner is in a state of narcotic or alcohol intoxication are required to write a report to the prison director, in which they should explain in detail what their suspicions are based on. Taking of further measures is then decided by the prison director in accordance with the rules of criminal procedure.

XIII ACCESS TO INFORMATION AND RESPONDING TO MEMORANDUMS AND REQUESTS FOR EXPLANATIONS

1. General outline

It is instrumental for the functioning of a democratic state and open society that persons have an opportunity to communicate with the state and have access to documents related to the exercise of public law functions. Free exchange of information fosters the transparency of the exercise of public authority and enables the public to have control over the activities of the state.

The duty of state authorities to distribute information concerning its activities has a constitutional guarantee (Art 44 para 2 of the Constitution), so does the right of citizens to address state agencies with memorandums and petitions (Art 46). By now the legislator has enacted more specific rules concerning both spheres: access to the information obtained in the course of fulfilling public functions is regulated by the Public Information Act; the procedure for addressing state agencies used to be based on the Response to Petitions Act, but since 10 December 2004 it is regulated by the Response to Memorandums and Requests for Explanations Act.[140] It is essential to point out that the aim of Art 46 of the Constitution is not as much the guarantee of the right to submit petitions, but rather the guarantee that the petitions do not go unanswered. This is exactly the principle in the light of which the Chancellor of Justice had several disagreements in regard to the initial draft of the Response to Memorandums and Requests for Explanations Act, as several of its provisions could have given agencies unjustifiably broad possibilities not to respond to petitions at all (this will be discussed in more detail below).

Like in the overview of the activities of the Chancellor of Justice in 2003-2004, the following examples allow for a conclusion that there have been no significant constitutional problems in regard to access to public information. The procedure conducted by the Chancellor of Justice rather indicates the negligence of persons exercising public authority in fulfilling the requirements arising from law. All violations were eliminated after pertinent proposals and explanations from the Chancellor of Justice.

An interesting issue to be singled out from those of the period under discussion is the delimitation of the range of subjects obligated under Arts 44 para 2 and 46 of the Constitution. Namely, several cases were concerned with the issue of who had the duty to fulfil the requests for information and respond to petitions. These were the few examples of the principal disputes concerning this sphere, where different persons and agencies interpreted the law differently. The opinion of the Chancellor of Justice is primarily based on the spirit of the referred provisions: the subjects exercising public functions are – due to their nature and the objective they were set up for – the addressees of the referred constitutional provisions, and the laws must be interpreted proceeding from this assumption. Thus, alongside the state agencies and local government agencies legal persons in public law and private law persons performing public functions should also be regarded as holders of information obligated to respond to petitions.

A repeated violation of law in fulfilling requests for information, as well as in responding to petitions, involved failure to respond to inquiries addressed to agencies. The failure to act was often justified by facts, which, pursuant to law, did not allow refusing to respond to inquiries. It is regrettable that there are still some authorities that do not act on the general presumption that there should always be communication with persons and that access to information should be free, unless otherwise provided by law. The legislator has provided for an exhaustive list of possibilities to refuse to respond with good reason, and, thus, it cannot be argued that an unreasonable burden of communicating with persons has been imposed on agencies. It seems that it will take some time until the principle of publicity will become rooted. There is no doubt that the Chancellor of Justice will be able to speed up the process through his explanatory work.

[140] RT I 2004, 81, 542.

2. The conformity of the Response to Memorandums and Requests for Explanations Act with the Constitution

Case No 6-6/57

(1) The Chancellor of Justice performed ex-ante review of the draft of Response to Memorandums and Response to Requests for Explanations Act on his own initiative.

(2) The Government of the Republic introduced the draft of Response to Memorandums and Response to Requests for Explanations Act[141] (hereinafter "the draft"), the purpose of which was to establish the procedure for responding to person's inquiries, to define the terms "memorandum" and "request for explanation", and to repeal the substantively out-dated Response to Petitions Act.

It appeared during the ex-ante control by the Chancellor of Justice that the draft provided for a number of grounds on the basis of which state agencies and local governments were neither obligated to respond to inquiries of persons nor to inform the inquirers of or explain the fact that there would be no response.

§ 5(9) 3), 5), 6) and 7) of he draft were worded as follows:

"A response need not be given if:
[…]
3) the person does not wish to receive a response to the memorandum;
[…]
5) less than one year has passed since the same person submitted a memorandum or request for explanation with the same content or issues related thereto;
6) the memorandum or request for explanation is not legible or the content of the request for explanation is not understandable;
7) it would be impossible to respond to the request for explanation without substantially jeopardising the organisation of work of the agency or body, and the failure to respond will not excessively damage the interests of the persons who submitted the request for explanation."

(3) During the proceedings, it was necessary to answer the question of whether the proposed legislation was in conformity with Art 46 of the Constitution.

(4) Pursuant to Art 46 of the Constitution everyone has the right to address state agencies, local governments, and their officials with memorandums and petitions. The procedure for responding shall be provided by law. The purpose of Art 46 of the Constitution is not as much to give everyone a possibility to submit such inquiries, but to guarantee that these are responded to. Thus, the Constitution requires that state agencies and local governments respond to every memorandum and petition.

With regard to the proposed restrictions the Chancellor of Justice formed the following opinion:

(4.1) The requirement that a memorandum should include a person's wish that they want a response is not in conformity with the constitutional right to presume that a response to a person's inquiry shall always be provided.

(4.2) The Chancellor of Justice is of the opinion that the expression "request for explanation related thereto" in § 5(9) 5) of the draft allows for arbitrary interpretation and unequal treatment. Also, it is a fairly common situation that a person who is dissatisfied with the response addresses a body

[141] The Draft of Response to Memorandums and Response to Requests for Explanations Act, as at 24 March 2004, No 251 SE I, accessible in Estonian at http://web.riigikogu.ee/ems.

exercising supervisory control over the responding agency. Furthermore, during a year new essential facts may become known.

(4.3) Concerning § 5(9) 6) of the draft, that establishes the right not to respond if the content of the memorandum or request for explanation is not legible or understandable, the Chancellor of Justice found that in such cases the person should be informed of the deficiencies which must be eliminated in order to receive a response to the memorandum or request for explanation.

(4.4) The Chancellor of Justice is of the opinion that the possibility not to provide a response if it would be impossible to respond to the request for explanation without substantially jeopardising the organisation of work of the agency or body, and if the failure to respond will not excessively damage the interests of the persons who submitted the request for explanation, established in § 5(9) 7) of the draft, allows for large-scale abuses and renders an ombudsman's subsequent control over such activities next to impossible.

(5) The Chancellor of Justice addressed the Constitutional Committee of the Riigikogu with a report, pointing out the referred problems and expressing the opinion that taking account of his observations would guarantee the constitutionality of the draft. A representative of the Chancellor of Justice participated in the deliberations of the Constitutional Committee concerning the issue.

The Constitutional Committee concurred with the observations of the Chancellor of Justice and amended the draft as follows.

- A response need not be given only if the person has expressly indicated that he or she does not wish to receive a response to the memorandum.

- The second restriction was eliminated.

- Upon implementing the third and the fourth restrictions the person who submitted the memorandum or request for explanation shall be immediately sent a notice to this effect, setting out the deficiencies which must be eliminated in order to receive a response to the memorandum or request for explanation.

The response to Memorandums and Requests for Explanations Act entered into force on 10 December 2004.[142]

[142] RT I 2004, 81, 542.

XIV RIGHT TO GOOD ADMINISTRATION

The Constitutional Review Chamber of the Supreme Court, in its judgment of 17 February 2003, when analysing the principles recognised in the European legal space,[143] came to the conclusion that the customary practice of good administration is a fundamental right, arising from Art 14 of the Constitution.[144] In its judgment of 4 April 2003, with a reference to the referred judgment, the Administrative Law Chamber of the Supreme Court held that the Administrative Procedure Act specifies the principle of good administration as well as other constitutional principles related to administrative procedure, and that the Act implements the general fundamental right to organisation and procedure, arising from Art 14 of the Constitution.[145]

Pursuant to the judgment of the Supreme Court of 8 October 2002, the purpose of good administration as a constitutional principle is to guarantee that those who exercise administration get the information necessary for taking decisions, to force others to take into account the interests of the person exercising administration, and to improve the quality of administrative decisions.[146] To render it all possible in real life, the body exercising administration must implement the principle of customer service[147], arising from the principle of state based on the rule of law.[148]

Pursuant to the principle of customer service, the body exercising administration has the duty to service persons. Rendering services involves not only the professional manner of a concrete activity, it also means the elementary duty to be polite. Thus, for example, an official who is serving a person may have good professional knowledge and skills but he may be hostile to the person he is serving, may insult the person, remove him from the service room without necessity, or do other things exceeding the limits of elementary politeness.

The relationship between a customer and a person providing the service is referred to in § 36(1) of the Administrative Procedure Act, pursuant to which an administrative authority shall explain to a participant in a proceeding or to a person who considers submission of an application, at the request of the person concerned, the rights and duties of the participant in the administrative procedure, the term within which the administrative proceeding is presumably conducted, and the possibilities to expedite the administrative proceeding, as well as which applications, evidence and other documents must be submitted in the administrative proceeding, and which procedural acts must be performed by the participants in the proceedings.

Customary practice of good administration is a principle, arising from the Constitution, which is further specified by the Administrative Procedure Act. That is why the constitutional principles, including the customary practice of good administration, included in the Administrative Procedure Act, must be observed in all proceedings, even in the case of special procedures.

143 About the principle of good administration in European legal sphere see the Charter of Fundamental Rights of the European Union Art 41. – OJEC C 364, 18.12.2000, pp 0001-0022

144 Supreme Court Constitutional Review Chamber judgment of 17 Feb 2003, No 3-4-1-1-03, RT III 2003, 5, 48, § 16.

145 Supreme Court Administrative Law Chamber judgment of 4 Apr 2003, No 3-3-1-32-03, RT III 2003, 11, 111, § 13.

146 Supreme Court Administrative Law Chamber judgment of 8 Oct 2002, No 3-3-1-56-02, RT III 2002, 25, 283, § 9.

147 M. Bullinger. Das Recht auf eine gute Verwaltung nach der Grundrechtsharta der EU. – C.-E. Erbele(ed). **Festschrift für Winfried Brohm,** 2002, z. 25; in I. Pilving. Haldusmenetluse seaduse eesmärgid [Purposes of the Administrative Procedure Act]. – A. Aedmaa et al (footnote 161) p 39.

148 A. Aedmaa. Selgituskohustuse põhiseaduslik taust [Constitutional background of the duty to give explanations]. – A. Aedmaa et al. Haldusmenetluse käsiraamat [Manual of administrative procedure]. Tartu 2004, p 159.

XV BRINGING DISCIPLINARY PROCEEDINGS AGAINST JUDGES

1. General outline

During the reporting period, the Chancellor of Justice received 16 applications requesting that disciplinary proceedings be brought against a judge. In one case the Chancellor of Justice considered it necessary to initiate such proceedings against a judge. The Disciplinary Chamber under the Supreme Court reprimanded the judge.

The right to bring disciplinary proceedings against all judges was added to the competencies of the Chancellor of Justice by the Courts Act that entered into force on 29 July 2002.[149] Yet, since the enactment of the Courts Act the Chancellor of Justice has been of the opinion that the regulation of disciplinary proceedings as established in Chapter 11 of the Act contains a number of problems.

In the course of and as a result of disciplinary proceedings against a judge the fundamental rights of the persons participating in the proceedings may become interfered with. The proceedings may result in the reduction of the judge's salary or his or her removal from office. The mere the fact that a disciplinary proceeding has been brought against a judge negatively affects his or her reputation. Proceeding from the first sentence of Art 3 para 1 of the Constitution, the fundamental rights may be interfered with only in conformity with the law. That is why the Courts Act should define, with sufficient precision, the issues relating to the bringing and conduct of disciplinary proceedings, such as the rights and duties and the liability of the participants in the proceedings.

Disciplinary proceedings are punitive in nature, and, thus, proceeding from Art 14 of the Constitution, the Courts Act should provide procedural guarantees to persons subject to proceedings both upon commencement of disciplinary proceedings as well as during the hearing of a disciplinary matter in court. The Courts Act in general fulfils this requirement, albeit fragmentarily and in a declarative manner.

An essential imperfection of the presently valid regulation is the fact that proceeding from § 91(2) of the Courts Act a situation may arise where disciplinary proceedings against a judge of first instance are commenced by several different officials, without the duty of informing one another of the fact. Furthermore, under § 91(3) of the Courts Act every person who commences disciplinary proceedings may gather evidence and demand explanations.

A situation may become complex when the officials, who have the right to commence disciplinary proceedings, come to opposite conclusions on the basis of the same evidence and explanations. For the time being, the probability of such situations is diminished only thanks to an agreement between the Chancellor of Justice and the Chief Justice of the Supreme Court to the effect that, if the elements of a disciplinary offence become known, the explanations from a judge under supervisory control shall be obtained through the Chairman of respective court. This agreement guarantees that the Chairmen of courts are informed of the intended commencement of disciplinary proceedings and enables, if need be, to share the information with other subjects referred to in § 91(3) of Courts Act.

Preparation of legislation concerning the functioning of courts is within the competence of the Ministry of Justice. In 2002 and 2003, in repeated addresses to the Ministry, the Chancellor of Justice pointed out the drawbacks of the regulation of disciplinary proceedings and made several proposals for the amendment of the Courts Act. These issues have also been revealed in the report on the Chancellor of Justice's activities in 2002.

So far the Courts Act has been amended five times, yet the regulation of disciplinary proceedings of

149 RT I 2002, 64, 390; 2004, 56, 403.

judges has been in force, unamended, since the enactment of the Act. It needs to be examined why the proposals of the Chancellor of Justice have been ignored.

2. Disciplinary proceedings against a judge: substitution of one and the same pecuniary punishment twice

Case No 9-4/279

(1) The Chancellor of Justice was addressed by an applicant who complained that a judge of a County Court had twice substituted the pecuniary punishment imposed on him by imprisonment and that he had been forced to serve both substitutive sentences.

(2) After the receipt of the application the Chancellor of Justice addressed the police prefecture and the prison, under § 28 of the Chancellor of Justice Act, demanding the information necessary for verifying the allegations set out in the application. Subsequently, the Chancellor of Justice examined the pertinent court files. As a result of the referred procedural acts, the following was ascertained.

The judge accused of the commission of a disciplinary offence had, by judgment of 22 November 1999 and under § 203(1) of Criminal Code, imposed a fine of 50 daily rates (1800 EEK) on the applicant for the acquisition and storage of property knowingly obtained through criminal activities.

The applicant had not paid the fine and on 4 January 2001 the bailiff of the enforcement department of the County Court submitted a report to the court, requesting that the fine imposed on the applicant should be substituted by detention. By the ruling of 7 February 2001, the accused judge substituted the fine imposed on the applicant by a 16-days' detention. Although on 21 January 2001 the applicant had received a summons to appear before the court on 7 February 2001, he failed to obey the summons and the accused judge heard the request of the bailiff sitting alone, without the applicant being present.

The applicant served the substitutive punishment, imposed on him on 7 February 2001, from 3 May 2001 to 18 May 2001. The police prefecture informed the court of the fact that the applicant was apprehended and taken to the jail of the police prefecture, by fax and by a letter dated 4 May 2001.

The bailiff of the territorial jurisdiction of the County Court requested in a report of 11 July 2003 that the court should decide the issue of substituting the fine imposed on the applicant on 22 November 1999, because the latter had not responded to the bailiff's call-up notice and the applicant's property could not be subject to a claim.

