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HUMAN RIGHTS CENTRE
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HUMAN RIGHTS IN ESTONIA 2010

Annual Report of the Estonian Human Rights Centre

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Dear reader

It is a pleasure to see that more and more people are interested in human rights. We hope that this report provides help navigating the topic of human rights as well as a good overview of the importance the society has placed on human rights.

The 2010 Human Rights report deals with Estonia's development in nearly all rights contained in the European Convention on Human Rights. Some areas (such as right to life or right to marriage) didn't experience mentionable changes or developments in 2010. That is also the reason why there are no chapters regarding these rights in this report.

Developments that took place in the field of human rights in Estonia in 2010 are described, analysed, illustrated by positive and negative examples as well as criticised, but not only that – specific recommendations for eliminating the shortcomings are also provided. Although each chapter has an author or authors, the report aims to provide a coherent overview of developments in human rights in Estonia as a whole.

Drawing attention to shortcoming is certainly not the sole purpose of the report. Initiating discussions and offering solutions has a positive effect on the welfare of the entire society and helps Estonia become a state where everyone can enjoy a better life.

Positive phenomena are also drawn attention to – for instance, devising of development plans essential to stable progress, lively debates on funding of political parties and the topic of tolerance and equal treatment.

The field of human rights in Estonia has reached a new stage of development. Government of the Republic of Estonia considers human rights increasingly important on an international level. Estonia is running for membership of the UN Human Rights Committee for the years 2012–2015 with the purpose of facilitating protection of human rights via international means.

Estonia has also been active in promoting women's rights by entering in the UN Commission on the Status of Women and becoming a member of the Executive Board of UN Women's Rights Agency. These examples of our state's commendable steps on an international level could set a great example for improving the situation within the state, as insufficient attention to guaranteeing the protection of human rights could hinder society's further development.

There has been a lot of public discussion on the topic of tolerance and equal treatment recently. Tolerance as a value is acknowledged more and more and the realisation is slowly forming that the desire to preserve ethnic peculiarities does not necessarily preclude acceptance of other minorities. It all depends on how this topic is handled – whether by antagonising the ethnicities or by viewing the minorities as a human resource of equal value to the majority.

We would like to thank all the authors and everybody who helped gather and pass on the necessary background information.

Anybody can contribute to compiling of the next year's human rights report – human rights cases or notifications of specific violations are welcome at the email address aastaaruanne@humanrights.ee all year round.

Feedback and proposals regarding the 2010 Human Rights Report are also welcome at the same email address.

Kari Käsper and Marianne Meiorg
editors of Human Rights in Estonia 2010

Prohibition of torture, inhuman or degrading treatment and punishment

THE AUTHOR

Epp Lumiste

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RIGHTS

ECHR Article 3 – Prohibition of torture

- No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

CHAPTER 1

Prohibition of torture, inhuman or degrading treatment and punishment

On 10 December 2009 the non-profit organisation Tallinn Crisis Centre for Women and the non-profit organisation offering support for crime victims (Kuriteoohvrite Toetamise Ühing Ohvriabi) turned to the Estonian Government, *Riigikogu* and the general public, expressing the need for an efficient policy and a national plan of action for combating violence against women. The European Union has provided guidelines, where violence against women is defined as:

> *„any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".*[1]

Thereby the definition includes physical abuse (including rape) as well as violence occurring within the family (physical and psychological). The latter is less visible as a rule and also more difficult to detect.

[1] Council of the European Union (2009) EU guidelines on violence against women and girls and combating all forms of discrimination against them. Available at: http://www.consilium.europa.eu/uedocs/cmsUpload/16173cor.en08.pdf

The topic of violence against women did not attract as much attention in 2010 as it should have, nonetheless, a lot of work has been done. At its April 1st, 2010 session the Estonian Government issued the order no 117 that approved the "Development Plan for reducing violence for years 2010–2014"[2].

The development plan was the basis for forming the analysis of the application of restraining orders and the analysis of application of the conciliation procedure.

In addition to the aforementioned, the members of *Riigikogu* interpellated the Minister of Justice on June 17th, 2010 about the drawing up of the specific law.[3] *Riigikogu* opened its autumn session of 2010 by discussing violence against women and the possibility of instigating the drawing up of the specific law. The Minister of Justice answered questions in front of *Riigikogu* and claimed that according to criminal statistics report of 2008 52% of victims of physical abuse are men and 48% women.[4] The Minister of Justice also emphasised that there are more men among the victims of violence occurring within the family than there are women and that the acts in force in Estonia are sufficient to provide everyone equal rights. However, the statement that there are more men among the victims is not backed by the study on violence among couples carried out by the Statistics Estonia in 2009. According to the study of the Statistics Estonia the violence among couples is widespread among women as well as men, however, there are substantially more women suffering violence.[5]

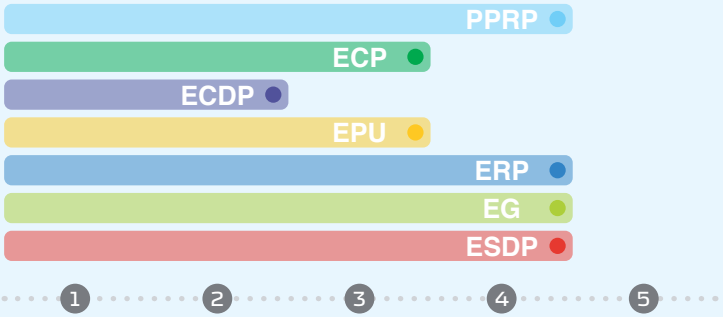
[2] Documents available at document registry of the State Chancellery. Available at: http://dhs.riigikantselei.ee/avalikteave.nsf

[3] *Riigikogu* (2010). Interpellation no. 461 to the Minister of Justice Mr. Rein Lang. Presented by Heljo Pikhof, Eiki Nestor, Jaan Õunapuu, Mark Soosaar, Jüri Tamm, Karel Rüütli, Peeter Kreitzberg, Sven Mikser, Jaanus Marrandi, Indrek Saar, Kalev Kotkas. 11th *Riigikogu* shorthand notes for the 7th session. 17.06.2010. Available at: http://www.*Riigikogu*.ee/?op=steno&stcommand=stenogramm&date=1276758300&pkpkaupa=1&paevakord=6783#pk6783.

[4] *Riigikogu* (2010). Interpellation no. 461 regarding violence against women. 11th *Riigikogu* shorthand notes for the 7th session. 13.09.2010. Available at: http://www.*Riigikogu*.ee/?op=steno&stcommand=stenogramm&date=1284379500&pkpkaupa=1&paevakord=6824#pk6824.

[5] Paats, Merle (2010). Paarissuhte vägivald – müüdid ja tegelikkus [Violence among couples – myths and reality]. Eesti Statistika kvartalikiri 3/10, p 80. Available at: http://www.stat.ee/dokumendid/51818.

Prohibition of torture, inhuman or degrading treatment and punishment
(1 – most problematic; 5 – least problematic)



Source: see Appendix – Survey of Political Parties

Violence against women in Estonia

There are ten shelters in Estonia. 80% of the people who end up there are women, 20% are men. A third of the 20% that men make up are under age.[6] According to the development plan the majority of persons who turn to shelters go there together with children. According to the Crime Barometer of the Ministry of Justice there were 67 rapes and 3624 offences involving physical abuse within the first 10 months of 2010; 49 cases of torture also occurred.[7]

[6] Ministry of Justice (2010). Development plan for reducing violence for years 2010–2014. p 28. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=52311/Development_Plan_for_Reducing_Violence_for_Years_2010-2014.pdf.

[7] Ministry of Justice (2010). Kuritegevuse statistika jaanuar–oktoober 2010 [The Crime Barometer for January through October 2010]. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=52289/Kuritegevuse+kuu%FClevaade+2010+10+kuud.pdf.

In comparison to the previous year the number of all the aforementioned offences has fallen. The criminal statistics of Ministry of Justice include different forms of physical violence, but not the psychological violence. The violence occurring within the family is the covert side of violence against women. According to the study carried out by the European Commission Estonia is in the top three EU Member States, preceded by just Lithuania, Latvia and Finland (depending on the data). 39% of respondents reveal that they know a female victim of a domestic violence within their circle of friends and family and 32% know of somebody in their circle of friends and family who subjects a woman to violence.[8]

It stems from the EU survey that 73% of respondents believe that violence against women is unacceptable and should be punishable by law.[9] According to the same survey the figures pertaining to perception of domestic violence in Estonia are surprisingly low.

The penal measures

According to § 18 of the Constitution of the Republic of Estonia[10] no one shall be subjected to torture or to cruel or degrading treatment or punishment. The principle of Article 3 of The European Convention on Human Rights (ECHR) is embodied in the Constitution. Paragraphs 121–122 of the Penal Code[11] cover physical abuse and torture. Both are punishable by a pecuniary punishment or imprisonment (up to three years in case of physical abuse and up to five years in case of torture). Punishment of imprisonment is prescribed for causing serious damage to health (§ 118 of the Penal Code) or negligent homicide (§ 117 of the Penal Code).

Presently, the Penal Code does not prescribe a considerable punishment for committing domestic violence. Since domestic abuse falls under the offence

[8] European Commission (2010). Special Eurobarometer 344. Domestic Violence against Women. Report. September 2010. Available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_344_en.pdf.
[9] Special Eurobarometer 344, p 46.
[10] The Constitution of the Republic of Estonia, RT [State Gazette] 1992, 26, 349…RT I 2003, 64, 429.
[11] The Penal Code. RT I 2001, 61, 364 … RT I, 11.03.2011, 1.

of physical abuse and since the prisons in Estonia are overcrowded, the pecuniary punishment is referred to as a rule of thumb. This, in turn means that the person causing violence will return home, where he is likely to continue with his previous habits.

Code of Criminal Procedure prescribes a possible defence for the victim, which is the temporary restraining order (§ 141^1 subsection 1). This is a measure of ensuring criminal procedure and therefore the temporary restraining order can be applied until the entry into force of the court judgment. Subsection 2 of this paragraph may prove to be an obstacle as application of the restraining order requires the consent of the victim. The victim may oftentimes retract the consent because of compassion for the partner, after making up with the partner, for social and economic factors or for fear.[12] The requirement of consent in criminal proceedings may lead to situations where the offender goes back to the victim and the victim later retracts his or her complaint and the offender goes unpunished.

The second major problem with temporary restraining orders is the lack of sanctions in case of violation.[13] This, on one hand, means that the victim lacks the motivation to notify of the offence and, on the other hand, that the person who is given a temporary restraining order is not afraid to breach it. § 331^2 of the Penal Code prescribes a punishment for violation of a restraining order,[14] but it is applicable only to a restriction order imposed by a court decision and not to a temporary restraining order. Therefore, it is not an effective measure of preventing a suspect from causing the victim new injuries.

In addition to applying a restraining order the development plan also foresees amending the conciliation proceedings. The consent of the victim as well as the suspect or the accused is necessary for application of conciliation proceedings (§ 203^2 of Code of Criminal Procedure). Conciliation proceedings

[12] Ministry of Justice (2009) Lähenemiskeelu kasutamine kriminaalmenetluses [Use of restraining orders in criminal proceedings]. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=52532/L%E4henemiskeelu+kasutamine+kriminaalmenetluses.pdf.
[13] Lähenemiskeelu kasutamine kriminaalmenetluses [Use of restraining orders in criminal proceedings], p 24.
[14] Translator's note: some English translations of the Penal Code of Estonia use the term 'restriction'.

are applied if the lack of evidence does not allow for a solution in the course of criminal proceedings.[15] Criminal cases that were referred to conciliation proceedings were predominantly (above 90%) cases involving violence, and almost 60% of those cases involved domestic violence. The suspect had 6 months to comply with his obligations. If obligations are not complied with in time the criminal proceeding may be renewed.[16]

Compliance with human rights

Article 3 of the ECHR contains the prohibition of torture, which states that no one shall be subjected to torture or to inhuman treatment or punishment.[17] States parties to the ECHR have taken on the obligation to ensure all people in their jurisdiction the fundamental rights and freedoms. This means that the Member States have a positive obligation to ensure the protection of all people from torture or inhuman treatment. This obligation extends to those cases where the perpetrator is a natural person.