On 9 September 2003, the applicant was delivered a summons to appear before the court on 17 September 2003, but he failed to obey the summons on the determined date.

On 1 December 2003, the accused judge issued a ruling for the arrest of the applicant. In the ruling the judge referred to Art 20 of the Constitution and found, on the basis of § 337[4] of Code of Criminal Procedure, that the applicant was to be declared a fugitive and arrested.

On 9 January 2004, the police apprehended the applicant and took him to prison. The North Police Prefecture informed the court of the arrest of the applicant by telephone and also by a letter of 12 January 2004. The prison informed the court of the arrival of the applicant in the department of preliminary detention by a letter of 13 January 2004.

Court session for hearing the issue of imposing a substitutive punishment on the applicant started at 9.45 on 22 January 2004, i.e. 15 days after the arrest of the applicant. The accused judge, the applicant, clerk of court session and prosecutor participated. The session ended at 10.00.

By the ruling of 22 January 2004, the accused judge substituted the pecuniary punishment, imposed on the applicant by a judgment of 22 November 1999, with a 16-days' detention. The time of commencement of the serving of the sentence was deemed to be the date when the applicant was arrested, that is 9 January 2004. The applicant was released from prison on 23 January 2004.

The Chancellor of Justice addressed the Chairman of the County Court, pointed out the facts which had become known during the proceedings and demanded, on the basis of § 91(3) of Courts Act, information concerning the case. The Chancellor of Justice wanted to know when the accused judge had been appointed judge and whether the judge had earlier committed disciplinary offences. In addition, the Chancellor of Justice asked the Chairman of the County Court to describe the personal characteristics of the accused judge, important for the judicial work, the attitude of the judge towards judicial work, and to evaluate the performance of the duties by the judge so far. The Chancellor of Justice also demanded information concerning the manner in which the court kept account of the enforcement of judgments and how the exchange of information with bailiffs was organised. Finally, the Chancellor of Justice asked the Chairman of the County Court to name the circumstances, known to him, which lead to the fact that the applicant was imposed two punishments for one and the same act, and to point out the reasons why the accused judge had issued the ruling of 1 December 2003 for having the applicant arrested.

In the same letter, on the basis of § 91(3) of the Courts Act, the Chancellor of Justice asked the Chairman of the court to take a written explanation from the accused judge about the circumstances that led to the applicant being imposed two substantive punishments for one and the same act, and about the reasons why the judge had issued the ruling of 1 December 2003 for having the applicant arrested. The Chancellor of Justice asked the Chairman of the County Court to deliver to the Office of the Chancellor of Justice the requested information and the written explanations of the accused judge, together with the pertinent court files of the County Court and a copy of the service record of the accused judge.

In his letter the Chairman of the County court did not submit any comments concerning the arrest warrant of 1 December 2003.

Among the possible reasons for the imposition of two substitutive punishments, the Chairman of the County Court pointed out the reform of bailiffs in the spring of 2001, in the course of which the information exchange between the courts and the bailiffs was disturbed. By the time the accused judge heard the request of the bailiff of the court's enforcement department for imposing a substitutive punishment on the applicant, the enforcement department of the County Court had already been liquidated. The list of cases under execution had been transferred to the Ministry of Justice for the distribution of cases between new bailiffs, who had not taken office by the time the substitutive punishment was imposed on the applicant. The Chairman of the County Court pointed out, though, that according to the bailiff the enforcement files always contained entries concerning each request submitted. Furthermore, the Chairman of the County Court referred to an analogous case when he himself received a request of a bailiff for the imposition of a substitutive punishment on a person, although the person had already served the substantive punishment.

The Chairman of the County Court also referred to the fact that the judges of the court had had a heavy workload for many years. This may be the reason why sometimes, with the aim of economising working time, the judges do not hurry to check the facts which seem to be self-evident. According to the Chairman of the County Court, cases like this could be avoided if the courts were granted access to the punishment register.

As regards the ruling of 1 December 2003 concerning the arrest of the applicant, the accused judge was of the opinion that what has been enacted with regard to the accused at trial is also applicable to convicted persons and that this was the established practice. The applicant did not appear before the court on 17 September 2003, although he had received a summons to that effect. Thus, on the

basis of analogy, the Constitution and the Code of Criminal Procedure, the accused judge issued an arrest warrant concerning the applicant, although § 73 refers to taking into custody as a preventive measure applicable with regard to a suspect, accused or accused at trial. The accused judge argued that, as based on § 337[4](3) of the Code of Criminal Procedure, a judge shall resolve the issues related to the deprivation of liberty of the convicted offender in the presence of the convicted offender, the court had no other possibility than to have the convicted person arrested and have compelled attendance applied in regard to him, because the convicted person himself had failed to attend the court session.

In the written explanation, the accused judge claimed being unaware of it being already the second occasion to issue the ruling on substituting the fine on 22 January 2004. As the judge had been sitting alone when hearing the issue of imposing a substitutive punishment, doing it in conformity with the Code valid at that time, the judge had no personal connection to the case and did not remember the fact of having already substituted the fine with a detention.

The accused judge explained the failure to examine the initial criminal case file at the session of 22 January 2004 with the fact that neither the applicant nor the prosecutor had requested this, and, furthermore, that this was not directly required by the procedure for review of issues which arise in enforcement, established in § 337[4] of the Code of Criminal Procedure. The accused judge was of the opinion that it would be unthinkable, considering the big workload of the courts, that every time an issue related to enforcement is reviewed the initial criminal file is examined. The accused judge argued that even when the data was entered in the computer the fact that the court had already resolved the issue of imposing a substitutive punishment on the applicant did not become evident.

As the applicant did not let the court know in any manner that a substitutive punishment had already been imposed on him, the accused judge argues that the applicant did not use his rights and obligations in good faith. In the written explanations the accused judge also pointed out having had no ground to think that this was a case of self-incrimination, because the question of the applicant's guilt was not at issue.

(3) The main question in this case was whether the conduct of the accused judge was sufficient to bring disciplinary charges.

(4.1) Pursuant to Art 20 para 1 of the Constitution, everyone has the right to liberty and security of person. Art 20 para 2 of the Constitution states that no one shall be deprived of his or her liberty, except in the cases and pursuant to procedure provided by law, and specifies the cases allowing for the deprivation of liberty. Art 20 of the Constitution protects the liberty and security of persons and establishes a prohibition for the state to deprive a person of liberty by an arbitrary arrest or detention. The liberty of person requires special protection, because this is a prerequisite for the exercise of the majority of fundamental rights, and by deprivation of a person's liberty his or her other fundamental rights are being restricted at the same time. That is why Art 20 para 2 provides for a high level of protection of the liberty of person and permits only the legislator to establish the grounds and procedure for the deprivation of liberty in the cases that have been exhaustively listed in Art 20 para 2 clauses 1-6 of the Constitution.

Pursuant to the first sentence of Art 3 para 1 of the Constitution, the state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. The requirement of legality of state authority is binding on everyone exercising the powers of the state. Pursuant to Art 146 of the Constitution, the courts shall administer justice in accordance with the Constitution and the laws. Consequently, the court may deprive a person of his or her liberty only on the grounds established by law; and pertinent legal grounds must be referred to in the judgment by which the person is being deprived of his or her liberty. The courts have no right to independently establish the grounds for the deprivation of liberty, and each deprivation of liberty without a legal ground is unconstitutional.

The Supreme Court has underlined the same: "[I]n accordance with Art 20 para 2 of the Constitution a person may be deprived of his or her liberty solely in the cases and pursuant to procedure provided by law. When applying detention as a preventive measure in criminal proceedings, the "cases provided by law" means the grounds for detention enumerated in § 73(1) of the Code of Criminal Procedure."[150]

In the ruling of 1 December 2003, ordering the taking into custody of the applicant, the accused judge proceeded from Art 20 of the Constitution, para 2 clauses 1 and 2 of which allow to deprive a person of his or her liberty to execute a conviction or detention ordered by a court and, in the case of non-compliance with a court order, to ensure the fulfilment of a duty provided by law. In the ruling the accused judge did not refer to any grounds for the deprivation of liberty established by an Act.

In the written explanations submitted to the Chancellor of Justice, the accused judge explained having proceeded from the Constitution and the Code of Criminal Procedure, using the analogy of law, when issuing the ruling of 1 December 2003 and ordering for the detention of the applicant. Proceeding from § 73(1) of the Code of Criminal Procedure, taking into custody may be applied as a preventive measure only with regard to a suspect, accused or accused at trial in order to prevent the absconding of the criminal proceeding, the commission of a new criminal offence, or in order to ensure the enforcement of a court judgment. It was only by § 429 of Division 4 "Settlement of Issues Arising in Execution of Court Decisions" of Chapter 14 of the Code of Criminal Procedure, which entered into force on 1 July 2004, that a legal ground for taking into custody of the convicted persons was established. At the time of taking the preventive measure, the Code of Criminal Procedure that was in force at the moment, did not provide for a legal ground for taking into custody of a convicted person. The use of analogy in criminal proceedings in depriving a person of liberty violates the requirement of legality of the exercise of the state authority and Art 20 para 2 of the Constitution.

In the light of the foregoing, it can be concluded that by the ruling of 1 December 2003 the accused judge ordered for the taking into custody of the applicant without a legal ground. As the courts must observe the law and the Constitution in their activities, and they can order taking into custody only when there is a ground established by law, the accused judge, when ordering the detention of the applicant for 15 days, violated the requirement of legality of exercising the powers of the state, established in the first sentence of Art 3 para 1 of the Constitution, and the conditions for the restriction of liberty established in § 20(2) of the Constitution. The Chancellor of Justice was of the opinion that the accused judge had performed the judicial duties unsatisfactorily and had committed a disciplinary offence for the purposes of § 87(2) of Courts Act.

(4.2) Art 23 para 3 of the Constitution stipulates that no one shall be tried or punished again for an act of which he or she has been finally convicted or acquitted pursuant to law. Also according to § 2(3) of the Penal Code, no one shall be punished more than once for the same offence. As the accused judge had, by the ruling of 7 February 2001, substituted the fine, imposed on the applicant by the judgment of 22 November 1999, with a detention, and the applicant had served the sentence, the ruling of the accused judge of 22 January 2004, by which the same fine was again substituted by imprisonment, is in conflict with Art 23 para 3 of the Constitution and § 2(3) of the Penal Code.

Pursuant to Art 14 of the Constitution, the guarantee of rights and freedoms is the duty of the courts; and pursuant to clause 2 of the Code of Ethics of Estonian Judges a judge has the obligation to perform his or her duties with care. Deprivation of liberty by a criminal punishment is one of the most intensive measures interfering with fundamental rights, and this is why a judge imposing an imprisonment must be extremely careful in order to guarantee the person's fundamental rights and liberties. The duty to guarantee fundamental rights and freedoms, established in Art 14 of the Constitution, requires that a judge should be active and each failure to act should be justified. Thus, when a judge is reviewing a request which may involve deprivation of a person's liberty, he or she must be extremely careful in ascertaining all the facts relevant to the just adjudication of the matter.

[150] Supreme Court Criminal Law Chamber judgment of 12 Apr 2001, No 3-1-1-42-01, RT I 2001, 13, 136.

Although the accused judge explained not having been aware that a substitutive punishment had already been imposed on the applicant, the written explanations of the judge show that the judge had not deemed it necessary to check the facts and examine the original criminal case file. The criminal case file also contained the ruling of 7 February 2001, by which the accused judge had for the first time substituted the fine, imposed on the applicant on 22 November 1999, with a detention. If the judge had examined the file it would have become known that the fine imposed on the applicant had already been substituted by an imprisonment.

The imposition of two substitutive punishments on the applicant was caused by the fact that the accused judge did not consider it necessary to check the circumstances underlying the request of the bailiff of the territorial jurisdiction of the County Court, irrespective of not having been aware of these. Thus, the accused judge fulfilled the duties of a judge negligently.

The Chancellor of Justice argued that the explanations provided in the letter of the Chairman of the County Court and in the written explanations of the accused judge do not justify the negligence of the accused judge. There is no direct causal link between the reform of bailiffs in the spring of 2001 and the imposition of two substitutive punishments. The disturbance in the exchange of information between the courts and the bailiffs, caused by the reform of the bailiffs system, may have caused the mistake of the bailiff, sending a request to the County Court and asking that a substitutive punishment be imposed on the applicant, but the only fact that can be deemed a cause for the mistake made by the accused judge is that the judge did not check the facts related to the bailiff's request. The bailiffs' reform did not involve such substantive changes in the work of judges that could have relevance in the matter. The Chancellor of Justice pointed out that the request to impose a substitutive punishment on the applicant could have also been submitted to the County Court as a result of the bailiff's mistake caused by some other circumstances (e.g. disordered records management). The awareness of the difficulties created by the bailiffs' reform and of the earlier cases when bailiffs had sent requests for the imposition of substitutive punishments twice should have made the judge more critical and more attentive towards such requests of bailiffs.

Neither can the heavy workload serve as an excuse for such a relevant mistake as the imposition of two substitutive punishments for one and the same act, and for the unjustified deprivation of liberty as a result of this.

What also requires attention is the fact that by the day of the court session of 22 January 2004 the applicant had already spent 15 days in detention and had thus, in fact, already served the substitutive punishment, without having had a possibility to submit objections to the substitution of the punishment.

On the basis of the above, it can be concluded that the accused judge negligently failed to check the facts underlying the request of the bailiff, and by the ruling of 22 January 2004 the judge again substituted the fine imposed on the applicant with a detention, which is in conflict with Art 23 para 3 of the Constitution. The Chancellor of Justice argued that the accused judge had performed the duties of a judge unsatisfactorily and had committed a disciplinary offence for the purposes of § 87(2) of the Courts Act.

(5) Pursuant to § 91(2) of the Courts Act, the Chancellor of Justice has the right to commence disciplinary proceedings against all judges. On the basis of the ascertained facts and on the basis of § 91(1) of the Courts Act the Chancellor of Justice commenced a disciplinary proceeding against the accused judge and forwarded the disciplinary charges to the Disciplinary Chamber under the Supreme Court.

The Disciplinary Chamber convicted the accused judge of the commission of a disciplinary offence and reprimanded the judge.

The Chancellor of Justice also proposed to the Minister of Justice to conduct a special supervisory control over the activities of the bailiff of the territorial jurisdiction of the County Court and to ascertain the reasons why the bailiff requested in his report of 11 July 2003 that the Court should hear the issue of substituting the fine, imposed on the applicant on 22 November 1999, with a detention, although the referred fine had already been substituted with a detention on 7 February 2001 and the imposed substitutive punishment had been served.

According to the reply of the Minister of Justice, the liberal professions and legal registers division of the Ministry had demanded explanations concerning the facts set out in the letter of the Chancellor of Justice from the bailiff of the territorial jurisdiction of the County Court. The bailiff had opened a file concerning the applicant on 4 April 2001; according to the bailiff, the Court had not forwarded the information concerning the substitution of the applicant's punishment and the information was not included in the enforcement file referred to the bailiff by the County Court. The Minister of Justice did not consider it necessary to commence a disciplinary proceeding against the bailiff, because the bailiff had not been aware that the punishment had been substituted in 2001, and subsequent to the opening of the applicant's file the latter himself had not informed the bailiff of the earlier substitution of the punishment.

Furthermore, the Chancellor of Justice addressed the Public Prosecutor's Office with a proposal to examine whether there were any elements of a disciplinary offence in the activities of the prosecutor who had attended the court session of 22 January 2004. The Chancellor of Justice also asked for the opinion of the Public Prosecutor's Office on the possibilities that the legislation provided for subsequent amendment or annulment of the ruling of 22 January 2004, and what opportunities were open to the applicant to obtain compensation from the state for the unfounded deprivation of liberty.

The Chief Public Prosecutor did not consider it necessary to commence a disciplinary proceeding against the prosecutor, because at the court session of 22 January 2004 there was no information at the disposal of the prosecutor that the applicant had already served a substitutive punishment, and the prosecutor had no possibilities to obtain such information. The Public Prosecutor's Office also prepared a petition for review in order to annul the ruling of the accused judge of 22 January 2004. The Supreme Court satisfied the petition for review and annulled the referred ruling. Thus, the applicant gained an opportunity to obtain compensation under § 1(1)7) of the Compensation for Damage Caused by the State to Person by Unjust Deprivation of Liberty Act.[151]

[151] RT I 1997, 48, 775; 2004, 46, 329.

XVI ACTIVITIES OF CHANCELLOR OF JUSTICE IN THE APPLICATION OF THE PRINCIPLES OF EQUALITY AND EQUAL TREATMENT

Division 4 of Chapter 4 of the Chancellor of Justice Act regulates the activities of the Chancellor of Justice in promoting the principles of equality and equal treatment. These provisions were added to the Act by the Chancellor of Justice Act Amendment Act, which entered into force on 1 January 2004.

Pursuant to § 35[16] of the Chancellor of Justice Act, the Chancellor of Justice shall perform the following duties for the application of the principles of equality and equal treatment:

1) analyse the effect of the implementation of legislation on the condition of the members of society;
2) inform the Riigikogu, Government of the Republic, government agencies, local government agencies and bodies, other interested persons and the public of the application of the principles of equality and equal treatment;
3) make proposals for the amendment of legislation to the Riigikogu, Government of the Republic, government agencies, local government agencies and bodies, and employers;
4) promote, in the interests of ensuring compliance with the principles of equality and equal treatment, the development of national and international cooperation between individuals, legal persons and agencies;
5) promote, in cooperation with other persons, the principles of equality and equal treatment.

The first sentence of Art 12 para 1 of the Constitution stipulates that everyone is equal before the law. Pursuant to the second sentence, no one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds. As, in addition to the prohibition of discrimination on the referred grounds, Art 12 para 1 of the Constitution establishes the general fundamental right to equality, the scope of protection of which covers all spheres of life, the violation of the general principle of equal treatment is very often one of the additional arguments set out in individual complaints. The issue may rise within constitutional review, ombudsman's procedure, as well as within conciliation procedure on the basis of various facts. That is why it is impossible to present statistics about how many applications referred to a violation of the principle of equal treatment.

Complaints alleging a violation of the prohibition of discrimination, referred to in the second sentence of Art 12 para 1 of the Constitution, are less frequent. In 2004, for example, this issue emerged in connection with the guarantee of education to children with special needs, and in connection with the imposition of the night time fatigue-duty on regular members of the Defence Forces, when asking for the mothers' consent in the cases provided by law. The Chancellor also reviewed the constitutionality of the provisions of the Disciplinary Measures in the Defence Forces Act[152], pursuant to which certain disciplinary punishments shall not be imposed on female members of the Defence Forces.

Sections 21(3) and 23(3) of the Disciplinary Measures in the Defence Forces Act stipulate that disciplinary detention and disciplinary arrest shall not be imposed on female members of the Defence Forces. To assess the constitutionality of the differential treatment the Chancellor of Justice addressed the Minister of Defence, to find out the considerations underlying the differential treatment in the imposition of disciplinary punishments on male and female members of the Defence Forces. The Minister concurred that the differentiation was unfounded and informed the Chancellor of Justice of the Disciplinary Measures in the Defence Forces Act Amendment Act, which will be proposed by the Government of the Republic and which will eliminate the differential treatment concerning disciplinary measures based on gender.

[152] RT I 1997, 95/96, 1575; 1999, 31, 425.

In 2004 the Chancellor of Justice only once initiated a conciliation procedure in a discrimination dispute between private law persons. The application related to differential treatment of persons on the basis of nationality. As already described in the general outline of the Report, the conciliation procedure is voluntary, and, as the respondent refused to participate in the conciliation procedure, the procedure was discontinued and no opinion on whether the discrimination took place was formed.

In 2004, the Office of the Chancellor of Justice laid more emphasis on explaining the new competencies of the Chancellor of Justice and on raising the competence of the Office's staff concerning the issues of equal treatment.

For example, in March 2004 there was a round table of non-profit associations in the Office of the Chancellor of Justice. The representatives of associations of women, disabled people, sexual minorities and national minorities were invited to participate. The purpose of the round table was to introduce the competencies of the Chancellor of Justice, especially in the light of the new competence to resolve discrimination disputes, which was added in 2002, and to exchange information concerning the actual problems that had arisen in everyday life. The Chancellor of Justice has constantly considered it vital to collaborate with non-profit organisations, because people first and foremost address the non-profit organisations that deal with the pertinent issues. Therefore, it is essential that these associations are capable of advising the people, including about the fact to whom they should address their complaints. It is inevitable that a large number of issues will never become a subject of proceedings, and, therefore, such round table discussions are essential for the exchange of information concerning concrete issues which have occurred in practice. As a result of the information gained, the Chancellor of Justice can monitor pertinent spheres with greater attention or conduct a proceeding for assessing the constitutionality of certain legislation on his own initiative.

In 2004, with the aim of enhancing the capability of the Office of the Chancellor of Justice to solve discrimination disputes, the Chancellor of Justice participated in a cooperation project with the Equality Commission for Northern Ireland. In this framework, a training course in European Union law on equality and non-discrimination was conducted, the employees of the Chancellor of Justice's office familiarised themselves with the activities of the institutions engaged in the equality issues in Northern Ireland and the Republic of Ireland, and visited relevant European Union institutions and international non-profit associations that are active in the field.

At the end of 2004, the Office of the Chancellor of Justice joined the European Network of Specialised Equality Bodies, set up within the European Union action program to combat discrimination. The purpose of the network is to develop and facilitate information exchange between equality bodies, to support cooperation between relevant institutions of Member States and the European Union, and to harmonise the practices of interpretation and application of European Union law in Member States.

XVII STATISTICS OF THE PROCEEDINGS

1. The activities of the Chancellor of Justice in resolving applications of persons

In 2004, the Chancellor of Justice received 2352 applications from natural and legal persons, i.e. 19.6% more than in 2003. Natural persons submitted 1717 applications and legal persons 635 applications. 753 persons came to the reception of the Chancellor of Justice. Most applications were received from Harju County (713 applications), many applications also came from Tartu County (296), Pärnu County (114) and Ida-Viru County (105). Least applications came from Hiiu County (one application). 16 applications were sent from eight foreign countries and 257 by e-mail.

Figure 1. Applications from and reception of natural persons in 1994-2004

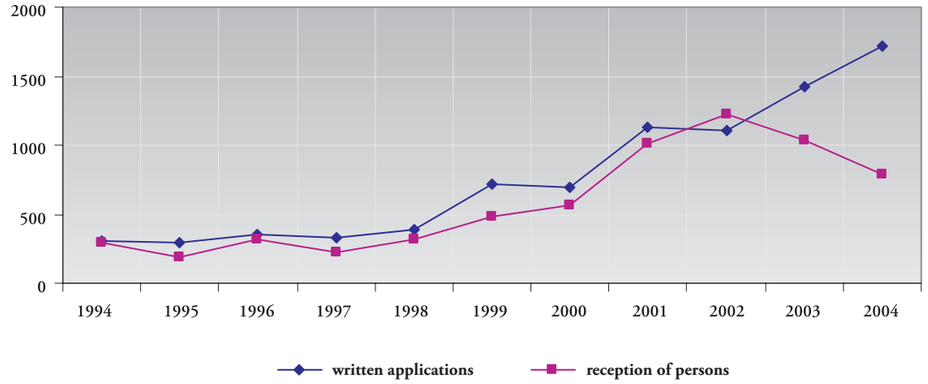


Figure 2. Applications received by the Chancellor of Justice in 1994-2004

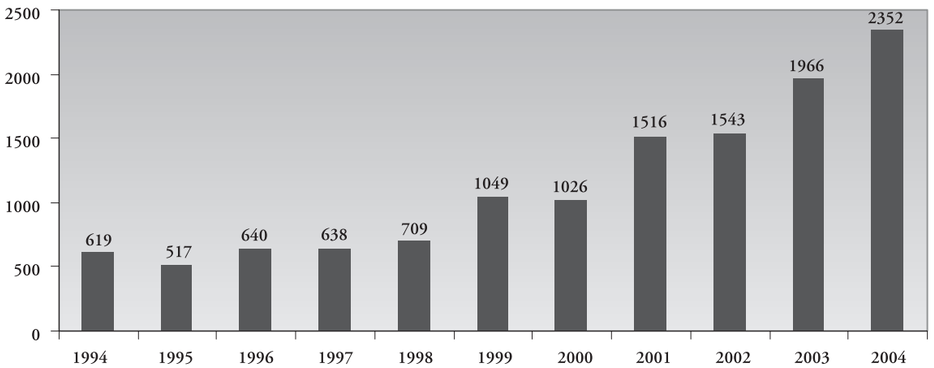


Figure 3. Applications from natural persons in 2004, by adminsitrative units

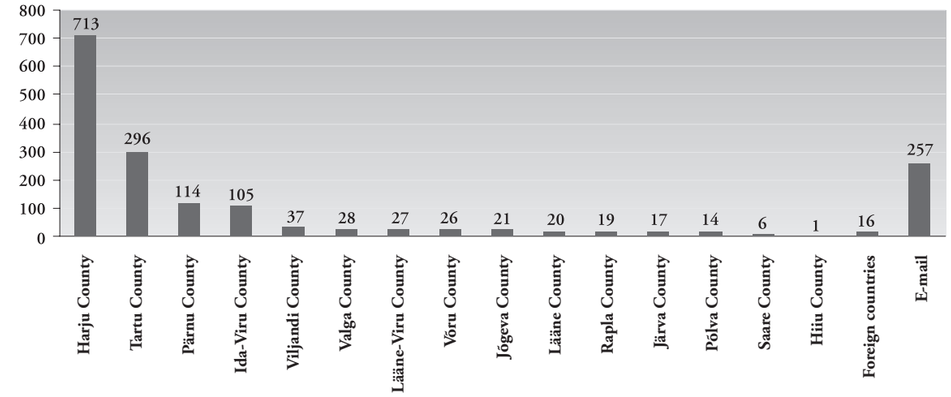
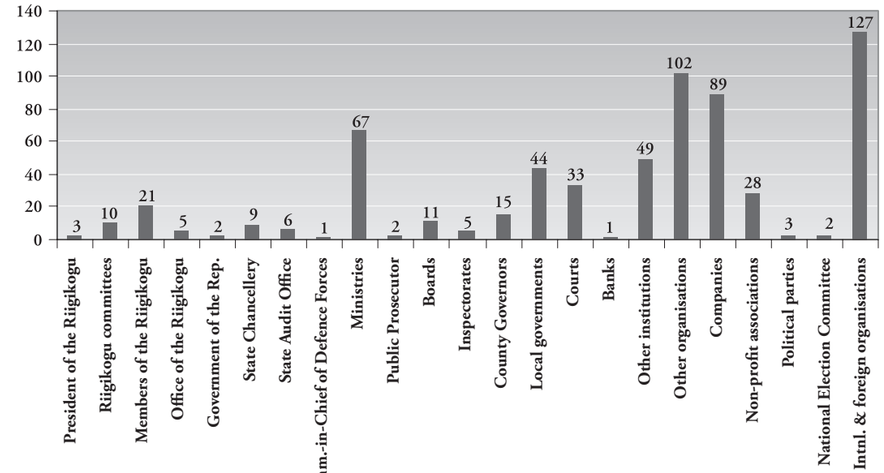


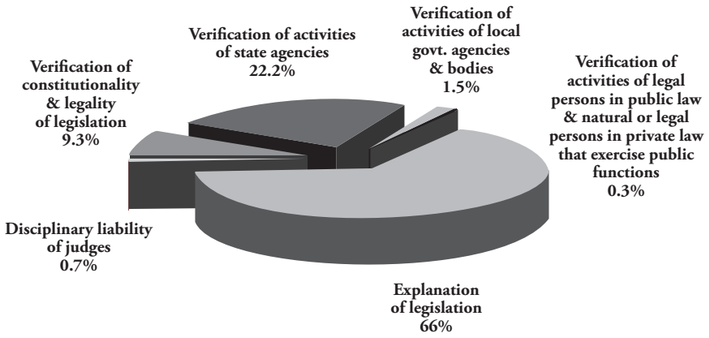
Figure 4. Applications from legal persons in 2004



Written applications received by the Chancellor of Justice in 2004 can be divided into six main categories:

- applications with requests to verify whether a legislative act was in conformity with the Constitution and the laws (218 applications, i.e. 9.3% of the total);
- applications with requests to verify the legality of the activities of state agencies (523 applications, i.e. 22.2%);
- applications with requests to verify the legality of the activities of local government agencies or bodies (35 applications, i.e. 1.5%);
- applications with requests to verify the legality of the activities of legal persons in public law or natural persons and legal persons in private law who exercise public functions (7 applications, i.e. 0.3%);
- applications with requests for explanation of laws or other legislation, or for consultation in solving legal problems (1553 application, i.e. 66%);
- applications with requests to initiate disciplinary proceedings against judges (16 applications, i.e. 0.7%).

Figure 5. Applications received by the Chancellor of Justice in 2004

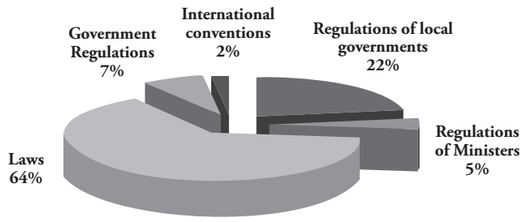


2. Verification of the conformity of legislation with the Constitution and the laws

Verification of the conformity of legislation with the Constitution and the laws was requested in 218 applications (9.8% of the total number of applications), including the following specific requests:

- verification of the conformity of international conventions with the Constitution (4 applications);
- verification of the constitutionality of laws (140 applications; incl. the Traffic Act (10), the Health Insurance Act (7), the Land Reform Act (7), the Penal Code (5), the Code of Misdemeanour Procedure (5), the Excess Stock Reserve Fee Act (5), the State Pension Insurance Act (5);
- verification of the constitutionality and legality of Government regulations (15 applications);
- verification of the constitutionality and legality of the regulations of Ministers (10 applications);
- verification of the constitutionality and legality of local government regulations (49 applications).

Figure 6. Applications by types of legislation



3. Verification of the legality of activities of state agencies

Verification of the conformity of the activities of state agencies with the laws was requested in 523 applications, i.e. 22.2% of the total number of applications. Proceedings were initiated with regard to 253 out of 523 applications. Violations were found with regard to 69 applications, which constitutes 27.3% of the total number of applications that were accepted for proceedings. In respect to ministries, most applications were against the Ministry of the Environment and the Ministry of Justice, in respect to boards against the Citizenship and Migration Board and the local pension boards of the Social Insurance Board. Among the executive agencies under the area of government of ministries, the largest number of applications were against prison authorities and police authorities, and among county governors against Harju and Ida-Viru county governors.