European Court of Human Rights has repeatedly decided that abuse must be of a certain level of severity to classify as breach of Article 3.[18] Constant physical and psychological abuse committed in the course of domestic violence constitutes as inhuman treatment in the meaning of Article 3. If a ECHR Member State does not guarantee adequate protection of the victims, then it constitutes as a breach of Article 3 of the ECHR.[19] The ECtHR applied Article 3 to a case involving domestic violence in its decision that came into force in September of 2009 and decided that the Member State had not fulfilled its obligation to protect the rights of the

[15] Lähenemiskeelu kasutamine kriminaalmenetluses [Use of restraining orders in criminal proceedings].
[16] Klopets, Urvo and Tamm, Kaire (2010) Kriminaalmenetluse lõpetamine leppimise tõttu [Termination of criminal proceedings due to conciliation]. Ministry of Justice. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=52673/Lepitusmenetluse+rakendamine.+Justiitsministeerium,+kriminaalpolitiika+osakond,+2010.pdf.
[17] The European Convention on Human Rights. Signed in Rome 4 November 1950. Estonia signed 14 May 1993. Ratified 16 April 1996. Article 3.
[18] European Court of Human Rights. 25 March 1993 judgment Costello-Roberts v United Kingdom. Application no. 13134/87, § 30; ECtHR. 29 April 1997 judgment H.L.R. v. France . application no. 24573/94, § 40; ECtHR. 19 February 2009 judgment A. v. United Kingdom . application no. 3455/05, § 20.
[19] A. v. United Kingdom, § 24.

victim.[20] As a result of this the Member State has a positive obligation to take steps to ensure the termination of violence as well as the abuse of the victim.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[21] also includes the elimination of violence against women. Estonia signed CEDAW on November 20th, 1991. Points 11 and 23 of No 19[22] of general recommendations made by the Committee point out the fact that family violence is the most dangerous form of violence and women are often unable to leave the situation as they depend on the offender. In 1992 the Committee of CEDAW advised the Member States to establish legal means to ensure adequate legal protection for the victims of domestic abuse.

As of the end of 2010 there are no elements of an offence for domestic violence in the Penal Code and the elements of an offence of physical abuse are not sufficient to ensure the safety of the victims and the termination of the abuse. The paragraph on physical abuse (§ 121 of the Penal Code) is also applicable in domestic violence cases. According to § 9 subsection 1, a person may be detained for up to 48 hours without an arrest warrant issued by a court.

Therefore, if a person is detained on the suspicion of physical abuse, he is free to return to the victim within 48 hours. The victim has the option to apply for a temporary restraining order that would effective until the court order enters into force. This should ensure victim's safety while the offender is at large.[23] Since the punishment for physical abuse is pecuniary punishment or up to three years' imprisonment, it is rather likely that the offender is given a pecuniary punishment which he will then pay and return to the victim.

There are other shortcomings in the proceeding. According to § 71 of the Code of Criminal Procedure, a spouse or a person permanently living together with

[20] ECtHR. 9 June 2009 judgment Opuz .v Turkey. Application no. 33401/02.
[21] Adopted in New York 18 December 1979. Estonia joined 21 October 1991. Published: RT II 1995, 5/6 /31.
[22] UN Committee on the Elimination of Discrimination against Women (1991). General Recommendation No. 19. Available at: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19.
[23] The effectiveness of restraining orders requires an analysis, as several people working with abuse victims at shelters have expressed their doubt about it.

the suspect or the accused has the right to refuse to give testimony as witness. There are also usually few witnesses in domestic violence cases. It is evident from the survey of Ministry of Justice that in case of lack of evidence the case is referred to conciliation procedure.

The aforementioned measures of procedure illustrate the situation where the accused or the suspect can often escape punishment and return to the victim.

As a result of the case Opuz v Turkey[24] it seems that Estonia has not fulfilled its obligation in the meaning of Article 3 and the Penal Code should be amended with the elements of an offence for domestic violence. The measure of procedure (restraining order) should be made efficient so that the victims of domestic violence could get effective help.

Conclusion

Violence against women is a problem that is not discussed much in Estonia. This topic may arise now and then in connection with a case that gained public attention or due to a campaign, but mostly the topic remains hidden from the public. And yet it influences the entire society. The development plan reveals the fact that domestic violence is not usually a singular occurrence, but that it becomes a daily part of family life. There is also the possibility that the children who are victims of abuse may become offenders themselves.[25] Domestic violence should be dealt with on all stages: preventative, punitive and the protection of victims.

Estonian Women's Association Round Table gave its suggestions at the drawing up of the development plan, but not all of them were included in the development plan itself. One of the most important suggestions may be giving the police the authority to remove the offender from home and to keep him away from home.[26]

[24] ECtHR. 9 June 2009 judgment Opuz v. Turkey. Application no. 33401/02.
[25] Development plan for reducing violence for years 2010–2014, p 11.
[26] Estonian Women's Association Round Table and Estonian Women's Sheltes Union (2010). Common proposals for the working draft of the development plan [Ühised täiendusettepanekud arengukava töövariandile]. January 2010. Available at: http://www.enu.ee/lisa/370_ENU%20ja%20ENVL%2021.01.2010.pdf.

International human rights conventions (ECHR and CEDAW) place the obligation on the Member States to take positive steps towards protection of rights of women. The legal framework in place in Estonia at the moment does not ensure a woman adequate protection from the offender.

Women have the opportunity to turn to crisis centres and shelters, which generally operate as non-profit associations and have project-based funding. The state should be the organ to provide the victims such help and a constant funding for respective organisations.

In order to make sure Estonian laws are in accordance with the decision of the ECtHR that came into force at the end of 2009 the Penal Code should be amended with the elements of an offence for domestic violence. Considering the particularities of the elements of an offence of domestic violence the procedural law should also be made more efficient. The concern expressed at the opening session of *Riigikogu* that the specific law would contradict human rights, would be easily dispelled if the elements of an offence of domestic violence were not based on the gender of the victim, but provide protection for victims of domestic abuse irrespective of their gender.

Recommendations

- Consider increasing authority of the police to enable removal of a violent person from home and to keep him away from home.
- Increase state's participation in funding of the organisations offering support services.
- Ensure the victim more efficient and more easily available support services and protection from the offender.
- Amend the Penal Code with the elements of an offence for domestic violence.

Prohibition of slavery and forced labour

THE AUTHOR

Epp Lumiste

RIGHTS

ECHR Article 4 – Prohibition of slavery and forced labour

- No one shall be held in slavery or servitude.
- No one shall be required to perform forced or compulsory labour.

CHAPTER 2

Prohibition of slavery and forced labour

Even in the year 2010 there are people who have to spend parts of their lives in slavery. The topic is also relevant in Estonia and it affects Estonian society, as human trafficking is a form of slavery.

Violation of fundamental human rights, as well as violation of human dignity by exploiting people (whether sexually, by forced labour or by drafting and keeping people, by keeping people in slavery or in a similar state) or by forced removal of an organ should be treated as human trafficking.[1] The Minister of Foreign Affairs has compared human trafficking to organised crime that endangers the international as well as national safety.[2]

There are different kinds of human trafficking. Perhaps the best known is sexual exploitation, but in addition to that there are also human trafficking in labour exploitation and organ trafficking.[3] Human trafficking has several causes, which may have to do with criminal as well as economic reasons.

[1] Eesti Naisteühenduste Ümarlaua ja Eesti Naiste Varjupaikade Liidu ühised täiendusettepanekud arengukava töövariandile [Estonian Women's Association Round Table and Estonian Women's Shelters Union's common proposals for the working draft of the development plan], p 31. Available at: http://www.enu.ee/lisa/370_ENU%20ja%20ENVL%2021.01.2010.pdf.

[2] Ministry of Foreign affairs (2010). Pressiteade: Eesti ühineb Euroopa Nõukogu inimkaubandusvastase konventsiooniga [Press statement: Estonia to join Council of Europe Convention on Action against Trafficking in Human Beings], No. 4-E. 7.01.2010. Available at: http://www.vm.ee/?q=node/8839.

[3] Ministry of Social Affairs (2008). Inimkaubanduse vormid [Various manifestations of human trafficking]. Last amended 11 October 2008. Available at: http://www.sm.ee/tegevus/sooline-vordoiguslikkus/inimkaubandus-ja-prostitutsioon/vormid.html.

To fight human trafficking a development plan was drawn up for years 2006 – 2009, which was approved by the Government.[4] As a result of the development plan an analysis for necessary elements of a criminal offence of human trafficking was drawn up.[5] As of 2010 the actions against human trafficking have been discussed in the "Development plan for reducing violence for years 2010–2014".[6]

Development plan for reducing violence for years 2010-2014

The development plan composes a multilayered action plan against human trafficking. It prescribes preventative work and increasing social awareness, helping the victims and investigation of human trafficking cases.[7] More attention is paid to labour exploitation as the previous development plant paid too little attention to this matter.[8] The development plan also points out the fact that there are no procedural guidelines in place for questioning potential victims and the need for raising awareness of various facets of human trafficking. Additionally it suggests that the guidelines are enhanced, however the need to perfect the existing acts (for instance adding the necessary elements of an offence in the Penal Code or amendments to the Code of Criminal Procedure) is not mentioned. Closing report on the development plan revealed that the international conventions Estonia is a party to prescribe criminalising of human trafficking. International co-operation is complicated because the Penal Code lacks such necessary elements for a criminal offence.[9] The analysis of the definition of human trafficking reveals the need for amending the Penal Code

[4] Ministry of Justice (2010). Inimkaubanduse vastu võitlemise arengukava aastateks 2006–2009 täitmise lõpparuanne [Final report on execution of the development plan to fight against human trafficking 2006–2009]. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=50228/Inimkaubanduse+arengukava+l%F5pparuanne.pdf.

[5] Ministry of Justice (2009). Inimkaubanduse definitsiooni ja kuriteokooseisu analüüs [Analysis of definition of human trafficking and the necessary elements of a criminal offence]. 24.08.2009. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=50155/IK+definitsiooni+ja+kuriteokossseisu+analuus_l%F5plik.pdf.

[6] Ministry of Justice (2010). Development plan for reducing violence for years 2010–2014. p 31. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=52311/Development_Plan_for_Reducing_Violence_for_Years_2010-2014.pdf.

[7] Development plan for reducing violence for years 2010–2014, pages 31-33.

[8] Development plan for reducing violence for years 2010–2014, page 32.

[9] Ministry of Social Affairs (2008). Inimkaubanduse vormid [Forms of human trafficking].

with such an element for a criminal offence. So far the Penal Code lacks this element for a criminal offence and according to the closing report the amendment should have been prepared in 2010.[10] By the end of 2010 no such amendment for the Penal Code had been submitted to the ministries for approval via the information system for proceeding drafts called e-Õigus.

Consistency with human rights

The Penal Code deals with slavery in the chapter that deals with offences against liberty. § 133 defines enslaving as placing a human being in a situation where he or she is forced to work or perform other duties against his or her will for the benefit of another person, or keeping a person in such situation, if such act is performed through violence or deceit or by taking advantage of the helpless situation of the person. The Penal Code does not entail a specific provision pertaining to human trafficking.

Estonia signed the Council of Europe Convention on Action against Trafficking in Human Beings in February of 2010.[11] Article 4 of the convention is very thorough in defining the concept of trafficking in human beings; it includes recruitment, transportation, harbouring or receipt of persons, for the purpose of exploitation, by means of threat, use of force or deception. Article 18 of the convention prescribes the duty of the states parties to this convention to criminalise all actions listed in Article 4 of this convention, when committed intentionally. Punishments prescribed for such offences have to be effective, proportionate and dissuasive. The Minister of Justice, speaking to *Riigikogu* this summer, was of the opinion that Estonia had already fulfilled 90% of the requirements stated in the convention.[12] *Riigikogu* has to ratify the

[10] Inimkaubanduse vastu võitlemise arengukava aastateks 2006–2009 täitmise lõpparuanne [Final report on execution of the development plan to fight against human trafficking 2006–2009.] Pages 14-15. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=50228/Inimkaubanduse+arengukava+l%F5pparuanne.pdf.

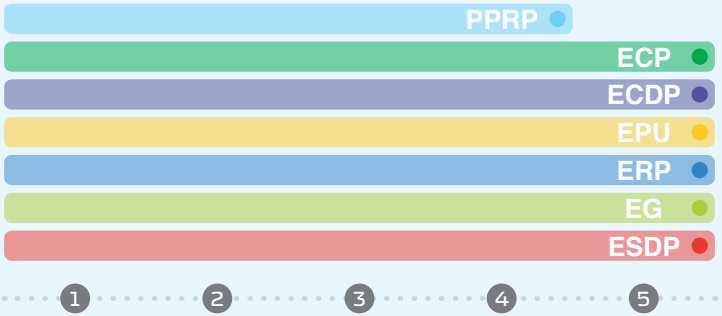
[11] The table on signing and ratifying the convention. Available at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=3&DF=29/04/2011&CL=ENG.

[12] *Riigikogu* (2010). Orjastamise karistamatusest Eesti Vabariigis [On lack of punishment for slavery]. 9th *Riigikogu* shorthand notes for the 7th session. 9.06.2010. Available at: http://www.*Riigikogu*.ee/?op=steno&stcommand=stenogramm&date=1276081500&pkpkaupa=1&paevakord=6623#pk6623.

convention, but the draft to the act of ratification had not reached *Riigikogu* by the time the author wrote this chapter.

Article 4 of ECHR prohibits holding persons in slavery or servitude and forced or compulsory labour. As is the case with all other articles of ECHR, the state party to the convention has the positive duty to ensure by enforcement of Article 4 that human beings in its jurisdiction do not have to suffer slavery.