Thus, out of the 523 applications for the verification of the legality of activities of state agencies:

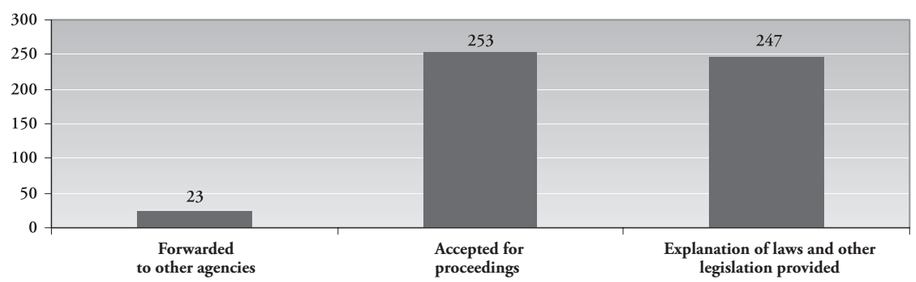
- in the case of 247 applications, an explanatory reply with a clarification of laws and other legislation was provided;
- 253 applications were accepted for proceedings, in the case of 69 of them violations were found;
- 23 applications were forwarded to other state agencies for consideration.

The above information is explained in more detail in the following table:

State agency	Applications received	Forwarded to other agencies	Explanatory reply provided	Accepted for proceedings	Findings of violations
Area of government of the Ministry of Justice	**348**	**8**	**213**	**127**	**38**
Ministry of Justice	9	-	-	9	-
Prosecutor's Office	7	3	3	1	-
Prison administrations	331	5	210	116	37
Viljandi County Court administration	1	-	-	1	1
Area of government of the Ministry of Internal Affairs	**95**	**7**	**30**	**58**	**17**
Ministry of Internal Affairs	5	-	-	5	1
Citizenship and Migration Board	15	-	2	13	1
Expulsion Centre of the Citizenship and Migration Board	7	-	-	7	-
Police Board	3	-	-	3	-
Security Police Board	2	-	1	1	1
Police authorities	54	7	25	22	14
Border Guard Board	6	-	2	4	-
South-East District of the Border Guard Board	1	-	-	1	-
North District of the Boarder Guard Board	1	-	-	1	-
Pärnu County Rescue Service	1	-	-	1	-
Area of government of the Ministry of Social Affairs	**21**	**2**	**2**	**17**	**6**
Ministry of Social Affairs	1	1	-	-	-
Social Insurance Board	1	-	1	-	-
Tartu Pension Board	7	1	1	5	3
Pärnu Pension Board	2	-	-	2	1
Tallinn Pension Board	5	-	-	5	1
Viru County Pension Board	1	-	-	1	1
Employment Board	1	-	-	1	-
Võru County Labour Inspectorate	1	-	-	1	-
Estonian Health Insurance Fund	2	-	-	2	-
Area of government of the Ministry of the Environment	**20**	**1**	**1**	**18**	**1**
Ministry of the Environment	12	-	-	12	-
Land Board	6	-	1	5	1
Environmental Inspectorate	2	1	-	1	-
Area of government of the Ministry of Finance	**11**	**2**	**1**	**8**	**1**
Ministry of Finance	3	-	-	3	1
Tax and Customs Board	6	2	1	3	-
South Tax Centre	1	-	-	1	-
Financial Supervision Authority	1	-	-	1	-

Area of government of the Ministry of Education and Research	**6**	**-**	**-**	**6**	**3**
Language Inspectorate	1	-	-	1	1
Ida-Viru County Supervision Service of the Language Inspectorate	1	-	-	1	-
Examination and Qualification Centre of the Ministry of Education and Research	1	-	-	1	-
University of Tartu	1	-	-	1	-
Võru Vocational Education Centre	1	-	-	1	1
Tallinn Technical Upper Secondary School	1	-	-	1	1
Area of government of the Ministry of Economic Affairs and Communications	**6**	**1**	**-**	**5**	**1**
Communications Board	2	-	-	2	-
Patents Board	1	-	-	1	-
Technical Supervision Inspectorate	1	1	-	-	-
Estonian National Vehicle Registration Centre	2	-	-	2	1
Area of government of the Ministry of Defence	**3**	**-**	**-**	**3**	**-**
Ministry of Defence	1	-	-	1	-
General Headquarters of the Defence Forces	1	-	-	1	-
Centre for Peace Operations	1	-	-	1	-
Area of government of the Ministry of Foreign Affairs	**2**	**-**	**-**	**2**	**1**
Estonian Embassy to London	1	-	-	1	-
Pskov Office of the St Petersburg Chief Consulate	1	-	-	1	1
Area of government of the Ministry of Culture	**1**	**1**	**-**	**-**	**-**
State Russian Drama Theatre	1	1	-	-	-
Other	**10**	**1**	**-**	**9**	**1**
State Chancellery	1	1	-	-	-
Harju County Governor	3	-	-	3	-
Ida-Viru County Governor	3	-	-	3	1
Saare County Governor	1	-	-	1	-
Valga County Governor	1	-	-	1	-
Võru County Governor	1	-	-	1	-
TOTAL:	**523**	**23**	**247**	**253**	**69**

Figure 7. Applications against state agencies



4. Verification of the legality of the activities of local government agencies or bodies

Verification of the legality of the activities of local government agencies and bodies was requested in 35 applications, i.e. 1.5% of the total number of applications. Out of 35 applications that were accepted for proceedings, violations were found in 14 cases, i.e. 40% of the applications that were accepted for proceedings.

5. Verification of the legality of the activities of legal persons in public law or natural persons and legal persons in private law who exercise public functions

Verification of the legality of the activities of legal persons in public law or natural persons and legal persons in private law who exercise public functions was requested in seven applications. No findings of violations were made upon verification.

6. Initiating of disciplinary proceedings with regard to judges

Initiating of disciplinary proceedings against judges was requested in 16 applications. On the basis of one application, proceedings were initiated and the Supreme Court disciplinary panel imposed a disciplinary sanction in respect to the judge.

7. Own-initiative proceedings of the Chancellor of Justice

The Chancellor of Justice also has the right to initiate proceedings on his own initiative if he considers it necessary for the protection of the rights of an individual or for securing constitutional order.

In 2004, the Chancellor of Justice issued opinions about draft legislation, analysed various items on the agenda of the Government, carried out verification visits, exercised own-initiative supervision based on his function of constitutional review and the ombudsman function, and prepared analyses concerning more problematic areas of law.

In order to pay attention to the concerns of people who themselves cannot sufficiently stand up for their rights or whose liberty has been restricted, the Chancellor of Justice and his advisors organised 11 verification visits to various agencies and institutions.

Materials of the sessions of the Government were examined in respect to 94 agenda items in 2004. Proposals were made on 48 occasions.

Opinion about draft legislation was expressed on 25 occasions. 21 analyses and studies of different fields were made based on own initiative.

As a result of own-initiative supervision with regard to the constitutional review and ombudsman's functions, 13 main cases emerged where the Chancellor of Justice took steps for the protection of the rights of persons or for securing constitutional order.

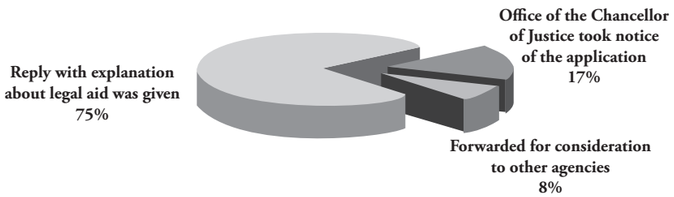
In addition to the above, the developments in law making in general were observed, based on the priority areas of the Chancellor's activities, various roundtables and seminars were organised. One of the major projects was the conference on the topic "THE POLICE.THE STATE.THE LAW", held in spring 2004.

8. Explaining of legislation

Explanation of laws or other legislation and consultation for solving legal problems was sought in 1553 applications, which constituted 66% of the total number of applications, among them:

- with regard to 1167 applications, explanatory replies about laws and other legislation were provided;
- 124 applications were forwarded for consideration to other agencies;
- 262 applications were taken by the Office of the Chancellor of Justice for implementation and consideration.

Figure 8. Replies to applications seeking explanation of legislation



9. Reception of persons

In 2004, 753 persons came to the reception to the Office of the Chancellor of Justice and to receptions organised in counties. Besides the Office of the Chancellor of Justice, reception of persons was also organised in county offices in Tartu, Jõhvi, Narva, Pärnu and Sillamäe. In addition, advisers to the Chancellor of Justice also received persons during their visits to county governments and city or rural municipality governments, about which persons were informed in advance via the mass media.

Most issues raised during the receptions were concerned with the areas of administrative law (mostly ownership reform issues), constitutional law and civil law.

Mostly, citizens who came to the receptions wished to have explanations of legislation and legal advice. There were issues that were accepted for proceedings, as well as issues that were beyond the competence of the Chancellor of Justice for various reasons (e.g. disputes between persons in private law that can not be resolved by way of conciliation proceedings).

If during the reception a need to draw up a written application arose, then assistance with this was provided by the advisor who was holding the reception.

10. Conclusion

The number of applications received by the Chancellor of Justice in 2004, i.e. 2352 applications, was considerably higher than in the previous years (1966 applications in 2003, 1543 in 2002, 1516 in 2001).

In comparison with the previous years, there were more applications requesting the verification of the activities of state agencies – 523 applications (437 in 2003, 310 in 2002). The biggest increase was in the number of applications submitted by prisoners – 331 applications (243 in 2003, 76 in 2002). The number of applications had also increased with regard to explanation of legislation and advice about legal problems – 1553 (1316 in 2003, 1010 in 2002).

A significant proportion of the applications received by the Chancellor of Justice were concerned with requests for explanation of legislation and legal problems – 1553 applications, i.e. 66% of the total number of applications. These applications, however, do not fall directly within the competence of the Chancellor of Justice. A large number of applications dealt with the following issues: court judgements – 117, ownership reform – 73, pensions – 62, education – 59, judicial proceedings – 58, social welfare – 37.

The number of applications with requests for verification of the constitutionality and legality of legislation (218 applications) was more or less the same as in the previous years (202 in 2003, 220 in 2002, 227 in 2001).

The number of persons who came to the reception of the Chancellor of Justice (753) had decreased as compared to the previous years (1032 in 2003, 1228 in 2002).

PART 3.

ACTIVITIES OF THE OFFICE OF THE CHANCELLOR OF JUSTICE

I ORGANISATION

The Office of the Chancellor of Justice is a bureau serving the Chancellor of Justice as a constitutional institution. The head of the Office is the Chancellor of Justice. The expenses of the Office are covered from the state budget.

Since 1 January 2004, the Office of the Chancellor of Justice is housed in new premises in the building at Kohtu Street 8 in Tallinn. The building was designed by Tallinn city architect Carl Ludwig Engel, and its construction was completed in 1814. Initially, the building belonged to the owner of Mõdriku and Rägavere manor Reinhold August von Kaulbars. Since 1850 the building changed owners several times. Since the 1920s, the building at Kohtu Street 8 has housed various ministries, for the longest period the Ministry of Finance.

The building is in the Empire style. On the pediment of the façade of the building, there is a motto in Latin: "With good wishes and blessing of the ancestors". Remarkable are the stucco décor and the back façade with a porch with six Ionian columns at the Pikk Jalg Street. An artistic marble fireplace, stylish stucco décor and Empire-style doors have preserved in the building.

The new premises of the Chancellor of Justice provide enough space for a staff of 60 persons, which covers the need of the Office of the Chancellor of Justice currently and also in the longer-term perspective. New premises are in conformity with the occupational health and safety requirements and improve the opportunities for the reception of persons addressing the Chancellor of Justice.

1. Symbols

In 2004, the Chancellor of Justice introduced new symbols. The new logo of the Chancellor of Justice and his Office – a lion with a torch that watches over and sheds light on the constitution and the legal system – was designed by a recognised expert Priit Herodes. The symbols are used on the reports of the Chancellor of Justice, letterheads, invitations and other representational material. For the first time, the new symbols were used at the scientific conference "THE LAW.THE POLICE. THE STATE" that was organised by the Chancellor of Justice.

ÕIGUSKANTSLER

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2. Structure and staff

The structure of the Office comprises the Chancellor of Justice, two deputy-advisers of the Chancellor, director of the Office and four departments.

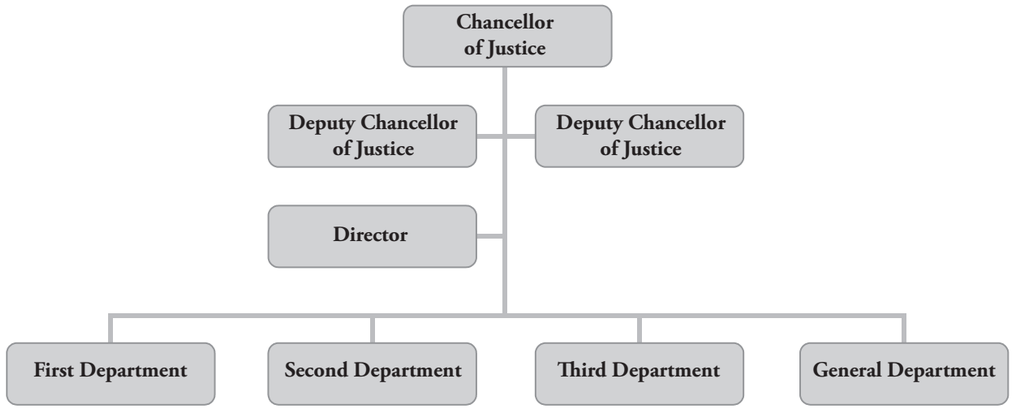
The **General Department** is dealing with supporting functions as reception of persons, international and public relations, personnel matters, budget and accounting, document management and archive, library and other administration matters.

In addition to the General Department, there are also three departments for dealing with the main areas of activity whose competencies are divided on the basis of the areas of government of the ministries.

The area of activity of the **First Department** includes all matters that fall under the area of government of the Ministry of Social Affairs, the Ministry of Education and Research, the Ministry of Culture, and their subordinate agencies and other units.

The area of activity of the **Second Department** includes all matters that fall under the area of government of the Ministry of Economic Affairs and Communications, the Ministry of Agriculture, the Ministry of Finance, the Ministry of the Environment, and their subordinate agencies and other units; as well as issues within the competence of the Bank of Estonia, the Financial Supervision Authority and the State Audit Office

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



On 31 December 2004, there were 48 staff positions in the Office of the Chancellor of Justice, 41 of which were covered. The main functions were performed by 28 and supporting functions by 13 officials.

3. The budget

The operating expenses of the Office of the Chancellor of Justice are covered from the state budget, in accordance with the State Budget Act.[153]

With the State Budget Act 2004, the Office of the Chancellor of Justice received 18.66 million EEK for operating expenses; 1.07 million of this came from the funds for foreign aid.

In accordance with the Education Act, 346 000 EEK were used for the repayment of study loans of the employees. The funds for this were allocated additionally from the budget of the Ministry of Finance.

The information in the budget implementation report is based on the principle of cash accounting, unlike the profit and loss statement which is based on the accrual principle.

[153] RT I 1999, 55, 584; 2004, 22, 148.