Is Your Party in favour of adding the necessary elements of an offence for human trafficking to the Penal Code?
1 – not at all in favour; 5 – completely in favour



Source: see Appendix – Survey of Political Parties

In 2010 the ECtHR made a decision in a case regarding trafficking in human beings.[13] It can be deducted from the judgment that the question of human trafficking involves breaching several rights stated in the ECHR: Article 2 (right to life), Article 3 (prohibition of torture or inhuman or degrading treat-

[13] European Court of Human Rights judgment of 7 January 2010 Rantseva v. Cyprus and Russia Application no. 25965/04.

ment) and Article 4 (prohibition of slavery). Since this chapter focuses on slavery the author will elaborate on the court's stance on Article 4.

The court emphasized that even though Article 4 does not mention slavery in those words the ECHR cannot be interpreted in a vacuum and the rules of interpretation set out in the Vienna Convention on the Law of Treaties must be considered.[14] The convention must be interpreted in the light of present-day conditions.[15] Human trafficking threatens the human dignity and the fundamental freedoms of its victims and is not compatible with principles of the ECHR.[16] Legislative and administrative frameworks put in place by Member States have to be sufficient and efficient to guarantee the protection of the victims and to regulate the activities of business enterprises that are used to foster human trafficking. Criminalising and sanctioning human trafficking is just a part of the state's responsibilities for Article 4, in addition the state has to protect victims and prevent human trafficking.[17] The state has the positive obligation to take steps to prevent human trafficking; one such step is providing training for law enforcement officials.[18]

Considering Estonia's obligations by the ECHR and the Convention on Action against Trafficking in Human Beings the Penal Code should be amended with the necessary elements of an offence for human trafficking. All the suggestions of the ECtHR should be taken into consideration and as the aforementioned case proves amending the Penal Code is not enough, the problem should be approached on multiple levels.

Conclusion

The development plan for reduction of violence is a step in the right direction in solving the problem of human trafficking, but Estonia has to coordinate its legislation to be consistent with international conventions including

[14] Rantseva v. Cyprus and Russia. 7.01.2010, points 272-273.
[15] Rantseva v. Cyprus and Russia, point 277.
[16] Rantseva v. Cyprus and Russia, point 282.
[17] Rantseva v. Cyprus and Russia, points 285-287.
[18] Rantseva v. Cyprus and Russia.

the obligations that fall under the ECHR. Adding the necessary elements of an offence for human trafficking to the Penal Code is just one step towards solving the problem. Despite the proposals made in 2010, the elements of an offence have not yet been added to the Penal Code. If these elements of an offence had been added to the Penal Code it would also be a step towards preventing human trafficking in punishing the culprits as well as in international cooperation.

Recommendations

- Coordinate Estonia's legislation with international conventions and the obligations taken on along with the ECHR, primarily with the positive obligations regarding protection of victims.
- Add the necessary elements for an offence of human trafficking in the Penal Code.
- Provide training for law enforcement officials to ensure better protection of victims and to increase efficiency of the fight against human trafficking.
- Rafity the Council of Europe Convention on Action against Trafficking in Human Beings.

Right to Personal Liberty

THE AUTHOR

Eve Pilt

Eve Pilt worked as a lawyer specializing in rights of persons with mental disorders at the Estonian Patient Advocacy Association (EPAA) 2002–2011. In that time period the EPAA, in assistance with Eve, presented 9 applications to the Supreme Court for amending court mistakes, the fruits of which have incorporated in the Civil Proceedings Act that came in to force January of 2006. She also assisted her clients in applications to ECtHR in cooperation between the EPAA and the Mental Disability Advocacy.

RIGHTS

ECHR Article 5 – Right to liberty and security

- Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  ... e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; ...

ECHR Protocol 4 Article 1 – Prohibition of imprisonment for debt

- No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

ECHR Protocol 7 Article 3 – Compensation for wrongful conviction

- When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

CHAPTER 3

Right to Personal Liberty

Article 5 of the European Convention on Human Rights (ECHR) protects the personal liberties and fundamental freedoms of those who have been deprived of liberty. Scope of application of Article 5 covers deprivation of liberty in criminal, as well as in civil proceedings, extending to the following subjects:

- arrest and detention of a person (Article 5(1));
- informing the person of the reasons of his arrest and the charges against him (Article 5(2));
- right to trial within a reasonable time (Article 5(3));
- right to access to court and court authorisation (Article 5(4));
- right to compensation (Article 5(5)).

Scope of application of Article 5 of ECHR partially coincides with the scope of Article 6 (right to fair hearing in court). Since Article 5 also covers the right to a fair trial for the detained, the ECHR case law[1] states those people are not subject to additional application of Article 6 of ECHR.

European Court of Human Rights (ECtHR) explained in its case *Winterwerp v. Holland*:

> *"The judicial proceedings referred to in Article 5 para. 4 need not … always be attended by the same guarantees as those required under Article 6 para 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned*

[1] See for example ECtHR, 4 February 2010 judgment Malkov v. Estonia. Application no. 31307/07.

should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty". Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves."[2]

Article 5(3) of ECHR - Entitlement to a trial within a reasonable time or a release pending trial.

ECtHR made a decision in *Malkov v. Estonia*[3] where the petitioner claimed the state of Estonia breached the right stated in Article 5(3) of ECHR – the entitlement to a trial within a reasonable time[4], as well as the right stated in Article 6(1) of ECHR – the entitlement to a fair and public hearing within a reasonable time[5].

The investigative action in the criminal case at hand began for the petitioner when he was heard as a witness on August 10th, 1999. The petitioner was arrested as a suspect on December 1st, 2003. Viru County Court reached the decision in the case on September 4th, 2008. Tartu Circuit Court reached its decision on January 27th, 2009 and thereby reduced the penalty given by Viru County Court. Tartu Circuit Court established that the proceedings in the criminal case lasted 10 years and 6 months in its entirety and concluded that the proceedings in the criminal case were not carried out within a reasonable

[2] ECtHR, 24 October 1997 judgment Winterwerp v. the Netherlands. Application no. 6301/73, § 60.
[3] Malkov v. Estonia.
[4] European Convention on Human Rights (ECHR). Adopted in Rome 4 November 1950. Estonia signed it 14 May 1993 and ratified it 16 April 1996. Article 5(3) states: "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."
[5] Article 6(1) states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

time. The court also established that the fact that the accused spent 5 years and 2 months in custody pending trial as inconsequential.

The ECtHR established that the State of Estonia breached the petitioner's entitlement to trial within a reasonable time as stated in Article 5(3).

The court pointed out the following circumstances.

- The petitioner attempted to be released during the trial repeatedly and without consequences. According to the law[6] the rulings of the court of first instance do not have the right to appeal. The Court also stated that the petitioner was also not able to contest his detainment in an appeal as the court was still discussing his case (point 38 of the court judgment).
- Contrary to the claims of the Government of Estonia the petitioner never lost his status as a victim, since Tartu Circuit Court never expressly stated in its judgment of January 27th, 2009 that Viru County Court had in its earlier judgment breached Article 5(3) of ECHR; neither did the Tartu Circuit Court connect the significant reduction of petitioner's sentence with the breach of this article (point 41 of the court judgment).
- The Government's claims that the proceedings are particularly complicated are unfounded.
- Care must be taken that criminal proceedings are carried out with special care (p. 49). In this case it did not happen (p. 50) the non-permissible length of the proceedings was due to constant suspension of the process, the inability to ensure the presence of the witnesses, the illness of the parties to the process, the death of the judge who commenced the proceedings and the backing down of the two consecutive judges (p. 51)

[6] Code of Criminal Procedure (RT I 2003, 27, 166 ... RT I, 23.02.2011, 2) § 385(6)[1] states that an appeal shall not be filed against a ruling on verification of the reasons for the arrest.

The Court did not allow the petitioner's appeal regarding the alleged breach of fair trial stated in Article 6(1), finding that Tartu Circuit Court did refer to Article 6(1) of ECHR when it reduced the petitioner's penalty.

Detainment for the purpose of conducting an expert analysis.

In the summer of 2010 a case received general attention, where the Harju County Court applied compelled attendance to bring the person before an expert, as well as placement of the person in a medical institution against his will for observation for a month.[7] This took place in a civil dispute of determining a residence for a child.

Since the object of the examination did not appear before an expert at a determined date the experts pursued the compelled attendance and the placement of the person in a medical institution for observation. The purpose of the examination was to determine the person's active legal capacity and the active civil procedural legal capacity. The person in question did not have a psychiatric diagnosis nor had he ever been subject to psychiatric treatment; he was not filed a petition against with the court for appointment of guardianship and/or for placing him in a closed institution.

The court substantiated the application of compelled attendance and the placement in a closed institution with a procedural provision that regulates placement in a closed institution.[8] The law states that if a person refuses examination for verification of the existence of the passive civil procedural legal capacity

[7] Harju County Court, Civil case number 2-09-66820 (21.05.2010).

[8] Article 537(3) and (4) of Code of Civil Procedure (RT I, 30.12.2010, 2) state:
"(3) If a person is ordered to undergo an examination, such person is required to appear before an expert. If the person fails to appear before an expert, the court may, after hearing the opinion of the expert, impose compelled attendance to bring the person before the expert.
(4) After hearing the expert, the court may order placement of the person in a medical institution for observation for up to one month if this is necessary for conduct of an examination. Before a decision is made, the person shall be heard. Where necessary, the court may extend, by a ruling, the time for placement of a person in a medical institution to up to three months and apply compelled attendance with respect to the person."

and active civil procedural legal capacity of the participant in a proceeding, the court shall initiate proceedings for appointing a guardian for the participant in the proceeding (Code of Civil Procedure § 204(2)). The same provision does not state application of compelled attendance and examination in a closed institution against the person's will. Code of Civil Procedure states that a person may be placed in a closed institution based on a petition by the rural municipality or the city government of the place of residence of the person (§533(1)) or in some instances by the petition of the guardian (§ 533(2)).

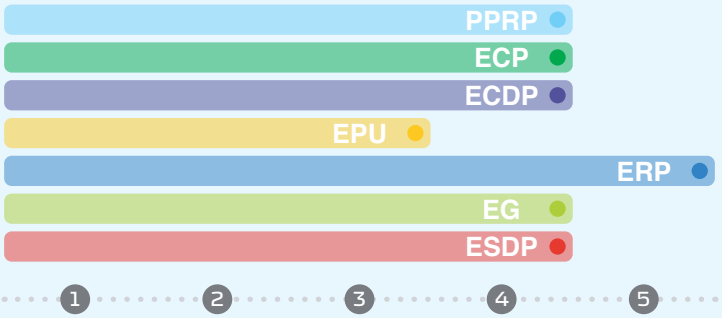
The person himself must be heard (§ 536(1)) along with the rural municipality or the city government, the spouse of the person and other family members who live with the person, the guardian of the person, the trustee appointed by the person etc (§ 536(2)).

The court may place a person in a closed institution only based on an expert opinion prepared by an expert who has personally examined or questioned the person (§537(1)). The court may order placement of the person in a medical institution for observation if there is not sufficient material to conduct an examination (§ 522(3) and § 537(4)). It must also to be noted that the Code of Civil Procedure only imposes compelled attendance on instances prescribed by law, whereas the person must be warned in advance (§ 47(4)). Therefore the court cannot apply discretion in this question.

According to the law the person may be placed in a medical institution for observation only in the context of prescribing a guardian (§ 522 (3)) and in the context of placing in a closed institution (§ 537(3) and (4)).

In this case the person was hospitalised without a warning of compelled attendance and in a proceeding where the Code of Civil Procedure does not prescribe the option of compelled attendance. The court thus placed the person in a situation where it was difficult for him to protect his rights due to being in a closed institution.

Right to Personal Liberty
(1 - most problematic; 5 - least problematic)



Source: see Appendix - Survey of Political Parties

Tallinn Circuit Court decided in its ruling of June 18th, 2010 that applying compelled attendance and placing the person in a medical institution for observation was unlawful, because the County Court was not processing an appeal from a municipality or a city government for placing a person in a medical institution against his will, but an appeal regarding a child's custody.[9] Tallinn Circuit Court was of the position that the need for limitation of a person's active legal capacity must be considered extremely carefully also in a civil proceeding. In no case may such limitation excessively limit a person's right to autonomy and self-determination. The court also assumed the position that limitation of a person's active legal capacity, especially in court proceedings, must be an extreme measure, which is applied on the condition that there is no other way to guarantee the person's fundamental rights and freedoms.

[9] Tallinn Circuit Court, civil case number 2-09-66820 (18.06.2010).

Consistency with Human Rights

Article 5(1) of Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms as well as § 20 of the Constitution of the Republic of Estonia state the principle of security of a person – that freedom can only be taken in instances stated in law, according to lawful procedure.

Even though Article 5 of ECHR linguistically contains criminal law terminology, it also protects the rights of persons placed in closed institutions[10] in the course of civil procedure.

ECtHR determined in its classic case of *Winterwerp v. Holland*,[11] what constitutes lawfulness in detention of a person of an "unsound mind".