Table 1. Balance of the Office on 31 December 2004

BALANCE		
EEK		
	31.12.2004	**31.12.2003**
Assets		
Operating assets		
Other receivables and advance payments	196 271	20 773
Total operating assets	*196 271*	*20 773*
Fixed assets		
Tangible fixed assets	207 461	284 842
Intangible fixed assets	334 539	
Total fixed assets	*542 000*	*284 842*
Total assets	**738 271**	**305 575**
Liabilities		
Short-term liabilities		
Liabilities to suppliers	55 780	78 856
Liabilities to employees	586 747	316 236
Other liabilities	479	4 422
Targeted financing		83 599
Total short-term liabilities	***643 006***	***483 113***
Accrued revenue to the state budget	**95 265**	**-177 538**
Total liabilities	**738 271**	**305 575**

3.1. Profit and loss statement

In 2004, the operating income of the Office that was received as support was total 366 000 EEK, and the operating expenses were 17.96 million EEK. Financial expenses include the interest expenses related to the operating lease on equipment, and loss from currency fluctuations. The statement does not include a comparison with 2003, because a transfer to new accounting principles was made in 2004, and, therefore, the results of the two years are not comparable.

Table 2. The profit and loss statement of the Office on 31 December 2004

PROFIT AND LOSS STATEMENT		
in EEK		**01.01.2004 -**
		31.12.2004
Operating income		
	Support received	365 973
Total operating income		**365 973**
Operating expenses		
	Labour expenditure	-11 508 900
	Other operating expenses	-5 385 299
	Expenses for taxes and fees	-778 616
	Capital asset consumption	-209 580
	incl. operating expenses on account of targeted financing	*-365 973*
	Support provided	-19 147
Total operating expenses		**-17 901 543**
Operating income		**-17 535 569**
Financial income and expenditure		
	Interest costs and other financial expenditure	-54 699
	Total financial income and expenditure	**-54 699**
Income before settling of accounts with the state budget		**-17 590 268**
Net financing from the state budget		**17 590 268**

3.2. Operating expenses

The largest expense item of the Office was the salary of employees and the compulsory taxes paid on it. The total of these expenses constituted 65% of all the operating expenses in 2004.

The salaries of public servants consist of the main salary, additional remuneration based on the Public Service Act for length of service, academic degree, language proficiency and work with state secrets, as well as additional remuneration for good performance, and the benefits and support paid in accordance with the salary guidelines of the Office.

Among the economic costs, there are office expenses, expenses for the lease of the premises, transport costs, IT maintenance and development costs, inventory costs and other expenses related to the management and representation of the Office.

Since 1 January 2004, the Chancellor of Justice hires the premises at Kohtu Street 8 from the State Real Estate Company for a term of 50 years. Additional premises for the reception of persons are hired from the Tartu Circuit Court and the State Chancellery in Jõhvi. The total sum of the lease with VAT per year is over 2.1 million EEK and makes up approximately 36% of the annual economic expenses.

The costs for information and communication technology in 2004 were 1.36 million EEK, of which 186 000 EEK were covered on account of the unused balance for 2003. The largest expenses were related to the operating lease of computer hardware and software, IT maintenance and development, and purchasing of the licences for a new document management system.

In 2004, 316 000 EEK were used for domestic trips and assignments abroad, and 198 000 EEK for training expenses. The annual training needs and foreign trips are determined in the training and foreign relations plan that are approved by the beginning of each financial year.

In the period from January until May 2004, in the framework of the Phare Twinning Light programme, a five-month cooperation project with the United Kingdom was carried out on the topic “Strengthening the administrative capacity of the Chancellor of Justice and the Office of the Chancellor of Justice” (EE03/IB/TWP/JHA/03). The total budget of the project was 1.79 million EEK, of which co-financing by the Estonian side was 0.72 million EEK. From the budgeted amount, 1.32 EEK were actually used, incl. 0.43 million EEK of co-financing.

Foreign assistance was received from the German Foundation for International Legal Cooperation (*Deutsche Stiftung für internationale rechtliche Zusammenarbeit e.V.*) for organising the Chancellor of Justice scientific conference “THE POLICE.THE LAW.THE STATE”.

In connection with the membership of the International Ombudsman Institute, the Office paid a membership fee of 9000 EEK.

Table 3. Statement of the discharge of income and expenses of the Office on 31 December 2004

STATEMENT OF THE DISCHARGE OF INCOME AND EXPENSES			
in EEK			
		Budget	**Discharge**
EXPENSES			
Operating expenses		***16 857 000***	***16 722 376***
50	*Labour expenditure*	***10 870 000***	***10 870 000***
500	Salaries	7 961 000	7 960 960
505	Fringe benefits	102 000	102 147
506	Taxes and social insurance payments	2 807 000	2 806 893
Economic expenses		***5 987 000***	***5 852 376***
5500	Administrative costs	1 248 000	1 247 749
5503	Expenses of business trips	320 000	315 918
5504	Training expenses	210 000	198 505
5511	Management expenses of real estate, buildings and premises	2 128 000	2 127 926
5513	Vehicle maintenance costs	603 000	603 383
5514	Information and communication technology expenses	1 290 000	1 171 247
5515	Inventory costs	188 000	187 648
Earmarked allocations for current expenses		***15 000***	***9 014***
4500	Membership fees of international organisations	15 000	9 014
Use of the unused balance of 2003 in 2004		***404 413***	***404 413***
50	Labour expenditure	11 000	10 810
5500	Administrative costs	57 000	57 509
1555	Procurement of information and communication technology	186 094	186 094
156	Procurement of intangible fixed assets	150 000	150 000
Foreign aid and co-financing for foreign aid		***2 022 104***	***674 256***
55	Foreign aid PHARE project	1 067 500	
55	Foreign aid PHRE project co-financing	724 000	430 554
55	Foreign aid to cover the operating expenses of the IRZ project (on account of the unused balance from 2003)	230 604	243 702
Repayment of study loans			***346 240***
505	Repayment of the principal sum of the loan		190 475
506	Income and social tax on fringe benefits		155 765
Total expenses		**19 298 517**	**18 156 298**

II DEVELOPMENT ACTIVITIES

1. Development plan for 2003-2007

The development plan of the Chancellor of Justice for 2003-2007 sets out the mission, vision and objectives of the Chancellor of Justice, as well as the fundamental values and principles of the activities of the Office, and the directions of the development of the activities of the Chancellor of Justice and his Office until the end of 2007.

The main objective of the development activities of the Office is to become the best public sector organisation by 2007, and become a model for other agencies.

The mission of the Chancellor of Justice is defined as follows:
- The Chancellor of Justice is an independent guardian of the basic principles of the Constitution and the protector of fundamental rights of individuals.
- The activities of the Chancellor of Justice are aimed at giving everyone a sense of security that the Estonian state authorities comply with the duties arising from the principles of human dignity, freedom, equality, democracy and the rule of law, and social justice.
- The activities of the Chancellor of Justice contribute to the achievement of legitimacy of the legal order and to an effective resolution of challenges facing the legislator, and will guarantee to the public an impartial assessment of the situation of basic constitutional principles and fundamental rights in the country.

The vision of the Chancellor of Justice until 2007 is defined as follows:
- The goal of the Chancellor of Justice as the bearer and promoter of the idea of the state based on social justice is to contribute, by his activities, to social security, trust between the state and the citizens and to guarantee justice in a democratic state.
- The goal of the Chancellor of Justice as the bearer and promoter of the idea of the rule of law is to guarantee that implementers of public authority and providers of public services would effectively comply with the principles of legal certainty, legality of public administration and good governance.
- The goal of the Chancellor of Justice as the bearer and promoter of the idea of democracy is to ensure that the democratic mediation of the power would be fair and understandable, as well as verifiable.

The development plan of the Chancellor of Justice for 2003-2007 is based on the mission and vision of the Chancellor of Justice, and it is the basis for the achievement of the activities and objectives of the Chancellor. The development plan for the activities of the Chancellor of Justice sets out:
1) the objectives of the activities;
2) the manner of achieving the objectives;
3) the areas of initiative;
4) organisational development.

2. Fundamental values and the code of ethics

Defining of the fundamental values was a natural part of preparing the mission, vision and action plan for 2003-2007. In shaping and defining the fundamental values, the public service code of ethics played an essential role, and the fundamental values of the Office are based to a large extent on the principles of the code of ethics. The need to define the fundamental values arose from the wish to unite the officials of the Office into an integrated team, to determine the objectives that are sought, and to ascertain the principles and values that would serve as a basis for operation and decision-making.

The fundamental values of the Office were defined as follows:
- professionalism – high level of professional skills and knowledge, regular self-improvement and research activities, responsible and dutiful attitude to work, and consciousness of one's profession;

- dedication – high appreciation for one's work, loyalty, sense of mission and initiative, and ethical behaviour that is appropriate for the profession both in and outside the office;
- pluralism – favourable attitude to the plurality of opinions, innovativeness and constant search for and debates to reach a common position.

The fundamental values play an essential role in shaping the behaviour of the officials, providing them with the criteria to decide which choices are appropriate, which actions are proper and what would be deplorable. The fundamental values are also important in hiring new staff, assessing the existing staff and making decisions.

As a necessary continuation of the establishment of the fundamental values, a code of ethics of the Office was completed at the end of 2004 as a result of joint debates. The code of ethics is meant to supplement the public service code of ethics and the Anti-Corruption Act. The incentive for drawing up the code of ethics came from the desire to define, in addition to the fundamental values, the rules of daily behaviour of the officials and to develop awareness of them among the whole staff. The code of ethics was approved by all the officials at a meeting.

The code of ethics of the Office contains the following principles:
- An official behaves in a respectable manner and is aware that shortcomings in professional activities, or improper behaviour, may also endanger the credibility of the Chancellor of Justice and his Office.
- An official performs his or her duties in the best possible manner, honestly, unselfishly, precisely and carefully.
- An official behaves in all situations as a respectable and law-abiding citizen who has high ethical and moral standards, which serve as a model for others.
- In communication with colleagues, cooperation partners and citizens, an official is always helpful, reliable, polite and friendly.
- An official avoids conflicts of interest and will not allow family relations or social and other contacts to affect his or her professional activities.
- An official refuses from services, gifts, money and other bonuses that could affect his or her independence in performing the official duties or that could be perceived as such.
- An official does his or her work with dedication and as effectively as possible.
- An official takes care of his or her proper appearance.

Through the fundamental values and the code of ethics, the Chancellor of Justice wishes to raise awareness among his staff, as well as among the general public, about the principles and standards observed by the Office.

3. Personnel development

In order to better organise the personnel development and other personnel work, the guidelines for the assessment of employees of the Office, procedures for personnel recruitment and selection were approved in 2004. The functions of the Office were also mapped and the job description of all the officials was approved.

The cooperation of the Office with the University of Tartu Law Institute and the Faculty of Law continued. Plans were made to organise an information day about traineeship opportunities for the students of the Law Faculty in the Chancellor's Office. In 2004, the Chancellor of Justice also met with the public administration students of the Tallinn Technical University and explained to them the activities of the Chancellor of Justice and traineeship opportunities in his Office. In 2004, 9 students did their traineeship at the Chancellor's Office, 7 of them in the main fields of activity and 2 in performing the support functions.

3.1. In-service training

In-service training of the Chancellor's staff is based on the annual training priorities and the training plan. In 2004, the priority areas of training were law, personnel work, public relations, public sector accounting, managerial assistance, and the Russian language. A total of 0.5 million EEK were used for the training of the staff of the Office from the state budget and financing from the PHARE programme.

In terms of law training, there was continued close cooperation with the Estonian Law Centre Foundation in the framework of the training of judges programme, as well as cooperation with the Estonian Lawyers' Association. With the support from the PHARE project "Strengthening the administrative capacity of the Chancellor of Justice and the Office of the Chancellor of Justice" (EE03/IB/TWP/JHA/03), 17 officials of the Office were trained in the field of settlement of discrimination disputes under the EU law. With the support from the German Foundation for International Legal Cooperation, the staff of the Office of the Chancellor and of the Ministry of Justice were trained in the issues of prison law.

In 2004, 45 officials of the Office participated in training on 167 occasions. Largest attendance was at the law training. An equal number of open and specially ordered training courses were used; the volume of in-house training was smaller. Several officials of the Office have themselves participated in law training courses and seminars as trainers.

Table 1. Attendance at training courses and the number of participants in 2004

Public servants group	Volume in hours	No. of participants	No. of attendances
Higher officials	1912	30	113
Senior officials	791	15	54
Junior officials	0	0	0
Support staff	0	0	0
Non-permanent staff	0	0	0
Total	**2703**	**45**	**167**

Table 2. Attendance at training courses and training volume in 2004, by types of training

Type of training	Volume in hours	No. of attendances
Open training	1276	96
Group training (specially ordered)	1256	53
In-house training	171	18
Total	**2703**	**167**

Table 3. Attendance at training courses and training volume in 2004, by fields of training

Field of training	Volume in hours	No. of attendances
European Union law	1085	54
Law	784	54
Language training	390	10
Administrative work, archiving, secretarial work	56	8
Accounting	35	4
Computer training and IT	35	3
Public relations	28	4
Management	28	2
Competence programmes for officials	21	3
Personnel work	21	2
Other training related to the main activities of the Office	171	18
Other	49	5
Total	**2703**	**167**

3.2. Personnel statistics

On 31 December 2004, there were total 48 staff positions in the Office, of which 41 were covered. Among the covered staff positions, 27 were higher officials and 14 senior officials. In 2004, 15 new officials were hired and 9 officials left the Office.

The gender composition of the staff was 24 women and 17 men. The average age of the staff was 33 years.

Figure 1. Composition of the staff at the Office of the Chancellor of Justice by gender, 31.12.2004

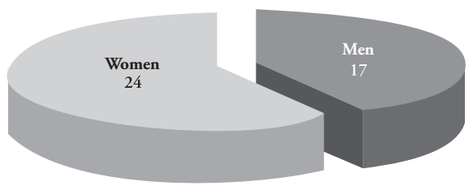
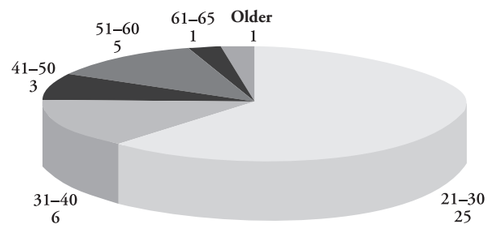
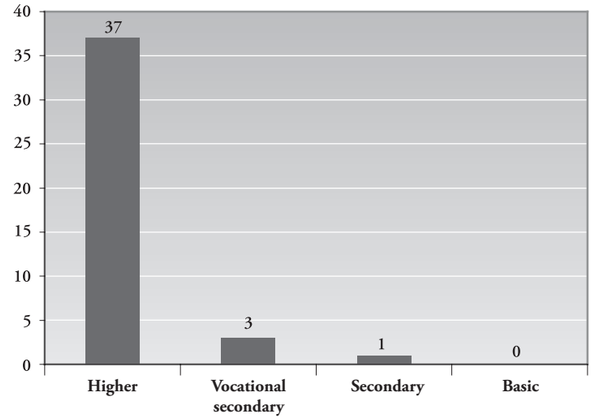


Figure 2. Composition of the staff at the Office of the Chancellor of Justice by age, 31.12.2004



Among the officials, 37 had higher education and 8 of them were engaged in Master's or Doctoral studies. 4 officials had secondary or vocational secondary education, 2 of them were engaged in Bachelor's studies.

Figure 3. Education of the staff of the Office of the Chancellor of Justice, 31.12.2004



4. Updating the information systems of the Office

In 2004, focus was on the development of the document management system and digital archiving, and the creation of a modern IT environment for the staff of the Office in order to achieve the information policy objectives.