- The person must be reliably established[12] to have an "unsound mind"[13], whereas his mental state is such as to justify his compulsory hospitalisation. Moreover, the lawfulness of detention depends on persistence of such a disorder.
- The authorities have a certain discretion in deciding upon criteria of an "unsound mind".
- In the case where the doctor's opinion is based on medical information, which does not express the person's condition at the time of making the opinion, then the delay between the clinical examination and the drawing up of the medical opinion may in itself be in contradiction of the basic principle of Article 5 of ECHR (protection against arbitrary detainment).
- The national civil law must be in accordance with the ECHR, including the general principles stated or implied within.

[10] The closed institutions in this case are psychiatric and/or communicative diseases' hospitals and the closed wards of social care institutions.
[11] *Winterwerp v. the Netherlands*.
[12] In the context of Estonian law this means, depending on the measure taken, a psychiatric opinion or an opinion of an expert appointed by the court.
[13] In the context of Estonian law the term "psüühilise erivajadusega inimene" (a person of psychiatric special needs) is used.

The opinion that the ECHR has a wider application than just criminal law was explained by ECtHR in 1990 in its judgment *Van der Leer v. Holland*:

> *"The Court is not unmindful of the criminal-law connotation of the words used in Article 5(2). However, it agrees with the Commission that they should be interpreted "autonomously", in particular in accordance with the aim and purpose of Article 5, which are to protect everyone from arbitrary deprivations of liberty."*[14]

Therefore Article 5 of ECHR is undeniably applicable in civil law procedures of assigning persons with mental disorders into closed institutions.

ECtHR repeated the principles that Article 5(1) primarily demands that the detention be lawful in its recent case of *Gatt v. Malta*. This primarily means that detention is carried out in accordance with national law. However, the court draws attention to the fact that any detention must also be consistent with the purpose of Article 5 of ECHR, to protect individuals from arbitrariness.[15]

The aforementioned Harju County Court decision of May 21st, 2010 breached the right to freedom stated in § 20 of the Constitution and Article 5(1) of ECHR as well as the important principle of legality stated in those provisions.

Action justifying detention

§ 11(1) of the Mental Health Act[16] as well as § 19(1) of the Social Welfare Act[17] state the circumstances, which, if occurring together may deprive a person of his freedom:

- the person has a severe mental disorder which restricts his or her ability to understand or control his or her behaviour;
- without inpatient treatment, the person endangers the life, health or safety or himself or herself or others due to a mental disorder;

[14] ECtHR. 21 February 1990 judgment *Van der Leer v. The Netherlands*. Application no. 11509/85, § 27.
[15] ECtHR. 27 July 2010 judgment Gatt v. Malta. Application no. 28221/08, §40.
[16] Mental Health Act. RT I 1997, 16, 260 … RT I, 23.02.2011, 2.
[17] Social Welfare Act. RT I 1995, 21, 323 … RT I 2010, 41, 240.

- other psychiatric care / other welfare institution measures are not sufficient or their use is not possible.

Rules of procedure for placing a person in closed institution are stated in chapter 54 of Code of Civil Procedure.

The legislator has not specifically described what is understood by endangering and what the criteria for measuring danger are.

Therefore parties to the proceeding of placing persons in a closed institution as well as the court lack a clear understanding as to what is considered dangerous. The definition of 'dangerous' has so far been defined by the Supreme Court and its decisions.[18] This year the Tallinn Circuit Court has expressed an understanding towards human nature and conceded that in certain circumstances irritability and instability may be a sign of a normal human reaction.

To be precise, the Tallinn Circuit Court said the following in its decision of August 18th, 2010:

> *"The Circuit Court hereby agrees with the view of the petitioner that in a situation where a person has been placed in a psychiatric clinic against his will and is therefore clearly irritated and instable, the aforementioned behaviour cannot be interpreted as a mental disorder or as being dangerous to himself or others. Such behaviour may, according to the petitioner, even be justified and considered normal, if a person has been unjustifiably and unfoundedly placed in a closed institution against his will."*[19]

The Tallinn Circuit Court said in its ruling of October 12th, 2010, which annulled Harju County Court's earlier ruling regarding involuntary emergency psychiatric care:"It cannot be inferred that a person is a danger to himself or those around him from the fact that the person is singing, running around or dancing or making ridiculous demands."[20]

[18] See for example The Civil Chamber of Supreme Court. Judgment in a civil matter no. 3-2-1-145-06 (2.03.2007).
[19] Tallinn Circuit Court case in a civil matter no. 2-10-26582 (18.08.2010).
[20] Tallinn Circuit Court case in a civil matter no. 2-10-29892 (12.10.2010).

These are important rulings as courts of first instance consider the practice of the circuit courts in their decision-making.

Application of less restrictive measures

"Letting dangerous crazy people loose?" – such media reaction was caused by a draft concluded by Ministry of Justice in 2010, which reached the second reading in *Riigikogu* in February of 2010. The need for a change in the system of coercive treatment grew apparent when the survey of 2008, conducted by Ministry of Justice, was published.

The survey titled "Analysis of speed and organisation of coercive treatment for people with psychological disorders"[21] also contained the suggestions:

> *"…to create a "conditional" option for application of the coercive treatment, so that persons whose condition has improved need not be kept on the coercive treatment, but if the person commits a new act or becomes dangerous, an easier process would be employed to send him or her back into treatment; to create a system for ensuring the quality of examinations; to create support system for those who have been noted to have more sever mental disorders or who at least has been applied coercive treatment to."*

The daily paper Postimees presented an overview of opinions of various parties to the question of coercive treatment in its article, which stated as its title that the draft allows some of the mental patients who have committed an offence to be let loose.[22]

The head of The Estonian Patient Advocacy Association (EPAA) Pille Ilves has stated that more harmless mental patients would need to visit a psychiatrist

[21] Brit Tammiste, Hendrik Kaing (2008). *Psüühikahäiretega isikute sundravile suunamise kiiruse ja korralduse analüüs* [Analysis of speed and organisation of coercive treatment for people with psychological disorders], pages 73–74. Ministry of Justice. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=39634/Ps%FC%FChikah%E4iretega_isikute_sundravile_suunamise_kiiruse_ja_korralduse_anal%FC%FCs_B.Tammiste,_H._Kaingx.pdf.

[22] Alo Raun (2010). *Eelnõu lubaks osa kurja teinud vaimuhaigeid tänavale* [The draft would let some of the mental patients who have committed an offence to be let loose]. Postimees, 16.02.2010. Available at: http://www.postimees.ee/?id=225267.

once or twice a month, get the so-called behavioural injection, and they could lead a rather normal life with this treatment. Deputy secretary general of Ministry of Justice Heili Sepp stated that the advantage of the ambulatory coercive treatment is that it is very flexible and allows for better opportunities for handling offenders and for re-associating them. The President of Estonian Psychiatric Association Andres Lehtmets is of the following opinion:

> *"Coercive treatment is not a regular health service. Whereas normally a patient turns to a doctor as a client, coercive treatment is obligatory. Persons treated by ambulatory coercive treatment need to be supported by psychiatrists with special training. The contingent subjected to coercive treatment needs specialised help for the system to work. This cannot be trusted with just any psychiatrist. Forensic psychiatry is treated as a special field in Europe."*

The adoption of the law amendment[23] by *Riigikogu* is a welcome development, which legalises ambulatory coercive psychiatric treatment as it is a substantially less restrictive measure than stationary treatment. The adopted law preserved what had been set out in the draft act,[24] according to which the ambulatory coercive psychiatric treatment will be regulated by § 17 of the Mental Health Act and the implementing provisions of the Minister of Social Affairs that specify the requirements made to the provider of coercive treatment, the requirements of the treatment and the organisation of work for the health service provider. Although the current act does not yet state who will be carrying out the surveillance over ambulatory and stationary coercive psychiatric treatment (if at all), this surveillance will be carried out by the Health Board as of September 1st. The amendments pertaining to the coercive treatment in the Code of Criminal Procedure nor the Mental Health Act provide an explanation how the state plans on ensuring the surveillance system of the persons subject to ambulatory coercive treatment, the timely access to consultation of the persons subject to coercive treatment and the necessary

[23] Kriminaalmenetluse seadustiku ja sellega seonduvate seaduste muutmise seadus [Act amending the Code of Criminal Procedure and other connecting acts]. RT I, 23.02.2011, 1.

[24] Draft 599SE-II-2 Kriminaalmenetluse seadustiku muutmise ja sellega seonduvalt teiste seaduste muutmise seadus [The Act amending the Code of Criminal Procedure and acts pertaining to this act]. Available at: http://www.*Riigikogu*.ee/?page=eelnou&op=ems&emshelp=true&eid=793874&u=20110421095123.

training for the psychiatrists. Nor does it appear from the draft who is responsible for the damage, which occurs in the course of the ambulatory coercive treatment. Is it the state or the health service provider?[25] The Supreme Court found in its resolution of April 17th, 2009 in the case of *M. V v. The State of Estonia and The North Estonia Medical Centre* that regardless the intent determined in civil court procedure or administrative court procedure the coercive treatment constitutes a relationship based on law of obligations and damages occurred in this relationship are not the responsibility of the state.[26]

This opinion of the Supreme Court contradicts the practice of ECtHR where the court found in the case of *Storck v. Germany* that the state is responsible for coercive psychiatric treatment in a private medical institution.

National legislation should be applicable in a way that coincides with the practice of ECtHR.

The Member States, primarily their courts, must apply national law in the spirit of the rights of the Convention. Failure to do that may qualify as a breach of a ECHR provision by the state.[27]

Compensation for unlawful detention

The object of regulation of Article 5 of ECHR is also the compensation for unlawful arrest or detention. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation (Article 5(5)). The Constitution states that everyone has the right to compensation for moral and material damage caused by the unlawful action of any person (§ 25 of the Constitution).

[25] § 1(2) and (3) of the State Liability Act state: (2) This Act does not regulate the restoration of rights or compensation for damage in private law relationships. (3) Causing damage in a private law relationship means a public authority causing damage in the following circumstances: 1) upon the violation of a prestation, including providing transport services, health services or other services as a person in private law

[26] The Supreme Court, resolution of Administrative Law Chamber 17.04.2009. in the civil case no. 3-3-1-16-09, paras 14-15.

[27] ECtHR. 16 June 2005 judgment Storck v. Germany, § 93. Application no. 61603/00.

In criminal cases the damage caused to a person detained unlawfully is compensated according to the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act (The Compensation Act). The compensation is paid in a determined amount, not considering the aforementioned constitutional regulation[28]. This regulation did apply in criminal cases until V. Õiglane who had been under arrest unlawfully for 171 days filed a complaint with the Administrative Court, which found that paragraph 5 subsections 1, 2 and 4 of the Compensation Act have to be declared contradicting the paragraphs 11, 12 and 25 of the Constitution. The Administrative Law Chamber of The Supreme Court conceded that the current law does not contain clear regulations, which would allow for solving claims regarding compensation for damages of unlawful detention.[29]

The Supreme Court *en banc* took the view that since it also has to adopt a position on whether paragraph 5 subsections 1, 2 and 4 of the Compensation Act are in accordance with the principle of equal treatment and compensation for damages stated in paragraphs 12 and 25 of the Constitution as well as the constitutionality of paragraph 15 subsection 1 of the State Liability Act in so far as it sets limits to compensating for damages in course of unlawful arrest, it also includes the *Riigikogu*, Chancellor of Justice and the Minister of Justice in the proceedings of the cassation appeal of V. Õiglane.[30]

The Chancellor of Justice stated in his reply to the Supreme Court that paragraph 5 subsections 1, 2 and 4 of the Compensation Act are in contravention of the Constitution in so far as the payment of a standard compensation

[28] § 5(1) of the Compensation Act (RT I 1997, 48, 775 … RT I 2004,46,329) states that the damage is compensated in an amount of seven daily rates (days' wages) for each twenty-four hour period during which the person was unjustly deprived of liberty.

[29] The Supreme Court, resolution of Administrative Law Chamber in administrative case no. 3-3-1-69-09, (15.03.2010) § 23.

[30] The Supreme Court *en banc*, resolution in the civil case no. 3-3-1-69-09 (15.06.2010), § 24(2).

is considered to be the compensation for the revenue forgone because of unfounded detention.[31]

The Compensation Act provides a regulation for criminal proceedings, which allows compensation for damages for those who have been deprived of liberty unjustly, however, for those who have been unjustly detained in a civil court proceeding, as in the aforementioned case, the law does not provide any measures for compensation. Yet, the state of Estonia did sign an agreement on July 11th, 2008 regarding a case before ECtHR, *M.V. v. Estonia*, by which it was decided that the Ministry of Justice will compose a draft for an act, which provides provisions for compensation for damages for persons who have been unjustly detained in psychiatric hospitals or social welfare institutions in the course of civil court proceedings.[32]

The fact that this promise made by the Government has still not yet been fulfilled and that there is no compensation mechanism for compensation for damages incurred in the course of civil court proceedings was pointed out by the Estonian Patient Advocacy Association and the Mental Disability Advocacy Centre in the shadow report on the implementation of the International Covenant of Civil and Political Rights by Estonia in 2010.[33] The UN Human Rights Committee didn't consider this important enough to include in the concluding observations on Estonia made on August 4th, 2010.