At the end of 2003, the Office concluded an agreement with the Ministry of Justice for the merger of the information systems and purchasing of the service from the Ministry of Justice. This made the Ministry of Justice an important partner for the Chancellor's Office in the development of the IT environment.

4.1. Document management and digital archiving

In 2004, the Office started developing a new document management system in cooperation with the Ministry of Justice. The new system is based on the *SharePoint* program that is used in the Ministry of Justice, and certain interfaces were added to it according to the nature and needs of the document management in the Chancellor's Office. The new document management system was launched in the Office on 1 January 2005. The system creates opportunities for the transfer to digital office management and archiving.

The incentive for the development of the document management system was to improve the work of the Chancellor's Office, to speed up processes, provide a better overview for the managers about the activities in their area of administration, create opportunities for collecting statistical information about the activities of the Chancellor, and to enable access for all the officials to the document management system and the digital archive. The updating of the document management system was based on the principles of simplicity and user-friendliness. With the launching of the new system, the administrative work and procedures in the Office will change and different bases will be used for the Office's main and subsidiary functions in the processing of documents. The basis for the management of the subsidiary function will remain largely unchanged, while the management of the main function will be case-based, which is also the practice today in the courts and prosecutors' offices.

As a result of the launching of the new document management system:

- the document management information system allows up to 100 simultaneous users and it has a central data storage;
- document related management can be done digitally;
- all the versions of documents are preserved and can be accessed retroactively;

- the user interface is convenient;
- the system allows reporting and statistics;
- upon the registration of a document, it is possible to determine a suitable profile for it, depending on its character;
- the rights of access to documents can be determined in a flexible manner. It is possible to determine access to documents by user groups as well as individual users;
- documents can be searched according to all their data parameters;
- a web-based interface for the documents register was created to disclose register entries on the homepage of the Chancellor of Justice;
- the system is compatible with the most common tools of group work and also allows group work by itself.

4.2. Homepage of the Chancellor of Justice

Regular updating and organisation of the homepage of the Chancellor of Justice continued. More attention was given to raising the speed of publication and quality of substance of the regularly updated news texts under the column "Event of the week" on the homepage of the Chancellor of Justice.

III PUBLIC RELATIONS

1. Relations with other institutions

In 2004, the Chancellor of Justice's Office developed cooperation with other constitutional institutions, primarily with the Riigikogu, the Government of the Republic and the Ministries. Also, cooperation with other partners and supervisory agencies, local governments, various target groups and organisations and with the representatives of the third sector continued. The Chancellor of Justice can succeed in his work first and foremost if his opinions and suggestions are implemented in cooperation with the institutions under supervision and taking into account the authority of the Chancellor of Justice.

1.1. Relations with the Riigikogu, Government of the Republic and State Audit Office

In the context of relations with the Riigikogu, the Chancellor of Justice made two reports and one proposal in 2004. The Chancellor of Justice also responded to the interpellations and written questions of the members of the Riigikogu.

In the report presented to the parliament on 3 February 2004, the Chancellor of Justice pointed out the necessity to guarantee to needy persons the state assistance on the level required by the Constitution. The Chancellor of Justice argued that the monthly subsistence benefit of 500 EEK did not guarantee to the person the constitutional right to state assistance in the case of need. The report was discussed both in the Constitutional Committee and the Social Affairs Committee of the Riigikogu, as well as in the Ministries and the Government of the Republic. As a result, the subsistence benefit was increased to 750 EEK as of 2005.

On 20 September 2004, the Chancellor of Justice addressed the Riigikogu with the overview of his activities the year before. He pointed out the topical issues inhibiting the democratic governance and the protection of fundamental rights, unacceptable tendencies in law-drafting, and several spheres which had been regulated unconstitutionally. The main topics he dealt with were the changes in the electoral system, regulation of financing the political parties, subsistence benefits, membership of the members of the Riigikogu in the supervisory boards of companies, the issues related to the Treaty Establishing a Constitution for Europe, etc.

On 26 November, the Chancellor of Justice made a proposal to the Riigikogu to bring the Political Parties Act and the Local Government Council Election Act into conformity with the Constitution. The Riigikogu rejected the proposal and on 21 December the Chancellor of Justice submitted an application to the Supreme Court, requesting that the provisions prohibiting election coalitions be declared invalid.

In 2004, the Chancellor of Justice and his advisers had frequent meetings with the major cooperation partners in the Riigikogu – with the Constitutional, Legal Affairs and Social Affairs Committees.

The Chancellor of Justice participated in the sessions of the Government of the Republic and presented his opinions concerning draft legislation; he sent numerous opinions and recommendations as well as memorandums and proposals to Ministers; the majority of the problems pointed out were solved as a result of joint efforts.

In 2004, the Chancellor of Justice also continued to co-operate with the State Audit Office. The Chancellor of Justice prepared his opinion on the membership of the members of the Riigikogu in the supervisory boards of companies, arguing that this practice was both unconstitutional and illegal. After the problem was pointed out by the Chancellor of Justice and the Auditor General in the report addressed to the Riigikogu, the latter started considering the matter.

The Chancellor of Justice also prepared an opinion on the Draft of Amendments to the State Audit Office Act, which recommended that the supervisory competence of the State Audit Office be extended to include the use of public funds by local governments. The Chancellor of Justice found the amendment to be in conformity with the Constitution.

1.2. Relations with local governments

In 2004, the Chancellor of Justice was successful in raising the awareness of local governments concerning fundamental rights. This is proved by the following examples, which earned the interest of the general public.

After the exchange of power in Tallinn in October 2004, the new ruling coalition of Tallinn consented to the opinion of the Chancellor of Justice that different fares on city public transportation depending on the registered residence of the passengers were unconstitutional. In January 2005, the differential treatment of persons was discontinued.

Thanks to cooperation between Tallinn city authorities and the Chancellor of Justice, also the organisation of parking was improved, as the city of Tallinn took into account the observations of the Chancellor of Justice concerning the collection of fines for delay on parking charges and the organisation of activities of AS Falck.

As a result of persistent demands of the Chancellor of Justice and overcoming the reluctance of Narva city authorities, an end was put to the practice of collecting illegal parking charges from the drivers crossing the Estonian-Russian border. The state authorities that had so far failed to act now found a solution to the border crossing arrangements through a law amendment, in liaison with Parliament, the Government and Narva city authorities.

The Chancellor of Justice, in cooperation with local governments and the institutions subordinated to these, prepared and conducted visits to them. Thus, visits were made to the following institutions: Narva-Jõesuu children's home and nursing home, Tilsi children's home, Taheva children's sanatorium, Tallinn Boarding School No 1, children's and nursing homes of Ida-Viru county, jail of the East Police Prefecture, Pärnu Kungla Street Basic School, social welfare and health care institutions of South Estonia, Türi Coping School, social welfare and health care institutions and heating power stations of Ida-Viru County, etc.

In cooperation with local governments, the Chancellor of Justice organised meetings to inform the public of his functions and duties and to discuss the problems of the Estonian legal order. On 30 March, in cooperation with the Viljandi County Government, the Chancellor of Justice's Office organised an information day for the rural municipalities and city secretaries of Viljandi and Valga counties, where the issues of social welfare and education were under discussion, as well as the new competencies imposed on the Chancellor of Justice by law as of 2004.

The Chancellor of Justice had meetings in schools with pupils and teachers and delivered lectures. On 25 May 2004, the Chancellor of Justice visited Kehtna and Valtu Basic Schools in Rapla County, where he delivered a lecture on the structure and functioning of the Estonian state and on the importance of the Constitution in the Estonian legal order; he also explained the role and duties of the Chancellor of Justice, as well as the fundamental rights arising from the Constitution, in particular those related to the rights of the child. These meetings also addressed the issues of school violence, compulsory school attendance and the rights and obligations of teachers.

1.3. Relations with other authorities and the third sector

In 2004, similarly to the previous years, the Chancellor of Justice attached great importance to relations with civil society.

In liaison with the citizen's associations, associations of local governments, the Ministry of Social Affairs and the Ministry of Education and Research, the Chancellor of Justice called a round table meeting on 16 March 2004 to discuss the status of school health. The representatives of the following associations were invited to participate: Association of Student Self-governments, Estonian Union of Teachers, Estonian Association of School Directors, Estonian Union for Child Welfare, Estonian Society of Family Physicians, Estonian Society of Paediatricians, Union of Estonian Nurses, Union of Estonian Towns, Estonian Union of Local Government Associations, Social Affairs Committee of the Riigikogu, as well as the representatives of Ministries. The round table discussions focused on the possibilities to bring the legislation regulating health in schools into conformity with the valid law and requirements of modern health care administration. On the basis of the materials of the round table and their analysis, the Chancellor of Justice addressed a memorandum containing several proposals on health care administration in schools to Marko Pomerants, the Minister of Social Affairs. As a result of the Chancellor of Justice's proceedings of the matter, the Ministry of Social Affairs has now started to deal with the issues very thoroughly.

One of the priorities of the Chancellor of Justice has been the protection of the rights of children, and in this sphere the Chancellor of Justice has been cooperating with the third sector. The issues of a safe school environment and school violence were widely discussed in society and were constantly in the focus of the media. The fact that a caring and safe school environment has become a value, and the general awareness of school violence as a problem has grown, is also manifested in the fact that in January 2004 the Riigikogu organised a debate on the current situation of children and the protection of their rights.

Public discussion in the media and in society about the illegal restrictions on movement, imposed on pupils in schools, was also launched with the assistance of the Chancellor of Justice. In October 2004, the Chancellor of Justice required that the Ministry of Education and Research should eliminate the unconstitutional restrictions on the freedom of pupils' movement from the internal rules of schools.

On 19 November 2004, the Chancellor of Justice made a presentation at the youth forum "101 children to Toompea", organised in cooperation between the Association of Student Self-governments and the Estonian Union for Child Welfare, the topic of which was "Young people in Estonia and freedom of speech". Before the children's parliament, the Chancellor of Justice gave an overview of his activities in 2004, focused primarily on the rights of the child in the spheres of health protection and education, and he also dealt with the freedom of speech issues. The Chancellor of Justice initiated a discussion on whether corporal punishment of children should be prohibited.

On the initiative of and in cooperation with the Estonian-Swedish Mental Health and Suicidology Institute, a Chancellor of Justice's round table was held on 8 October 2004, to which representatives of pertinent Ministries and agencies as well as the opinion leaders active in the spheres related to society's mental health and organisation of state life had been invited. At the round table, the participants pointed out the perceived risks of the Estonian nation: short lifespan due to stress-induced deaths, dangerous and aggressive ways of stress-relief, increase of the occurrence of mental disorders and inclination to suicide. The aim of the participants of the round table was to point out to the responsible Ministries, the Government of the Republic and the Riigikogu the constitutional obligations of the state for the protection of mental health.

Late in 2004, the Chancellor of Justice and the Public Understanding Foundation agreed to discuss the topics of the Foundation's health forum, planned to be held in January 2005, and the presentation of the Chancellor of Justice on this subject.

To raise the quality and efficiency of the performance of the legal duties of the Chancellor of Justice and to enhance the accessibility of law information the Chancellor of Justice's Office and the National Library of Estonia concluded a cooperation agreement, indicating the following:

- development of information resources and coordination of relevant activities;
- exchange of information in which the other party has an interest;
- involving the other party in the projects in which it has an interest.

The Office of Chancellor of Justice is also involved in the development of a collection of law publications of the National Library of Estonia; in the development of licensed electronic databases on law; and the Office will make proposals for better development of the collections.

In 2004, the employees the Chancellor of Justice's Office continued the tradition of charity donations at the end of year. This time a stereo system was purchased with the funds donated, and it was given to the children with special needs at the Tallinn Boarding School No 1.

2. Media relations

2.1. General principles of public relations

In 2004, the Chancellor of Justice continued the policy of transparent, citizen-friendly and clear relations with the media and the public.

The media relations of the Chancellor of Justice are based on the principles of simplicity and availability, and the relations with journalists should be as bureaucracy-free as possible; as far as possible, first-hand interviews and explanations are given and access to information should be as easy as possible. The journalists get answers to their questions and requests for information as quickly as the Chancellor of Justice's procedure and competencies permit. The public documents, statements and opinions of the Chancellor of Justice are all easily accessible to the journalists.

Besides the principle of openness in relations with the media, in 2004 much more emphasis was laid on professionalism, on the precision and legal quality of the Chancellor of Justice's message. In 2004, in the context of media relations and choice of media channels, the Chancellor of Justice set out to achieve a conscious balance between the need for constant dissemination, vigour and efficiency of information, on the one hand, and, public relations appropriate to a respectable and dignified constitutional institution, on the other.

The objective of open and simple, yet quality oriented relations with the public and the media has been to guarantee that people are better informed of the constitutional requirements and values in Estonian society, of fundamental rights and freedoms of persons, of the activities of the Chancellor of Justice and of the possibilities available for having a recourse to the Chancellor of Justice for the protection of one's rights.

Under the Chancellor of Justice Act, the Chancellor of Justice has the right, if necessary, to make his requirements public through the media, to achieve the efficiency of his work and compliance with his proposals.

Activities addressed to the public, the awareness of the public about the activities and principles of the Chancellor of Justice, and public pressure to ensure law-abiding behaviour in society are essential prerequisites for the efficiency of the work of the Chancellor of Justice. The Chancellor of Justice can only be successful if his opinions are reckoned with. This, in turn, is possible only when the media and the public trust him. Thus, the Chancellor of Justice is successful if he has – through good public relations – gained a high level of credibility and become a figure whose opinion counts.

In 2004, the communication strategy and guidelines for emergency communication of the Office were approved, as well as the public relations plan for 2004, which was generally fulfilled in practice.

2.2. Statistical overview

During the reporting year, the Chancellor sent 41 press releases to information agencies and the media concerning the activities of and issues addressed by the Chancellor of Justice, and he also organised a press briefing.

In addition to more frequent press releases, the Office of the Chancellor of Justice started to prepare memos on specific topics to the journalists, with the aim of ensuring better understanding of the activities of the Chancellor of Justice and enhanced comprehensibility of legal analyses.

The national media monitoring that the Office commissioned from the Estonian Telegraph Agency yielded 1092 references on search words "õiguskantsler (Chancellor of Justice) Allar Jõks" for 2004 (the year before the figure had been 938). The monitoring covers all genres of journalism from news to detailed articles, and such media as news agencies, online-channels, bulletins; daily, weekly, county and city papers, journals, main television news programmes and radio broadcasters. More than one thousand references a year is a significant amount, which demonstrates, on the one hand, the increasing interest as well as a need of both the media and the public in the activities and the message of the Chancellor of Justice, and, on the other hand, the streamlined development and reasoned character of the media relations of the Chancellor of Justice.

During the year, the press published 60 thorough and informative pieces of writing on the topics related to the Chancellor of Justice, including articles written by the Chancellor of Justice himself, longer interviews with him and feature stories and portraits, as well as longer articles written by journalists on the basis of topics suggested and materials supplied by the Chancellor of Justice. Among them, there were five opinion stories and articles by Allar Jõks: in the daily *Eesti Päevaleht* about the freedom of speech of regular members of the Defence Forces and other public servants; in the daily *SL Õhtuleht* about Tallinn city public transportation fares and subsistence benefits; about the rights of the child in the spring issue of gazette *Märka last* (Notice the child) of the Estonian Union for Child Welfare; about the legal rights of disabled persons in the December issue of the journal *Sinuga* (With You) of the Estonian Board of Disabled People; in addition one article by Mihkel Allik, adviser to the Chancellor of Justice, about the police law in the *Politseileht* periodical of the Estonian police; plus three exclusive interviews of the Chancellor of Justice and a longer portrait story in the daily *Postimees*. The Chancellor of Justice, Deputy Chancellor of Justice-Adviser Aare Reenumägi, adviser in the Ida-Viru County Igor Aljoshin and senior adviser Jüri Liventaal gave the total of 19 oral and written interviews to different newspapers nationwide.