Conclusion

The ECtHR continued its criticism regarding unreasonably long duration of court proceedings in 2010, which in this case meant detention of a person for

[31] Chancellor of Justice (2010). Arvamus põhiseaduslikkuse järelevalve kohtumenetluses [Constitutional review in court proceedings]. No. 9-2/101471/1005395. 10.09.2010. Available at: http://www.oiguskantsler.ee/public/resources/editor/File/ERIMENETLUSED/Arvamused_Riigikohtule_2010/Riigikohus_arvamuse_edastamine_AVVKHS___5_lg_1_ja_2_ning_lg_4_ls_1_p_hiseadusp_rasus.pdf

[32] ECHR. 7 October 2008 judgment M.V. v. Estonia. Application no. 21703/05.

[33] Estonian Patients' Advocacy Association and Mental Disability Advocacy Center (2010). Shadow report on the implementation of the International Covenant of Civil and Political Rights by Estonia, p 6, point 4. June 2010. Available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/EPAA_MDAC_Estonia99.doc.

a large extent of the proceedings and his fruitless attempts to stop the detention. This criticism is especially regrettable considering that Estonia has been criticised about this for years. An unfulfilled promise given by the Ministry of Justice in 2008 regarding drawing up of a draft act allowing persons to be compensated for being placed in a social welfare institution in the process of civil proceeding came to the fore in 2010,

The offhanded decision of the Harju County Court to place a person in a psychiatric hospital in the course of a family law case is regrettable as well as completely without a legal basis. However, court decisions made in two other cases, where Tallinn Circuit Court in the course of defining the term 'dangerous' stated that irritability and instability of a person in a condition where he has been placed in a psychiatric hospital against his will does not necessarily remark dangerousness, can be considered a positive development. This behaviour is rather a normal reaction to a situation of groundless detention.

Amendments to the legislation enabling ambulatory coercive psychiatric treatment can be considered yet another positive development. As a result, socially harmless persons who need psychiatric treatment, do not have to stay in institutions permanently, but may go receive treatment as per prescription.

Recommendations

- Review regulation regarding court proceedings and analyse the reasons why Estonia is unable to fulfil the obligation stemming from ECHR regarding entitlement to a trial within a reasonable time or the inability to release the person for the duration of court proceedings.
- Analyse reasons that made possible the Harju County Court decision to place a person in a psychiatric hospital on illegal grounds and in a way that made protection of his rights difficult.
- Implement the agreement that Estonia signed in connection with the ECtHR case M.V. v. Estonia 11 July 2008 taking on the obligation to compose an act, which provides compensation for damages for persons who have been unjustly detained in social welfare institutions in the course of civil court proceedings.

Right to a fair trial

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Eve Pilt

RIGHTS

ECHR Article 6 – Right to a fair trial

- In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ...

ECHR Article 13 – Right to an effective remedy

- Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

CHAPTER 4

Right to a fair trial [1]

There were no developments that could be considered definitive of the year 2010. However, several smaller changes and events concerning the right to a fair trial did take place, which deserve to be discussed here.

It is important to mention the 9th annual plenum of judges, where the Supreme Court judge Eerik Kergandberg summarised the criticism directed at Estonia by the ECtHR. He pointed out, as an interesting fact, that as of February 3rd, the ECtHR had detected a breach of the principle of fair trial or Article 6(1) of the ECHR in 8 cases out of 21 that involved Estonia.[2] This could be considered the weakness of Estonian court system. Year after year the Chancellor of Justice also refers to the unreasonable length of the court proceedings.[3] 2010 saw another case against Estonia in the ECtHR concerning a complaint under the same article, this time to do with unreasonable length of court proceedings.[4]

[1] With thanks to Rene Kullör for the help in analysing and gathering the information.

[2] Kergandberg, Eerik. (2010). EIK kriitika Eesti kohtusüsteemi töö suhtes – kas põhjus kohtunike töö hindamiseks. [criticism of the ECtHR about the work of Estonian legal system – a reason to evaluate judges work?] 9th annual plenum of Judges, p 1. 11–12.02.2010. Available at: http://www.riigikohus.ee/vfs/957/Lisa_6_Eerik_Kergandberg_ettekanne.pdf.

[3] Chancellor of Justice (2011). Ülevaade õiguskantsleri 2010–2011. aasta prioriteetide täitmisest 2010. aastal. [overview of execution of priorities of the Chancellor of Justice for the years 2010–2011 in 2010] Available at: http://www.oiguskantsler.ee/public/resources/editor/File/OIGUSKANTSLERI_KANTSELEI/prioriteedid/_levaade_prioriteetide_t_itmisest_2010_l_puks__5_.pdf.

[4] ECtHR. 4. February 2010 judgment Malkov v. Estonia. Application no. 31407/07. (The case has been described in detain in chapter 3).

The Conciliation Act

The Conciliation Act that entered into force on January 1st, 2010 could be considered one of the most important changes that took place in Estonian legal system in 2010.[5] The purpose of adopting the Conciliation Act was to offer an alternative to court proceedings and to encourage solving various civil disputes outside of court and in a less formal way. The conciliation proceedings have several advantages over court proceedings, including its relative simplicity and the potentially smaller financial cost. The explanatory memorandum also mentions conciliation proceedings' speed in comparison to court proceedings.[6]

In relation to the adoption of the Conciliation Act, the Code of Civil Procedure was also amended. The amendments gave the court the right to oblige the parties to participate in the conciliation proceedings stated in the Conciliation Act, if it is necessary, in court's opinion, for solving the case, considering the circumstances and its proceedings (§ 4(4) of the Code of Civil Procedure). The agreement concluded as a result of conciliation proceedings will be authorised by a court that holds jurisdiction of the conciliation proceedings (§1211 of the Code of Civil Procedure). The court will not declare the agreement possible to implement if it exceeds the limitations stated in the Conciliation Act, is in contradiction with good manners or acts of law or an important public interest or if it isn't possible to implement the agreement (§ 6271 of the Code of Civil Procedure).

According to the sworn advocate Andres Past and lawyer Anna Fedurko the adoption of the Conciliation Act has laid "a foundation for alternative dispute resolution". It "enables parties to reach a mutually satisfying result that resembles a compromise with substantially less time and financial cost than in a court proceeding". Whereas, it also entails a court aspect

[5] Conciliation Act. RT I 2009, 59, 385.
[6] The Government of the Republic of Estonia (2009). Lepitusseaduse eelnõu seletuskiri [The explanatory memorandum to the draft of the Conciliation Act], p 1–2. Available at: http://www.*Riigikogu*.ee/?page=en_vaade&op=ems&eid=624582.

– the option of declaring the agreement possible to implement.[7] Therefore it can be said that, in principle, the adoption of the Conciliation Act has improved access to justice and to efficient process in general, considering time and cost. It is, however, still early to evaluate the influence and effectiveness of this act as it has been in force for just one year. Yet this process has potential and the developments connected with it are worth following.

E-toimik (electronic dossier)

The creation of information system *e-toimik* (for processing electronic dossiers) in civil procedure could be considered the second important change of 2010. This option came about with the Act amending the Code of Civil Procedure, the Courts Act and other acts that came into force on January 1st, 2010.[8] A year earlier the *e-toimik* had been adopted in criminal proceedings. The paragraphs and additions added to the Code of Civil Procedure also extend the possibilities of delivering procedural documents electronically. The Ministry of Justice has attributed the following phrases to *e-toimik*: legal certainty, saving time, saving taxpayers' money, equal access to information of parties to a proceeding, safety, simplification of offices' work, less time spent on proceedings.[9] According to the explanatory memorandum, the second main purpose of this act was the simplification of the expedited procedure to better fit the nature of the electronic procedure.[10] This amendment is sure to simplify and potentially speed up the court proceedings.

[7] Past, Andres and Fedurko, Anna (2009). Lepitusseadus pakub alternatiivi kohtumenetlusele [The Conciliation Act offers an alternative to court procedures]. Available at: http://www.concordia.ee/est/lepitusseadus-pakub-alternatiivi-kohtumenetlusele.

[8] Tsiviilkohtumenetluse seadustiku, kohtute seaduse ja teiste seaduste muutmise seadus [Act amending the Code of Civil Procedure, the Courts Act and other acts]. RT I 2009, 67, 460.

[9] Ministry of Justice. Õiguskaitseasutuste ühine menetlusinfosüsteem *E-toimik* [Law enforcement authorities' common procedural system of information]. Available at: http://www.just.ee/*e-toimik*.

[10] The Governement of the Republic of Estonia (2009). Tsiviilkohtumenetluse seadustiku, kohtute seaduse ja riigi õigusabi seaduse muutmise seaduse eelnõu seletuskiri [The explanatory memorandum to the draft amending the Code of Civil Procedure, the Courts Act and the State Legal Aid Act]. Available at: http://www.*Riigikogu*.ee/?page=eelnou&op=ems&emshelp=true&eid=773361&u=20110224223257.

Summary proceedings

In 2010 the Constitutional Review Chamber of the Supreme Court declared invalid the paragraphs stating summary proceedings. The Supreme Court found in its judgment that the paragraphs 251–256 and paragraph 318 subsection 3 point 3 do not provide an efficient right to protection.[11] Essentially the notice of appeal had to do with the right to appeal stemming from § 24(5) of the Constitution and Article 6(3) points b and c of the ECHR. The Supreme Court came to the conclusion that § 318(3) point 3 of the Code of Criminal Procedure rules out the option of appeal in the course of summary proceedings and that this constitutes breach of right to appeal stated in § 24(5) of the Constitution. The Supreme Court decided that summary proceedings also breach everyone's right to petition for any relevant law, other legislation or procedure to be declared unconstitutional while his or her case is before the court stemming from § 15(1) of the Constitution. Therefore, the Constitutional Review Chamber found that the regulation of criminal procedure was in contradiction of the Constitution in so far as it does not provide efficient right to protection, nor does it allow for declaring a law relevant to his or her case unconstitutional.

Access to justice

A great deal of controversy arose in 2010 when the UN Committee on Elimination of Racial Discrimination presented Estonia with recommendations for implementation of the Convention on the Elimination of All Forms of Racial Discrimination.[12] Extensive discussion was caused by media's free interpretation of the committee's recommendation on use unofficial

[11] The Constitutional Review Chamber of the Supreme Court. Judgment 3-4-1-5-10 (18.06.2010).
[12] UN Committee on the Elimination of Racial Discrimination (2010). Draft Concluding observations: Estonia, paras 2–3. CERD/C/EST/CO/8-9 (27.08.2010) Available at: http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-EST-CO-8_9.doc.

languages,[13] but the committee's remark on the near absence of complaints of acts of racial discrimination is more important in the context of this chapter. The Committee recommended Estonia research the causes of the low interest of the people. The Committee also recommended Estonia verified whether it is not the result of victims' lack of awareness of their rights, lack of confidence in the police and judicial authorities or limited access to available mechanisms.[14]

Another important topic of 2010 was the high cost of state fees. Excessively high state fees may restrict access to justice and thereby obstruct people from using their rights. Several articles were published on this topic.[15] Chancellor of Justice has also covered this topic. Chancellor of Justice decided to initiate analysis of constitutionality of state fees based on the petitions.[16] The Centre Party initiated the draft amending the State Fees Act on December 8th, 2010, stating in its explanatory memorandum that the draft was necessary to reduce the state fees that had more than doubled for civil proceedings since January 1st, 2009.

According to the estimation of the initiators of the draft the current state fees are not proportionate to the purpose of economy of proceedings, and a Supreme Court judgment 3-4-1-25-09 supporting this position is referred to. This case, in turn, refers to the ECtHR judgment Mehmet and

[13] For example: Rekand, Tiina (2010). ÜRO: Eesti peaks olema kakskeelne [UN: Estonia should be bilingual]. Postimees, 20.10.2010. Available at: http://www.postimees.ee/?id=329020; Jaagant, Urmas (2010). ÜRO soovitab Eestile kakskeelsust [UN suggests bilingualism for Estonia]. Eesti Päevaleht, 20.10.2010. Available at: http://www.epl.ee/artikkel/585683; – (2010). ÜRO soovitab Eestile kakskeelsust [UN suggests bilingualism for Estonia]. Delfi, 20.10.2010. Available at: http://www.delfi.ee/news/paevauudised/eesti/uro-soovitus--eesti-peaks-olema-kakskeelne.d?id=34063735; Ministry of Foreign Affairs (2010). ÜRO rassilise diskrimineerimise kõrvaldamise komitee soovituste tõlgendamisest [On interpreting UN Committee on Elimination of Racial Discrimination recommendations]. 20.10.2010. Available at: http://www.vm.ee/?q=node/10119.

[14] UN Committee on the Elimination of Racial Discrimination (2010). Draft Concluding observations: Estonia, § 18.

[15] For example: Tahlfeld, Kaisa (2010). Kohtuasjade riigilõivud on liiga kõrged [The cost of state fees too high]. Äripäev, 12.09.2010. Available at: http://www.ap3.ee/article/2010/9/12/kohtuasjade-riigiloivud-on-liiga-korged.