The Chancellor of Justice was quoted more often than before – during the year, the press published a number of his quotes and statements. The topics dealt with by the Chancellor of Justice were addressed in several editorials of several newspapers.

In 2004, the Chancellor of Justice was also broadcast often than previously by both Estonian and Russian language television and radio channels. As many as 28 radio interviews of the Chancellor of Justice, and radio programmes on his topics, were broadcast, including a lengthy interview in the live programme of Vikerraadio "Päevasüda", a one-hour live programme "Argipäev" of Vikerraadio, and a one-hour talk-show in "Nädala tegija" programme of Radio Kuku. The Chancellor of Justice gave 51 television interviews, including 3 long studio interviews in programmes "Aeg luubis" and "Aktuaalne kaamera" of Estonian TV and in programme "Koosolek" of TV3; programme "Parlament" of ETV and "Hoogu juurde" of Kanal-2 broadcast longer episodes presenting the institution of Chancellor of Justice.

The Chancellor of Justice attached more importance than previously to speaking about his activities in county and local papers. The editor's offices of local papers were informed of the visits of the Chancellor of Justice to local governments, and the journalists were enabled to write about the visits. Longer articles about the activities of the Chancellor of Justice were published in the local newspapers of Ida-Viru County, Narva and Sillamäe towns, Viru, Pärnu, Viljandi, Järva and Saaremaa Counties, in the papers of South Estonia and Põlva County, etc.

In 2004, contacts with the Russian-language press became closer, especially with the TV company Pervyi Baltiiskii Kanal and with such periodicals as Molodjozh Estonii, Delovyie Vedomosti, Vesti Dnja, MK Estonia, Infopress, etc., and with the Russian-language periodicals of Ida-Viru County. A chapter on the institution of the Chancellor of Justice was published in "Kodaniku käsiraamat" (Citizen's handbook), issued by the Integration Foundation in 2004.

The Office of the Chancellor of Justice continued its cooperation with the University of Tartu law journal *Juridica*. In 2004, a special issue (7/2004) of the journal was published, featuring the materials of the conference "The Police. The Law. The State", organised by the Chancellor of Justice to discuss the issues of police law and law enforcement law; the journal contained the following lengthy law articles written by the advisers to the Chancellor of Justice: "The police as a guarantor of internal peace" by Katri Jaanimägi and "The definition of public meeting in the light of the freedom of speech" by Berit Aaviksoo.

Issue 5/2004 of *Juridica* contained an article by the adviser to the Chancellor of Justice Ave Henberg "Labour law and the Constitution", and a study of Madis Ernits, the Deputy Chancellor of Justice-Adviser, entitled "Delivery in the light of the fundamental rights".

Among the authors of "Handbook of Administrative Procedure", published in 2004, was also the adviser to the Chancellor of Justice Nele Parrest, who wrote several chapters on administrative procedure.

In 2004, the Chancellor of Justice also developed media relations on the European Union level. The October issue of the English-language periodical of European ombudsmen "European Ombudsmen Newsletter" published the Estonian Chancellor of Justice's article entitled "The role of ombudsman in united Europe". Furthermore, the Chancellor of Justice contributed to "Ombudsman Daily News", a virtual newspaper of ombudsmen, enabling the members of ombudsmen's network to obtain information about the activities of ombudsmen and analogous institutions within the European Union and outside.

2.3. The effects of public relations

The carefully considered strategy and tactics of the Chancellor of Justice's public relations have intensified good relations with the media. The good reputation of the Chancellor of Justice has been preserved, whereas his credibility in the eyes of the citizens and the supervised institutions has increased. On the basis of the feedback from journalists and the public, it can be stated that the media texts and message of the Chancellor of Justice have become clearer, more precise and decisive. The Chancellor of Justice has proven to be a highly valued interviewee and interlocutor for the journalists. The institutions under the Chancellor of Justice's supervision are more and more willing to comply with his proposals.

According to the results of a survey "Media relations of enterprises and institutions in 2004" carried out among journalists by Turu-uuringute AS (market research company), among the public sector institutions the professional organisation of public relations of the Chancellor of Justice was the most highly valued one among the journalists.

Among many other things, the efficiency of the Chancellor of Justice's open public relations and media activities involving target groups and media channels on a well-considered bases is also demonstrated by the following indicators.

In 2004, the Chancellor of Justice received 2352 applications from citizens, that is about 400 more than in 2003. At least partly the larger number of applications is a result of constant explanations by and access to information on the activities of the Chancellor of Justice.

The credibility of the Chancellor of Justice is an important factor in the context of evaluating his public relations. When in 2003 about 67% of the respondents had confidence in the Chancellor of Justice, by the end of 2004 the figure had reached 76% according to the results of surveys conducted by Turu-uuringute AS. This result exceeded the objective of achieving the confidence of 75% of population, set out in the activity plan of the Chancellor of Justice for 2003-2007.

Nevertheless, the knowledge of Estonia's inhabitants about the competence, duties and role of the Chancellor of Justice among other supervisory and law enforcement institutions is far from satisfactory. Further clarification is particularly need with regard to the new functions of Chancellor of Justice that were entrusted to on him as of 1 January 2004, such as supervision over compliance with the fundamental rights and freedoms and the principle of good governance by local governments, and in the context of activities of legal persons in public law and private law persons fulfilling public functions. Also, the public is quite unaware of the Chancellor of Justice's function to conduct conciliation proceedings in the cases of discrimination.

In 2004, the Chancellor of Justice was still addressed with complaints the resolution of which is not directly within his competence. The number of applications requesting mainly explanations about legislation and legal problems has slightly increased in the recent years, making up about 66% of the total number of applications.

These are the factors that have to be taken into account when planning further activities in the sphere of public relations and relations with media.

3. Internal relations within the Office

Internally in the Office of the Chancellor of Justice, a basis was laid to the systematic and organised movement of internal information in 2004.

The structure of the "Weekly Information" that is sent to the Office's mailing list once a week was prepared, and also the guidelines for the movement of internal information were drawn up. The public relations adviser began to prepare and distribute "Weekly Information" since autumn 2004, which contains necessary information for the officials of the Office about the materials that would be disclosed and published in the media within the week, and information about the published materials and matters concerning the work and representation duties of the Chancellor of Justice and the Office's management; the replies, opinions and proposals sent by the Chancellor of Justice, as well as the pending cases, working meetings, business trips and training courses, personnel information and current organisational matters.

In addition to "Weekly Information", in 2004 steps were taken to provide more regular and comprehensive information to the staff of the Office about how the activities of the Chancellor of Justice and topics related to the Chancellor were covered by the media, as well as to provide information to the staff about social events and developments that are important with regard to their work.

In the final months of 2004, a survey among the staff was organised to assess the movement of internal information within the Office. This provided important feedback and information to the public relations adviser, other officials dealing with the dissemination of information and the management about the attitudes of the staff and their information needs, which, in turn, allowed to make important conclusions in terms of internal organisation of work and understanding of the needs of the organisation.

Continuation of the tradition of summer and winter days, and participation in the interministerial football and basketball tournaments organised by the "Kalev" sports association also contributed to better communication between the staff and development of the team spirit. Achievements in work

and the completion of important stages of activity were celebrated with joint competitions in the bowling hall.

Increasing attention was paid to the appreciation of the talents, aptitude and interests of the staff outside the area of law. In 2004, the photo competition "Day in our house" was held. The officials submitted their photos of interesting moments and angles on the daily activities of the Chancellor of Justice and his Office. The best photos received a prize and a permanent exhibition was made of all the photos submitted for the competition. The exhibition also proved to be interesting for the visitors to the Office.

Joint cultural events, such as visiting of concerts and exhibitions, cannot be underestimated either in creating a good working spirit, pleasant atmosphere and motivation among the staff. On 4 November, the officials of the Office visited the charity concert "Märka last" (Notice the child) organised by the Estonian Union for Child Welfare and the "Pere ja Kodu" magazine in the Estonia Concert Hall. The proceeds from the concert were donated for procuring sports clothes and sporting equipment for children raised by nursing families. For the first time, Christmas was celebrated with a joint visit to the theatre, to see the City Theatre performance "Vincent".

IV INTERNATIONAL RELATIONS

For the Chancellor of Justice the year 2004 was a year of energetic launching of international cooperation projects and promoting cooperation with the *ombudsmen* and Chancellors of Justice of other countries.

At the beginning of January, within the *Phare Twinning Light* programme a five-month cooperation project with the United Kingdom was launched, entitled "Strengthening the administrative capacity of the Chancellor of Justice and of the Office of Chancellor of Justice". In October, a visit was paid to the Office of the Finnish ombudsman, with the aim of in-service training in prison law. In December, with the support of the German Foundation for International Legal Cooperation, a training seminar for the officials of the Office of Chancellor of Justice and the Ministry of Justice on prison law was organised. Since December, the Office participates in the European Network of Specialised Equality Bodies, launched within the European Union action program to combat discrimination.

In the spring of 2004, the yearly tradition of the Chancellor of Justice's scientific conferences was continued in cooperation with the German Foundation for International Legal Cooperation. The conferences have been aimed at pointing out essential problems in the Estonian legal order. This time the emphasis was on the issues of police and law enforcement law.

Furthermore, several meetings with the Chancellors of Justice and ombudsmen of Latvia, Sweden and Finland took place. The Chancellor of Justice participated in the training programmes for Russian human rights ombudsmen and for high officials of Jordan as a lecturer.

1. Relations with international organisations

1.1. European ombudsman

Good cooperation continued with the European colleague – the European Ombudsman, whose duty is to handle complaints of maladministration in the institutions and bodies of the European Community. Such institutions are, for example, the European Commission, the Council of the European Union and the European Parliament. The European Environment Agency and the European Agency for Safety and Health at Work are among the bodies the activities of which the European ombudsman is entitled to investigate. Only the Court of Justice and the Court of First Instance acting in their judicial role do not fall within his jurisdiction.

In addition to the aforementioned functions, the European ombudsman has made a significant contribution to the promotion of cooperation between the ombudsmen of the European Union member states. A network of liaison officers of member states' ombudsmen has been established, and an internal web has been set up. The Chancellor of Justice has – through his liaison officers – actively participated in the work of the network and has contributed to "European Ombudsmen Newsletter", published by the European Ombudsman. In 2004, the article entitled "The role of ombudsman in a united Europe", written by the Chancellor of Justice, was published in the newsletter, and the intranet of ombudsmen's liaison officers published his article entitled "Chancellor of Justice – an ombudsman and a watchdog of the Constitution".

1.2. European Commission's Advisory Committee on Equal Opportunities for Men and Women

Since Estonia's accession to the European Union, a representative of the Chancellor of Justice has been a full member of the European Commission's Advisory Committee on Equal Opportunities for Men and Women. The Chancellor of Justice's representative in the Committee is the head of the First Department Eve Liblik, who was elected to act as vice-president of the Committee as of 2005. Regular sessions of the Committee take place twice a year in Brussels.

1.3. International Ombudsman Institute

International Ombudsman Institute (hereinafter "I.O.I.") was founded in 1978 as a worldwide non-profit organisation of ombudsmen. The purposes of the I.O.I. are to promote the institution of ombudsman throughout the world, to support educational programmes for and exchange of information and experience between ombudsmen, and to support research and study in the institution of ombudsman. The I.O.I. conjoins the ombudsman institutions of numerous countries, encompassing all continents. The Estonian Chancellor of Justice has been a full member of the I.O.I. since 2001.

VIII International Ombudsman Conference was held in Quebec City in September 2004, the main topic of which was the stepping up of security measures in the face of enhanced danger of international terrorism and its threats on democratic order and human rights and freedoms. The role of ombudsman in the protection of human rights in the situation of increased danger of terrorism was discussed and the opinions of ombudsmen of different countries were heard. Chancellor of Justice Allar Jõks participated in the workshop discussing the worldwide developments in the sphere of human rights.

1.4. Council of the Baltic Sea States

The cooperation of ombudsmen and Chancellors of Justice within the Council of the Baltic Sea States continued. In November, in Warsaw, the Polish ombudsman organised the 4th seminar of the ombudsmen of the Council of the Baltic Sea States, entitled "The Ombudsman and Contemporary Pathologies in the Family". The sub-topics of the seminar included protection of children against violating their dignity and their right to privacy, the protection of minors against family violence, paedophilia and interference of public institutions in parental rights. One of the aims of the seminar was to join the efforts of different institutions for the protection of the rights of the child. The representatives of national as well as of international institutions and of non-governmental organisations had been invited to participate in the Warsaw seminar. Chancellor of Justice Allar Jõks participated in the discussions and gave a speech on the experience of the Estonian Chancellor of Justice in the protection of the rights of the child.

Previous seminars of the ombudsmen of the Council of the Baltic Sea States were held in 2003 in Tallinn, in 2002 in St Petersburg and in 2001 in Copenhagen.

1.5. German Foundation for International Legal Cooperation

The German Foundation for International Legal Cooperation (hereinafter "IRZ") was founded in 1992 as a non-profit association and the lion's share of the its funding now comes from the budget of the Federal Ministry of Justice and from European Union programmes. The purpose of the Foundation is to promote international legal cooperation and to support the development of legal systems of its partner-states, offering both expert assistance and training for that purpose.

The Chancellor of Justice has been cooperating with the IRZ since 2003. With the IRZ support the Chancellor of Justice's conferences and seminars have been organised and expert analyses of legal issues have been carried out. In 2004, the IRZ supported the organisation of the Chancellor of Justice's scientific conference "THE POLICE.THE LAW.THE STATE", of a training seminar and the completion of legal analysis of post-doctoral university assistant (*Privatdozent*) Martin Borowski on "The freedom of conscience, thought and religion in the Estonian Constitution".

In mid-December there was a five-day seminar on prison law in the Office of Chancellor of Justice, entitled "Enforcement of sentences of imprisonment and custody pending trial in a rule of law state – the protection of the rights of imprisoned persons". The seminar was conducted by the Secretary General of the Ministry of Justice of Berlin Christoph Flügge and the director of the Berlin juvenile prison Marius Fiedler, the relevant officials of the office of Chancellor of Justice and of the Ministry of Justice participated. The following topics were discussed:

- the principles of prison law in Germany;
- the principle of *ultima ratio*, collective versus individual correction;
- philosophy of criminal executive law in Germany, status of the imprisoned persons, three pillars of security, typical course of imprisonment since admission into until release from prison, individual treatment programme of prisoner;
- execution of imprisonment of juveniles and women;
- legal remedies, system of appeals and applications, judicial proceedings upon arrest and imprisonment;
- maintenance of security and order, principle of proportionality, correction and follow-up proceedings, disciplinary law as *ultima ratio*;
- monetary resources of imprisoned persons, possession of items in the cell and items that have been deposited, leisure.

In 2005, the prison law training will be followed up by a study trip to the custodial institutions of Germany.