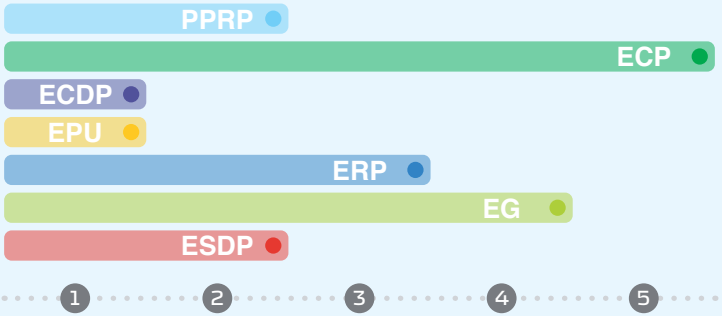
[16] Ülevaade õiguskantsleri 2010–2011. aasta prioriteetide täitmisest 2010. aastal [Overview of execution of priorities of the Chancellor of justice 2010–2011].

Suna Yigit v. Turkey, which stated that an excessive state fee constitutes as breach of the ECHR.[17] However, this draft will not proceed in *Riigikogu* due to expiry of the term of office.[18]

Persons with mental disorders

Faults in application of right to a fair trial were also pointed out by the UN Human Rights Committee in their 4 August 2010 concluding observations to Estonia in implementing the UN Covenant on Civil and Political Rights.[19] Foremost, the committee found fault with guaranteeing the rights of mentally disabled persons and their legal guardians in criminal proceedings.

Right to a fair trial
(1 – most problematic; 5 – least problematic)



Source: see Appendix – Survey of Political Parties

[17] Eesti Keskerakonna fraktsioon (2010). Riigilõivuseaduse muutmise seaduse eelnõu seletuskiri [The explanatory memorandum to the draft of amending the State Fees Act]. 8.12.2010. Available at: http://www.*Riigikogu*.ee/?page=eelnou&op=ems&emshelp=true&eid=1256537&u=20110224224425.

[18] *Riigikogu* Rules of Procedure Act, § 96. RT I 2003, 24, 148 ... RT I, 21.03.2011, 1.

[19] UN Human Rights Committee (2010). Concluding observations: Estonia, CCPR/C/EST/CO/3, para 12. (4.08.2010). Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/440/92/PDF/G1044092.pdf?OpenElement.

The Human Rights Committee fund that mentally disabled persons and/or their legal guardians are often insufficiently informed of criminal proceedings and charges against them; the right to a fair hearing and effective legal assistance is also oftentimes breached (see chapter 3, "Right to personal liberty"). The committee also found that the independence of experts appointed to assess a patient's need for continued coercive treatment is compromised if they work in the same hospital as the one in which the patient is held.

The aforementioned recommendation of the Human Rights Committee does not concern just the review of justification of coercive treatment in criminal procedures, but is also applicable by analogy to conducting expert analysis before placing a person in a closed institution in civil procedures. Human Rights Committee recommendations are in accordance with Tallinn Circuit Court 12 October 2010 judgment, where the court stated that opinion of psychiatrists providing the coercive psychological treatment do not constitute expert opinion in the meaning of § 537(1) of Code of Civil Procedure.[20] This judgment influenced the practice of Harju County Court where continuation of coercive psychiatric treatment was prescribed in the course of legal protection based on § 533 of Code of Civil Procedure, and the court did not use to require expert analysis and settled for the opinion of the psychiatrists providing the service.[21]

Summary

The problem of duration of the court proceedings, which the ECtHR has criticised for years, is still without a solution. Another persisting problem is the ineffectuality of the provision on incitement of hatred in the Penal Code, which Estonia has been criticised for for years. Yet another unsolved issue is

[20] § 537(1) of Code of Civil Procedure (RT I 2005, 26, 197 ... RT I, 30.12.2010, 2) states that the court may place a person in a closed institution only based on an expert opinion consisting of prerequisites of the placement, including dangerousness of the person, prepared by an expert who has personally examined or questioned the person. Only a psychiatrist, or in case of a communicable disease, a doctor competent in the field, may be used as an expert.

[21] See Harju County court judgment in civil matter no. 2-10-29892 (16.12.2010).

the problem of state fees which may prove a significant obstacle to access to justice. In this instance, they are just too high.

The entry into force of the Conciliation Act can be pointed out as a positive development. One just needs to wait to see how it will be used in practice. The adoption of the *e-toimik* system in civil procedures is another positive development in facilitating access to justice. The Supreme Court judgment declaring summary judgments unconstitutional in criminal proceedings is also another step forward in ensuring efficient right to protection.

Recommendations

- Thoroughly analyse Estonian court system and what so often causes the long duration of court proceedings and take measures to avoid it in the future.
- Amend the provision prohibiting inciting hatred in the Penal Code, remove the condition that requires proof of danger to a person's life or health.
- Thoroughly analyse the rates of state fees in access to justice in court proceedings.

Right to respect for private and family life

THE AUTHOR

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Eve Pilt

RIGHTS

ECHR Article 8 – Right to respect for private and family life

- Everyone has the right to respect for his private and family life, his home and his correspondence.
- There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

CHAPTER 5

Right to respect for private and family life

Data protection

The ongoing activity of the Data Protection Inspectorate (DPI) in explaining the principles of data protection, especially via publication of advisory guidelines could be considered a positive development in the field of data protection.[1] No important amendments were made in laws regarding protection of personal data in 2010.

A case to be mentioned in connection to protection of personal data is of the electronic survey carried out in the course of the election campaign by Pro Patria and Res Publica Union (IRL) called "IRL listens to your voice!", in the course of which personal data was gathered and processed. DPI, as a result of its supervision proceedings, found that data gathered for the purpose of direct marketing (for the purpose of forwarding future political messages) should not be used for this purpose, as the questionnaire did not leave a clear option for the respondents to opt out of their data being processed, therefore the consent of the subject of this questionnaire is invalid.[2] Furthermore, in

[1] See also Data Protection Inspectorate (2011). Andmekaitse Inspektsiooni aastaaruanne „Avaliku teabe seaduse ja isikuandmete kaitse seaduse täitmisest aastal 2010." [Annual report of the Data Protection Inspectorate "On implementing the Public Information Act and the Personal Data Protection Act in 2010"]. Tallinn, 2011. Available at: http://www.aki.ee/download/1862/AKI%202010%20aasta%20ettekanne.pdf.

[2] Data Protection Inspectorate (2011). Pressiteade: Järelevalvemenetlus IRL küsitluse asjas jõudis lõpule [Press release: supervision proceedings in the case of the IRL survey come to an end]. 3.11.2010. Available at: http://www.aki.ee/est/index.php?part=news&id=301&group=3.

October of 2010 the DPI published advisory guidelines for use of personal data in election campaigns.[3]

Disabled persons' right to private life from the point of view of ratification of the Convention on the Rights of Persons with Disabilities

The President of Estonia signed the Convention on the Rights of Persons with Disabilities (CRPD) on September 15th, 2007. In October of 2010 the Ministry of Social Affairs concluded the draft ratifying the CRPD and its additional protocol, which included Estonia's intention to

> *"[compose] a declaration for Article 12 explaining [Estonia's] understanding that Article 12 cannot be interpreted as an obligation to remove all possibilities of restricting active legal capacity. Estonia retains the right to continue its current national practice, which allows the court to appoint a guardian for a person of restricted active legal capacity."*[4]

Article 12(2) of the CRPD states that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.[5]

§ 204(2) of the Code of Civil Procedure, which states that the court shall initiate proceedings for appointing a guardian if it has doubts regarding the active

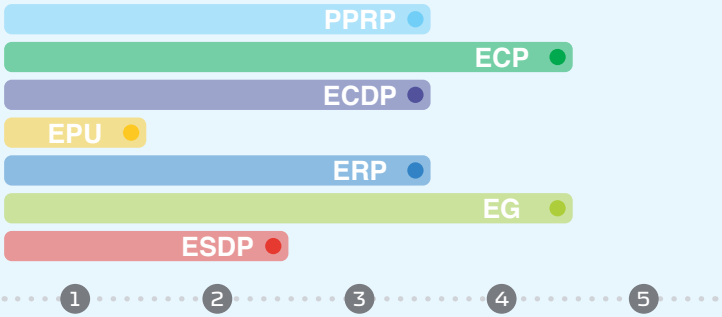
[3] Data Protection Inspectorate (2011). Juhis: Isikuandmete kasutamine valimiskampaanias [Guideline on use on personal data in election campaigns]. 8.10.2010. Available at: http://www.aki.ee/download/1750/Isikuandmete%20kasutamine%20valimiskampaanias%20-%20juhis%20erakondadele.pdf.

[4] Ministry of Social Affairs (2010). Seletuskiri „Puuetega inimeste õiguste konventsiooni ratifitseerimine ja konventsiooni fakultatiivprotokolliga ühinemine" seaduse eelnõu kohta [Explanatory memorandum to the draft to "Ratification of the CRPD and joining the optional protocol of the convention"]. 7.10.2010. Available at: http://www.ead.ee/orb.aw/class=file/action=preview/id=375878/Eeln6u_seletuskiri.pdf.

[5] Convention on the Rights of Persons with Disabilities. Adopted in New York 13.12.2006. Estonia signed it 25.09.2007. Available at: http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

civil procedural legal capacity of a participant in a proceeding, clearly contradicts this provision.[6]

Right to respect for private and family life
(1 – most problematic; 5 – least problematic)



Source: see Appendix – Survey of Political Parties

The Estonian Patient Advocacy Association (EPAA) has raised the question of whether the fact that the court appoints a forensic psychiatric examination to verify the existence of an active civil procedural legal capacity is in accordance with the Constitution of the Republic of Estonia and the CRPD. Whereas, it is widely known that the forensic psychiatrists lack legal knowledge and therefore cannot be considered authority in the meaning of § 293(1) of Code of Criminal Procedure. EPAA has raised this question with the Ministry of Justice as well as the office of Chancellor of Justice, but has so far received

[6] Code of Civil Procedure (RT I 2005, 26, 197 ... RT I, 30.12.2010, 2) § 204 (2) states that if the court has doubts regarding the active civil procedural legal capacity of a participant in a proceeding who is a natural person, the court may demand that the person provide a doctor's opinion to such effect, or to order an examination. If the person refuses to comply with the court's orders or the documents submitted fail to remove the doubts of the court, the court shall initiate proceedings for appointing a guardian for the participant in the proceeding.

replies, which stipulate that the regulation contained in § 204(2) Code of Civil Procedure is necessary and allegedly helps to protect the rights of person of restricted active legal capacity in civil court procedures.

Chancellor of Justice stated the following in his reply to the EPAA:

> *"[A]ctive legal capacity and civil procedural legal capacity are not necessarily connected. The person whose civil procedural legal capacity is restricted may not necessarily be incapable of independent transactions in any other areas of life. However, the basis of restriction of civil procedural legal capacity can only be a mental health disorder. A sign of such disorder that can be a basis for restriction of civil procedural legal capacity could mainly be that the person misjudges his or her factual or legal situation and not for lack of legal knowledge, but in comparison to a person of sound mental health without legal knowledge. If the court has doubts it has the duty to verify the existence of the passive civil procedural legal capacity and active civil procedural legal capacity of the participants in a proceeding in the manner pointed out in § 204(1) of Code of Criminal Procedure. The court may include an expert in the field to verify the active civil procedural legal capacity. The expert competent to verify the existence of a mental disorder is undoubtedly a psychiatrist. However, it has to be emphasised that the basis of restricting active civil procedural legal capacity certainly cannot be the fact that the person wishes to protect his various rights and freedoms by turning to the court."*[7]

Contrary to the assurance of the Chancellor of Justice the courts not only verify the active civil procedural legal capacity in proceedings initiated by § 204(2) of Code of Civil Procedure, but include all areas of the person's life in the examination, including the right to vote, the right to make independent transactions, the right to decide over his own treatment and everyday life, the right to make a will, the right to marry etc.[8] Thereby the court unnecessarily intrudes in a person's

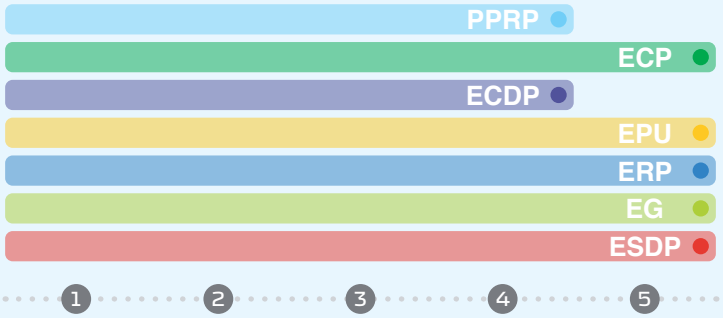
[7] Chancellor of Justice (2010). Lõppvastus [conclusive report] no. 6-1/100634/1003271, § 11 (1.06.2010). Available at: http://www.oiguskantsler.ee/public/resources/editor/File/NORMIKONTROLLI_MENETLUSED/Seisukoht_vastuolu_mittetuvastamise_kohta_/2010/Eesti_Patsientide_Esindus_hing_vastuolu_mittetuvastamine_TsMS__204_lg_2_p_hiseadusp_rasus.pdf.