1.6. European Centre for Minority Issues

The Chancellor of Justice has established good cooperation relations with the European Centre for Minority Issues (hereinafter "ECMI"). The ECMI promotes the rights of minority nations, advises partner organisations in the issues concerning minority nations and conducts surveys on the situation of minority nations in European states. The Estonian Chancellor of Justice's agency has participated in several training seminars and study trips organised by the ECMI.

In November, Kristiina Albi, acting as adviser to the Chancellor of Justice, participated in a six-day study-trip to Flensburg. The purpose of the trip was to develop the network of the institutions of ombudsmen, to learn from the experience of the region of Danish-German border in the protection of the minorities and – more generally – the protection of human rights, and to acquire information and skills for the implementation of European and international human rights standards.

2. International cooperation projects

2.1. Phare Twinning Light

From January to May 2004, within *Phare Twinning Light* programme, a five-month cooperation project with the United Kingdom was carried out, entitled "Strengthening the administrative capacity of the Chancellor of Justice and of the Office of Chancellor of Justice" (EE03/IB/TWP/JHA/03). The Activities of the Chancellor of Justice Act Amendment Act, which entered into force on 1 January 2004, empowered the Chancellor of Justice, inter alia, to conduct conciliation procedures in discrimination disputes between private law persons. Arising from this, the purpose of the project was to strengthen the administrative capacity of the Chancellor of Justice's agency upon fulfilling the new functions imposed on the Chancellor of Justice. The total budget of the project amounted to 1.79 million Estonian EEK, of which 0.72 million EEK were co-financed by Estonia. The total expenditure was 1.32 million EEK, including 0.43 million EEK covered by co-financing.

Within the cooperation project, Geraldine Scullion, an expert of the Equality Commission for Northern Ireland, stayed in the Chancellor of Justice's Office from February to May, with the function of conducting training on EU law and case study in the context of equal rights, organising study trips to Ireland and Northern Ireland and to relevant institutions of the European Union, preparing a handbook on the resolution of discrimination disputes for the Office, as well as proposing a list of law literature for the library of the Chancellor of Justice.

By the end of the project all intended objectives had been achieved:

- the training in EU law took place on seven days, in four-hour sessions, and 17 officials of the Office participated in it;

- 10 officials of the Office went on a two-day study trip to Ireland and Northern Ireland to draw on the experience of the bodies conducting reconciliation procedures and solving discrimination disputes, as well as to learn about the activities of non-profit associations and institutions of the European Union;
- a manual for the conduct of discrimination disputes was prepared;
- the library of the Office was supplemented with 28 books on the issues of equality.

2.2. EuroNEB

In December, the Office joined the European Network of Specialised Equality Bodies project (hereinafter "EuroNEB), launched within the European Union action program to combat discrimination. The project will continue from December 2004 until November 2006, with the participation of 24 organisations from 21 EU member states. The main purpose of the project is to improve the exchange of information between equality bodies, to support cooperation between member states and pertinent EU institutions and to harmonise the interpretation and implementation practices of EU law in member states. The EuroNEB will act in the format of annual meetings, work groups, trainings and electronic system for the exchange of information. All in all, four work groups covering the following spheres will be set up: promotion of exchange of information, strategic implementation, dynamic interpretation, and policy formation.

3. Conferences and seminars

3.1. "THE POLICE.THE LAW.THE STATE"

On 7 May, in cooperation with the IRZ, the Chancellor of Justice organised a scientific conference, entitled "THE POLICE.THE LAW.THE STATE", devoted to the topic of police and law enforcement law.

The purpose of the Chancellor of Justice's scientific conference was to initiate a discussion to develop the understanding of law enforcement law and to speak about the deficiencies of police law. The subject matter of the conference was prompted by the current situation of the police law and the law enforcement law. There is no Act in Estonia specifying the definition of public order and the activities of the police in maintaining it. The rules for the maintenance of public order, that are in force in rural municipalities and cities, have been enacted without a legal basis.

Up to now the maintenance of public order has been considered to be the duty of the police only. This is an out-dated approach, and the protection of law and order should also be the duty of other law enforcement and state supervision agencies, as well as of every member of society in general. At the same time there is no law providing for uniform bases for the coordinated activities of all law enforcement agencies, and empowering the members of society to interfere in the cases of breach of public order.

Maintenance of public order is very much a preventive activity. The basis for the system of prevention of crime has in fact been laid, but this has been done without a specific legal ground, either on the state level or on the level of local governments.

Based on problems relating to this sphere, the conference was divided into three blocks of scientific presentations and a panel discussion. The presentations were made on the following topics:
- the actual state of police law and public order law;
- constitutional and European law framework of police law and public order law;
- the future of police law and public order law – prospects and trends.

Top politicians and leading legal scholars and practicing lawyers of Estonia and Germany were invited to make presentations at and moderate the conference. The opening speeches of the conference were made by Chancellor of Justice Allar Jõks, Minister of Internal Affairs Margus Leivo, and the director of the IRZ Matthias Weckerling. The different topics were moderated by the chairman of the Riigikogu legal affairs committee Märt Rask, justice of the Supreme Court Dr Julia Laffranque, chairman of the constitutional committee of the Riigikogu Urmas Reinsalu and State Secretary Heiki Loot. Presentations were made by justice of the Supreme Court Prof Indrek Koolmeister, Prof Dr Holger Schwemer (Hamburg), adviser to the Chancellor of Justice Katri Jaanimägi, head of a division of the Ministry of Internal Affairs of the Federal Republic of Germany Michael Niemeier (Berlin), judge of Tallinn Circuit Court Oliver Kask and Prof Dr Friedrich Schoch (Freiburg).

In cooperation with the Office of the Chancellor of Justice, the law journal *Juridica* published a special issue with the presentations delivered at the conference and articles written on the basis of the presentations.

3.2. Participation of the Chancellor of Justice in conferences and seminars

In 2004, the Chancellor of Justice participated in several conferences and seminars as a speaker, introducing the model of the Estonian institution of Chancellor of Justice and educating the ombudsmen and high officials of other countries on the human rights issues.

In February, on the invitation of the Speaker of the Swedish Parliament, the Chancellor of Justice participated in "Future challenges of parliamentary control and ombudsmen" seminar in Stockholm. The seminar was organised in the honour of Claes Eklund, the ombudsman of Swedish parliament, whose term of office expired in 2003. The Chancellor of Justice actively participated in the panel discussions of the seminar.

In May, the Chancellor of Justice was in Russia, on the invitation by the Centre for Humanitarian and Political Studies "Strategy", to make a presentation at a seminar entitled "Ombudsman and human rights", which was organised within the framework of qualification enhancement training of human rights representatives of the Russian Federation. In Russia the Chancellor of Justice gave a lecture to the employees of the human rights representatives' agencies of the Russian Federation on how to effectively protect human rights through the activities of ombudsman. The seminar was held with the support of the Makarturov Fund.

At the beginning of October the Chancellor of Justice participated in the conference of ombudsmen in Amman, on the invitation of the Danish Ministry of Foreign Affairs and on the proposal by the Danish ombudsman. The Chancellor of Justice made a presentation at the conference, introducing the Estonian model of the Chancellor of Justice and sharing the experience of ombudsman's work in Estonia. The conference of ombudsmen was organised within the framework of Danish-Jordanian cooperation project and was financed by the organisers. The aim of the project was to analyse the possibilities and conditions in Jordan and neighbouring regions for the establishment of the institution of ombudsman. The presentations of ombudsmen of Denmark, Norway and Estonia and of several other presenters were heard at the conference, and there was a discussion on the legal bases and fields of activities of the ombudsman's institution in different societies. The conference was attended by the representatives of Jordanian parliament and government, legal institutions, the press and civil society. The official representatives of the Jordanian government in Syria, Lebanon, Palestine, Egypt and Yemen were also invited.

4. Cooperation of the Chancellor of Justice with the Chancellors of Justice and ombudsmen and with other high public servants of foreign countries

In 2004, the Chancellor of Justice continued to enhance good cooperation relations with the ombudsmen and Chancellors of Justice of other countries.

On the invitation of the Swedish Chancellor of Justice, the Chancellors of Justice of Sweden, Finland and Estonia met in Stockholm in the middle of May. This business meeting of the Chancellors of

Justice of the three countries was the first of the kind. At the meeting, the Chancellors of Justice gave an overview of the recent developments in their respective states and of important events in the legal order and within the sphere of activities of a Chancellor of Justice. Also, the issues related to the supervision of the EU Charter of Fundamental Rights and the role of ombudsman's institution in the European Union were discussed. Furthermore, there was a discussion concerning the limits of the supervision over the courts, bearing in mind their independence. One of the subjects was the reliability of the legal systems of the three countries and the possibilities of a Chancellor of Justice to increase the reliability.

In October, on the invitation by the director of Latvia's State Bureau on Human Rights (Latvian ombudsman), the Chancellor of Justice and a delegation of seven members of his Office visited the Latvian State Bureau on Human Rights. Annual meetings with the colleague of this neighbouring country with the aim of promoting cooperation have become a good tradition. At the meeting, the human rights' situation and recent developments in the work of respective agencies were introduced reciprocally and the role of ombudsman in the protection of the rights of the child was discussed.

Constructive cooperation continued also with the ombudsman of our third neighbour – Finland. In October, the advisers to the Chancellor of Justice Enn Markvart, Heldin Vahtra and Margit Sarv were on a three-day study visit to the Finnish ombudsman. They familiarised themselves with the prison law of Finland and with the supervisory activities of the Finnish ombudsman over the custodial institutions. The advisers to Estonian Chancellor of Justice participated, as observers, in the routine visit of the Finnish ombudsman to the Vantaa Prison.

CONTACT INFORMATION

Kohtu Street 8
15193 Tallinn
Phone: +372 693 8400
Fax: +372 693 8401
Homepage: http://www.oiguskantsler.ee

	Fax	693 8401	
Chancellor of Justice	**Allar JÕKS**	693 8400	allar.joks@oiguskantsler.ee
Deputy Chancellor of Justice	**Aare REENUMÄGI**	693 8403	aare.reenumagi@oiguskantsler.ee
Deputy Chancellor of Justice	**Madis ERNITS**	693 8407	madis.ernits@oiguskantsler.ee
Director	**Alo HEINSALU**	693 8420	alo.heinsalu@oiguskantsler.ee
Secretary to the Chancellor of Justice	**Kristi KASS**	693 8400	kristi.kass@oiguskantsler.ee oiguskantsler@oiguskantsler.ee

I DEPARTMENT

Head of Department	**Eve LIBLIK**	693 8418	eve.liblik@oiguskantsler.ee
Senior Adviser	**Jüri LIVENTAAL**	693 8409	jyri.liventaal@oiguskantsler.ee
Adviser	**Igor ALJOŠIN**	693 8431	igor.aljosin@oiguskantsler.ee
Adviser	**Ave HENBERG**	693 8435	ave.henberg@oiguskantsler.ee
Adviser	**Kärt MULLER**	693 8432	kart.muller@oiguskantsler.ee
Adviser	**Andres ARU**	693 8433	andres.aru@oiguskantsler.ee
Adviser	**Mari AMOS**	693 8441	mari.amos@oiguskantsler.ee

II DEPARTMENT

Senior Adviser	**Ilmar SELGE**	693 8411	ilmar.selge@oiguskantsler.ee
Adviser	**Kristjan OTS**	693 8417	kristjan.ots@oiguskantsler.ee
Adviser	**Arnika KALBUS**	693 8428	arnika.kalbus@oiguskantsler.ee
Junior Adviser	**Kalle KIRSS**	693 8439	kalle.kirss@oiguskantsler.ee
Junior Adviser	**Jaana PENNE**	693 8413	jaana.penne@oiguskantsler.ee

III DEPARTMENT

Head of Department	**Nele PARREST**	693 8438	nele.parrest@oiguskantsler.ee
Senior Adviser	**Enn MARKVART**	693 8415	enn.markvart@oiguskantsler.ee
Adviser	**Mihkel ALLIK**	693 8406	mihkel.allik@oiguskantsler.ee
Adviser	**Heldin VAHTRA**	693 8427	heldin.vahtra@oiguskantsler.ee
Adviser	**Katri JAANIMÄGI**	693 8419	katri.jaanimagi@oiguskantsler.ee
Adviser	**Tiina ILUS**	693 8430	tiina.ilus@oiguskantsler.ee
Adviser	**Helen KRANICH**	693 8446	helen.kranich@oiguskanstler.ee
Adviser	**Lauri MÄLKSOO**	693 8404	lauri.malksoo@oiguskantsler.ee
Adviser	**Ulrika EESMAA**	693 8412	ulrika.eesmaa@oiguskantsler.ee
Adviser	**Kristiina ALBI**	693 8429	kristiina.albi@oiguskantsler.ee
Junior Adviser	**Kaarel ELLER**	693 8426	kaarel.eller@oiguskantsler.ee
Junior Adviser	**Aiki SCHNEIDER**	693 8445	aiki.schneider@oiguskanstler.ee

GENERAL DEPARTMENT

Head of Department	**Kertti PÄEVA**	693 8434	kertti.paeva@oiguskantsler.ee
Chief accountant	**Eve MARIMA**	693 8421	eve.marima@oiguskantsler.ee
Adviser on public relations	**Jaana PADRIK**	693 8423	jaana.padrik@oiguskantsler.ee
Senior Adviser	**Edgar MIKIVER**	693 8405	edgar.mikiver@oiguskantsler.ee
Junior Adviser	**Eva POOM**	693 8436	eva.poom@oiguskantsler.ee
Archivist	**Helbe LIIN**	693 8422	helbe.liin@oiguskantsler.ee
Assistant Adviser	**Maria KUSTOVA**	693 8444	maria.kustova@oiguskantsler.ee
Assistant Adviser	**Nele-Marit ORAS**	693 8437	nele-marit.oras@oiguskantsler.ee
Assistant Adviser	**Marit OLESK**	693 8424	marit.olesk@oiguskantsler.ee
Assistant Adviser	**Kristel LEKKO**	693 8410	kristel.lekko@oiguskantsler.ee
Assistant Adviser	**Ivi VEI**	693 8404	ivi.vei@oiguskantsler.ee
Assistant Adviser	**Kaidi KAIDME**	693 8442	kaidi.kaidme@oiguskantsler.ee
Assistant Adviser on administration matters	**Aivar PIIRIMEES**	693 8440	aivar.piirimees@oiguskantsler.ee

RECEPTION TIMES

Reception of persons in the Office of the Chancellor of Justice

The Chancellor of Justice or the Chancellor of Justice Deputy-Adviser receives persons on Wednesdays at 9.00-11.00. The Adviser to the Chancellor of Justice receives persons on Tuesdays at 9.00-11.00 and 14.00-17.00, and Wednesdays at 14.00-17.00.

Reception of persons in regions

The Adviser to the Chancellor of Justice receives persons at the following places:

- Pärnu County Government
  Akadeemia 2, 80088 Pärnu
  Every other month on the third Thursday of the month at 10.00-17.00.

- Tartu Courts House
  Kalevi 1, 50050 Tartu
  Every other month on the third Thursday of the month at 10.00-17.00.

- Narva City Government
  Peetri Square 5-316, 20308 Narva
  On Mondays at 13.00–17.00

- Ida-Viru County Government
  Keskväljaku 1, 41594 Jõhvi
  On Tuesdays at 14.00–16.00

- Sillamäe City Government
  Kesk 27, 43222 Sillamäe
  On the first Tuesday of every month at 10.00–12.00.

Registration to the reception by telephone +372 693 8404.