[8] See for example Harju County Court. Judgment in civil case no. 2-09-63050 (29.03.2010).

private life, including in matters that nobody has asked the court to limit the person's active legal capacity.

Appointing a guardian could be useful for the purpose of active civil procedural legal capacity if the guardian is a person who has legal knowledge and is capable of evaluating whether the application lodged with the court by a person with allegedly restricted active legal capacity is justified and substantiated. Usually the person appointed guardian is a close relative without legal knowledge or the local government who also lacks competence to represent a person in a civil proceeding.

Does your party support swift ratification of the Convention on the Rights of Persons with Disabilities and its Protocol
(1 – not at all in favour; 5 – completely in favour)



Source: see Appendix – Survey of Political Parties

EU ratified the CRPD on December 23rd, 2010, which means the European Commission, The European Parliament, Council of Europe and the European Court of Justice take the obligation to follow the rights of persons with disabilities

stated in the convention.[9] The ratification of the CRPD is still in process in Estonia. The relevant draft has already been completed and sent to respective organisations along with the explanatory memorandum.[10] It stems from the explanatory memorandum that the Ministry of Social affairs intends to make a declaration for the convention what concerns the regulation of appointment of the guardian in Estonia. The Ministry of Social Affairs has the following proposal: "Estonia retains the right to continue its current national practice, which allows the court to appoint the guardian for the person of restricted active legal capacity." It is hard to evaluate the effect and intent of this declaration at the moment. It is possible Estonia may need to explain this practice in front of European Court of Justice, but considering the fact that each Member State has the right to make independent reservations according to the reservation of the EU, this is a limited possibility.[11]

Recommendations

- Ratify the CRPD without making reservations and amend the current regulation on restriction of active legal capacity and appointing the guardian so it is in accordance with the convention.
- Substantially increase the competence of the guardians to ensure effective protection of persons with restricted active legal capacity.

[9] Table of signatures and ratifications. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en.

[10] See for example Ministry of Social Affairs (2010). Sotsiaalministeerium: edastame kooskõlastamiseks ja arvamuse avaldamiseks puuetega inimeste õiguste konventsiooni ratifitseerimise ja konventsiooni fakultatiivprotokolliga ühinemise seaduse eelnõu [Ministry of Social Affairs: about to pass on the draft for act for ratification and joining of the optional protocol of the CRPD for approval]. Estonian Union of Disabled Women, 28.09.2010. Available at: http://www.epnu.ee/index.php?1,10,13,2007,2,608.

[11] European Union (2007). Declaration. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec.

Freedom of expression

THE AUTHOR

Ülle Madise

Ülle Madise has worked at University of Tartu, the Tallinn University of Technology and as the head of department of public law at the Ministry of Justice. She has also worked as the adviser and Head of Secretariat of the Constitutional Committee of *Riigikogu*. She is currently the Legal Adviser to the President of Republic of Estonia. Ülle has published several scientific articles and is the co-author of the Commented Edition of the Estonian Constitution.

RIGHTS

ECHR Article 10 – Freedom of expression

- Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

CHAPTER 6

Freedom of expression

The so-called Source Protection Act[1] received a lot of media attention in 2010. The newspapers expressed severe opposition, citing possible conflict with human rights' norms (among others the excessive limitation of freedom of speech) as their reason.

In the process of deciding whether to proclaim the so-called Source Protection Act the conformity with various fundamental rights recognised in the Constitution of Republic of Estonia[2] were analysed, above all the journalistic freedom (§ 45 of the Constitution), duty to protect persons' honour and good name (§ 17 of the Constitution), right to enterprise and property (§-s 31 and 32 of the Constitution) and right to compensation for moral damage (§ 25 of the Constitutions). In addition, principles were observed that stem from Article 10 of European Convention for the Protection of Human Rights and Fundamental Freedoms[3] and that are in accordance with practice of the European Court of Human Rights and Council of Europe's Recommendation (2000) 7[4]. Acts of several other European Union Member States regarding protection of journalistic sources and compensation for moral damage were

[1] The official title is "Ringhäälinguseaduse, kriminaalmenetluse seadustiku, tsiviilkohtumenetluse seadustiku ja võlaõigusseaduse muutmise seadus" [Act amending the Broadcasting Act, Code of Criminal Procedure, Code of Civil Procedure and the Law of Obligations Act] RT [State Gazette] I 2010… RT I, 21.12.2010, 1.

[2] The Constitution of the Republic of Estonia. RT 1992, 26, 349 … RT I 2003, 64, 429.

[3] European Convention for the Protection of Human Rights and Fundamental Freedoms. Adopted in Rome 4.11.1950. Estonia signed 14.05.1993. Estonia ratified 16.04.1996.

[4] Council of Europe. Recommendation (2000) 7. Available at: http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2000)007&expmem_EN.asp.

analyzed. The rules for allocating jurisdiction in cases of damages against media corporations in European Union were also consulted.

Provisions regarding compensation for moral damages

The new subsections 5 and 6 of § 134 of Law of Obligations Act[5] do not require the court to change its practice regarding determining the fair compensation for moral damages.

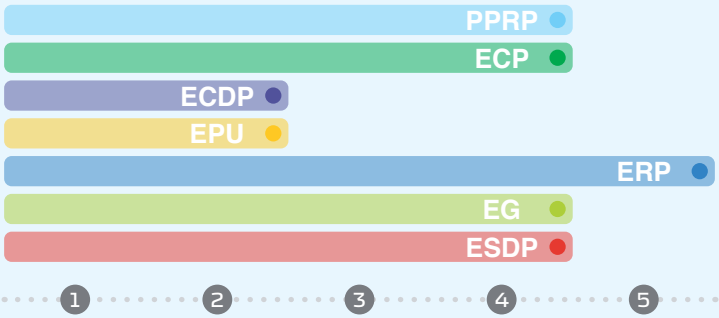
Subsection 5 imposes upon the court the duty to consider the severity and extent of the offence as well as the offender's behaviour and attitude towards the injured party after the offence has taken place. Subsection 6 does not place any obligations on the court. The court does not have the duty (even after the addition of the new subsections) to influence the offender to desist from causing further damage by determining the amount of compensation for defamation of honour and good name that would have that effect. Subsections 5 and 6 describe the considerations in place at the moment to determine the compensation for moral damages.

§ 25 of the Constitution simply states: "Everyone has the right to compensation for moral and material damage caused by the unlawful action of any person". The size of the compensation for moral damage is determined by the court, considering all circumstances and according to its inner convictions. There are no objective criteria in place. The new provisions do not change that principle. All rules and principles regarding compensation for damages in the Law of Obligations Act will remain in force after the amendments come into effect, whereas the prerequisite for compensating for damages is the fact that the damage has actually occurred; the burden of proof lies with the injured party; the compensation for damages may not serve the purpose of enriching the injured party; only the damage that occurred unlawfully is to be compensated for; there has to be a causal link between the damage and the unlawful

[5] RT I 2001, 81, 487 ... RT I, 4.02.2011, 2.

act of the person who did it. This falls into the sphere of private law, a relationship between private persons. The case for damages is not submitted to the court on the initiative of the state, but the person who has suffered the damage who decides to turn to court by filing an action, paying the fee for filing a court action and preparing to take on the rest of the court fees. That is also the case according to the Law of Obligations Act in force at the moment.

Freedom of expression
(1 – most problematic; 5 – least problematic)



Source: see Appendix – Survey of Political Parties

The current Law of Obligations Act does not state the maximum potential amount of compensation for damages in case of defamation of honour; the fair amount is to be determined by the court according to its discretion. Estonian court practice has seen a wide range of amounts of compensations for damages from the press, amounting to several hundred thousand kroons in some cases. Considering the court practice so far, as well as the acts in force, anybody who may cause defamation of honour or good name by its actions has to acknowledge the possibility of it resulting in compensation for damages.

According to § 45 of the Constitution the freedom of expression (including the freedom of press) may be restricted to protect public order, morals, and the rights and freedoms, health, honour and good name of others. Paragraphs 17, 19 and 25 of the Constitution place it upon the legislative body to prescribe means for protection of honour and good name, and to ensure the compensation for moral damages for everyone. Therefore it can be concluded that the current Law of Obligations Act as well as the proposed amendments are in the spirit of the constitutional objectives. Paragraph 11 of the Constitution states that the limitations may not be excessively strict and the limitation has to be proportional to the constitutional objective. Considering the fact that defamation is punishable pursuant to criminal procedure in addition to being awarded damages by way of civil proceedings in many other states based on rule of law, the claim that the provisions in force in Estonia or the proposed provisions would constitute excessive limitations and prove detrimental to the nature of journalism, would not be a feasible one.

As a conclusion, the proposed amendments do not force the court to change its practice in determining compensation for moral damages. Public law measures of force or punishment for defamation of honour will not be established. The draft regulation is flexible and allows the court to reach a fair solution by weighing opposing rights, and the person causing the damage has the opportunity to influence the amount of the compensation by his or her behaviour. However, it has to be noted that the Government of Estonia did ignore the good custom of legislative drafting – the press were not included in appraisal of the need for the draft or in the appraisal of the amendments being made.

The general knowledge of law in Estonia is in a relatively poor state; the earlier assumption of the press is also erroneous (that the acts regarding data processing, criminal proceedings and compensations for damages do not apply to journalists or publications). Especially because of this erroneous assumption it would be extremely useful to include the press in the common discussion.

Provisions regarding source protection

According to the acts in force at the moment the persons processing data for journalistic purpose did not had the right to refuse giving statements in criminal proceedings prior to passing of the so-called Source Protection Act. Source protection was regulated only in broadcasting cases. This is in contravention of Council of Europe's Recommendation (2000) 7. Therefore, it is necessary to state the protection of journalistic sources in an act of law in order to secure the freedom of press. The question – what are the circumstances that justify the breach of the protection of journalistic sources? – is a complicated one. The compromise found in the course of the draft proceedings seems to be consistent with the aforementioned recommendations: disclosing the source can be required only in case of serious crimes (minimum category of punishment 8 years); if other means of gathering evidence are impossible or difficult; if public interest for statements outweighs the interest of concealing the source provided the court grants the permission. It cannot be precluded, similarly to the other states, that there is a possibility of dispute arising out of implementation of the provisions regarding protection of journalistic sources in practice. That in itself is not sufficient to consider the Code of Criminal Procedure to be in conflict with the Constitution.

Summary

The President of the Republic of Estonia considered the act to be in accordance with the Constitution and decided to proclaim it. The act entered into force on the January 1st, 2011.

The controversy and false information that arose from processing the draft is deplorable. The head of state has repeatedly drawn attention to the fact that the necessity, content and the predictable effect of all acts should be discussed with the people whose actions the act influences and that best experts of the relevant field be given sufficient time and included in the drafting process. That was not the case in this instance.

Compared to other states (European Union Member States included) the freedom of press in Estonia will remain ample and that is a welcome sign.

Right to freedom of peaceful assembly

THE AUTHOR

Marianne Meiorg

RIGHTS

ECHR Article 11 – Freedom of assembly and association

- Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

CHAPTER 7

Right to freedom of peaceful assembly[1]

No remarkable changes in regulation concerning rights and freedoms of organising assemblies took place in 2010. And the attention of the public amounted to singular articles in the press and the social media. As an outstanding exception to this general trend, the Chancellor of Justice published the recommendations to the Tallinn City Government on the correct implementation of the regulation on public assemblies in the summer of 2010.[2]

The recommendation of the Chancellor of Justice touched upon the topic that was dealt with in the annual report "Human Rights in Estonia 2008–2009", in other words the dispute between the Circus Tour and the animal rights' activists.[3] On September 30th, 2009 the representative of the movement *Loomade Nimel* passed an application to the Chancellor of Justice which requested investigation into the legality of cancellation of the protest that was to take place on September 19th, 2009. The Chancellor of Justice analysed the events thoroughly in the June 21st, 2010 recommendation to Tallinn City Government and also gave his legal appraisal.

[1] With thanks to Rene Kullör for the help in analysing and gathering the information.

[2] Chancellor of Justice (2010). Soovitus õiguspärasuse ja hea halduse tagamiseks [Recommendations for ensuring legality and good administration], no. 7-5/091862/1003600 (21.06.2010). Available at: http://www.oiguskantsler.ee/public/resources/editor/File/OMBUDSMANI_MENETLUSED/Soovitused_oigusparasuse_ja_hea_halduse_tava_jargimiseks/2010/Tallinna_Linnavalitsus_soovitus_avaliku_koosoleku_registreerimine.pdf.

[3] Human Rights Centre at the Tallinn Law School of the Tallinn University of Technology (2010). Human Rights in Estonia 2008–2009, p 31.

Essentially, the Chancellor of Justice found that failing to register the public assembly for the movement *Loomade Nimel*,[4] because an assembly for *Taimede Nimel*[5] had already been registered to take place at the same time and place on the grounds of safety, was unlawful. According to the recommendation of the Chancellor of Justice, the organiser is advised to choose another time for the assembly if another public assembly has already been registered at the requested place and time.

If in that case the public meeting loses its meaning, a new place must be chosen in the vicinity, however, not in the immediate vicinity of the assembly that had been registered earlier. The Chancellor of Justice also found the fictitious public assemblies deplorable if their actual intention is to preclude constitutional rights of others (in this case the right to assembly and freedom of expression). Chancellor of Justice considered it necessary to point out that the public authority should not have the right to decide over the admissibility of the content of assemblies.

A similar case from 2009 and 2010 is that of the traditional public meeting held in Hirvepark on August 23rd. The competing events for the same date and the same place are the event celebrating the anniversary of the Molotov-Ribbentrop pact and the event celebrating the 1987 protest against Soviet rule. The latter is traditionally organised by Pro Patria and Respublica Union (IRL), the former by nationalist Jüri Liim, who has had the luck to register the event in Hirvepark first for the last two years.[6]

Amendments to the Penal Code

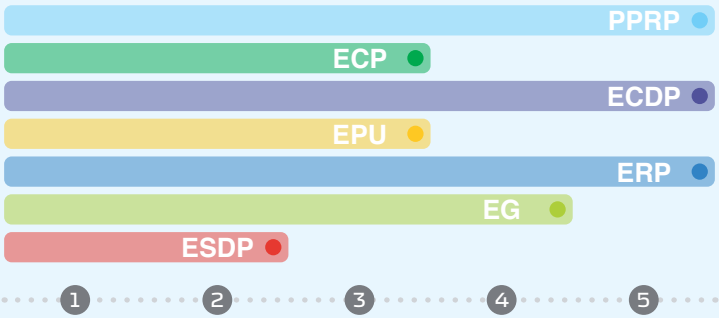
Some important developments that did not make it into the annual report "Human Rights in Estonia 2008–2009" took place at the end of 2009. An interesting case from the point of view of implementation of the right to freedom

[4] Translator's note: in the name of animals.
[5] Translator's note: in the name of plants.
[6] (2010). Jüri Liim registreeris Hirvepargi koosoleku taas enda nimele [Jüri Liim registered the Hirvepark meeting in his name once again]. Delfi, 25.07.2010. Available at: http://www.delfi.ee/news/paevauudised/eesti/juri-liim-registreeris-hirvepargi-koosoleku-taas-enda-nimele.d?id=32292121.

of peaceful assembly and the Public Assemblies Act, which did not make it in the report was the Administrative Law Chamber of the Supreme Court judgment 3-3-1-80-09.[7]

The Supreme Court gave an appraisal to the appeal of the non-profit organisation Öine Vahtkond concerning the repeated ban of organising a public assembly imposed by the Northern Police Prefecture in March and April of 2008.

Right to freedom of peaceful assembly and to forming unions
(1 – most problematic; 5 – least problematic)



Source: see Appendix – Survey of Political Parties

Sergey Tydyyakov, a member of the non-profit organisation Öine Vahtkond gave three notices of public assembly to Tallinn City Government in March and April of 2008, in order to organise a meeting "for preservation of democratic values in modern Estonia" in Hirvepark, Falgi park and Tuvi park. Northern Police Prefecture banned all of these assemblies. The assembly was

[7] Sergey Tydyyakov's notice of appeal for non-patrimonial damage from Northern Police Prefecture in the amount of 80 000 kroons. – Administrative Law Chamber of the Supreme Court. Judgment in civil matter no. 3-3-1-80-09 (11.12.2009).

allowed to take place on the condition that it is held in the park next to the Centre of Russian Culture or the Tallinn Military Cemetery near the monument of the bronze soldier. The assembly took place on April 26th, 2008 in the park next to the Centre of Russian Culture.

Even though the Supreme Court reviewed the cassation for non-patrimonial damage, it also approved the earlier Tallinn Administrative Court judgment in the case, which declared the referrals of Northern Police Prefecture banning the assemblies unlawful. Northern Police Prefecture had thus breached the Public Assemblies Act, as there was no basis for banning the public assembly. The Police had not referred to bases that could have justified the ban of these assemblies in their referrals. Even though this judgment cannot guarantee that such cases will not occur in the future, the right to freedom of assembly is, nevertheless, protected from arbitrariness of the police and the local governments by the constitution.

The Penal Code amendments crucial to the right of freedom of assembly that did not make it into the respective chapter of the previous annual human rights report entered into force at the end of 2009. These amendments were paid remarkable amount of attention to in the political sphere and the press during the adoption process, especially what concerns § 238 of the Penal Code. Different stages of processing these changes and the story of development deserve a more thorough approach.

Until November 14th, 2009, before the amendment proposal was made, the § 238 was worded as follows:

> *"§ 238. Organising mass disorder*
>
> *Organising a disorder involving a large number of persons, if such disorder results in desecration, destruction, arson or other similar acts, is punishable by 1 to 5 years' imprisonment."*[8]

[8] Penal Code. RT I 2001, 61, 364 ... RT I 2009, 39, 261.

Point 6 of motions to amend the draft of the act amending Penal Code (416 SE) advised to word § 238 as follows:

> *"§ 238. Organising mass disorder or preparation and appeal to commit it*
>
> *(1) Organising or preparing or appealing to take part in a disorder involving a large number of persons that may result in desecration, destruction, arson or other similar acts, is punishable by 1 to 5 years' imprisonment.*
>
> *(2) The same offence, if it has resulted in desecration, destruction, arson or other similar acts, is punishable by 3 to 5 years' imprisonment."*[9]

In the appraisal of Silver Meikar and Aleksei Lotman[10] this amendment would have been a hazard to democracy in Estonia. In their opinion, only those assemblies that have assault on public order and public security as their purpose must be punishable. Excessive limitations on freedom of peaceful assembly may obstruct and deter people from expressing their opinion peacefully, which in turn restricts the freedom of speech, an essential and constitutionally as well as internationally protected and recognised human right.

The draft was passed as law on the third reading on June 15th, after having gone through several changes, with 52 members of *Riigikogu* in favour of it and 30 against.[11] In that reincarnation the § 238 read as follows:

> *"§ 238. Organising mass disorder and preparation and appeal to participation*
>
> *(1) Organising or preparing or inciting to participate in a disorder involving a large number of persons that may result in desecration, destruction, arson*

[9] 416 SE I Karistusseadustiku muutmise seaduse eelnõu [Draft amending the Penal Code]. Available at: http://www.*Riigikogu*.ee/?page=pub_file&op=emsplain&content_type=application/msword&file_id=521689&file_name=karistusseadustiku%20muutmine%20(417).doc&file_size=34165&mnsent=416+SE&fd=13.04.2011.

[10] Meikar, Silver (2009). Kuidas soovitakse piirata sõna- ja koosolekuvabadust [On limiting freedom of expression and the right to peaceful assembly]. Meikar.ee, 12.05.2009. Available at: http://www.meikar.ee/blog/2009/05/kuidas-soovitakse-piirata-sona-ja-koosolekuvabadust/.

[11] *Riigikogu* (2009). 11th *Riigikogu* shorthand notes for the 5th session. 15.06.2009. Available at: http://www.*Riigikogu*.ee/?op=steno&stcommand=stenogramm&date=1245067500&pkpkaupa=1&paevakord=4610#pk4610.

or other similar acts, is punishable by pecuniary punishment or up to 5 years' imprisonment.

(2) The same offence, if it has resulted in desecration, destruction, arson or other similar acts, is punishable by 3 to 8 years' imprisonment."[12]

Compared to the first motion to amend the amendment adopted by *Riigikogu* differs mainly for the severity of the sanction. An offence based on subsection 1 is now punishable by pecuniary punishment as well as imprisonment. Nonetheless, many doubted the constitutionality of this provision and President Toomas Hendrik Ilves decided not to proclaim this act on July 1st, 2009. The President explained his stance regarding § 238 that there is an extremely small possibility that any event or action may result in other events and actions.[13] Estonian Penal Code does not entail any other necessary elements of a criminal offence of similar construction. The definition of disorder is also without a clear definition.

It cannot be precluded that the definition of disorder could be made to include an unregistered public assembly. In the President's appraisal the adopted form of the paragraph is in contradiction with § 47 of the Constitution that guarantees the right to freedom of peaceful assembly, and that principle would lose its meaning if the organiser of a peaceful assembly is made punishable for offences that took place at the meeting despite of his intentions. If the new wording of § 238 of the Penal Code came into force,

[12] *Riigikogu* (2009). Viimane tekst – Karistusseadustiku, avaliku teenistuse seaduse, välismaalaste seaduse, kodakondsuse seaduse, kohaliku omavalitsuse volikogu valimise seaduse ja kriminaalmenetluse seadustiku muutmise seadus [Final text – Act amending the Penal Code, the Public Service Act, the Aliens Act, the Citizenship Act, the Electing Council of Local Government Act and the Code of Criminal Procedure]. 15.06.2009. Available at: http://www.*Riigikogu*.ee/?page=pub_file&op=emsplain&content_type=application/msword&u=20110419013343&file_id=692085&file_name=416-s-XI-karistusseadustiku,%20avaliku%20teenistuse.doc&&file_size=43520&mnsent=416+SE&fd=13.04.2011.

[13] The President of Republic of Estonia. Decision no. 513 „Karistusseadustiku, avaliku teenistuse seaduse, välismaalaste seaduse, kodakondsuse seaduse, kohaliku omavalitsuse volikogu valimise seaduse ja kriminaalmenetluse seadustiku muutmise seaduse väljakuulutamata jätmine" [Failure to proclaim the Act amending the Penal Code, the Public Service Act, the Aliens Act, the Citizenship Act, the Electing Council of Local Government Act and the Code of Criminal Procedure] (1.07.2009). Available at: http://www.*Riigikogu*.ee/?page=pub_file&op=emsplain&content_type=application/msword&u=20110419013343&file_id=692085&file_name=416-s-XI-karistusseadustiku,%20avaliku%20teenistuse.doc&&file_size=43520&mnsent=416+SE&fd=13.04.2011.

it would be almost completely unforeseeable for the organisers of peaceful assemblies or the persons inciting participation whether he is facing a punishment for a criminal offence against the state or not.[14]

The following autumn the problem areas pointed out by the President were addressed and the draft was amended. The second reading of the second legislative proceeding of the act that President had not proclaimed took place on October 14th, which was followed by the third reading on October 15th, where the draft was finally passed as law. The President proclaimed it law on October 27th and the amendment that came into force on November 15th reads more severe yet more lenient than the initial proposal:

> *"Organising or preparing or inciting to participate in a disorder involving a large number of persons, if it has resulted in desecration, destruction, arson or other similar acts, is punishable by 3 to 8 years' imprisonment."*[15]

Therefore, unlike per the initial motion to amend, organising a public assembly or preparing or participating in an assembly, which merely may result in desecration, destruction, arson or other similar acts, is no longer punishable under § 238. Yet the possible punishment compared to the earlier law has been increased notably. The minimal imprisonment for this offence has risen to three years from the previous one year and the maximum imprisonment to eight years from the previous five.

For the purpose of providing the right to freedom of assembly the current wording of § 238 of the Penal Code is preferable to its earlier motions to amend, however, the sanction that prescribes a minimum of three years' imprisonment for breaching this paragraph may have a restrictive effect on a fundamental right that is the right to freedom of assembly. It is disputable, whether a term of punishment of such severity can be considered proportionate to potential offences committed under § 238 of the Penal Code. Yet the rights of these people must also be considered.

[14] The Decision of the President of the Republic of Estonia no. 513.
[15] RT I, 6.01.2011, 10.

Protests and public assemblies in 2010

It seems that the amendments that came into force at the end of 2009 have not impeded organising public assemblies. Large protests and public assemblies are not customary in Estonia nor were there surprises in 2010, when no remarkable protests took place. The assemblies are commonly organised by various political forces, Estonian nationalists and Russia-minded unions.

There has already been a mention of the annual meeting in Hirvepark that takes place on August 23rd. The 20th division Estonian veterans' assembly on July 31st, 2010 at Sinimäe also received wider attention. The non-profit organisation Öine Vahtkond also wished to have an assembly at the same location. Vaivara rural municipality government rejected their appeal, and Öine Vahtkond therefore sued the Vaivara rural municipality government. Tartu Administrative Court rejected the organisation's appeal.[16] At last Öine Vahtkond organised the assembly "World without Nazism" a bit further from the assembly of the SS veterans. 100–130 people took place in the assembly of Öine Vahtkond. More than 300 people participated at the assembly of the veterans. Öine Vahtkond still accused the police of obstructing their arrival at Sinimäe and sending back some of the people who were on their way to the assembly.[17] It must be noted that the assemblies of various interest groups at Sinimäe have always caused differences of opinion and controversy, and therefore there is always the chance that smaller or greater offences may be committed in the course of it.

So far the commemorative events that have been organised since 1994 have passed without conflicts, but considering the increased activity of Öine Vahtkond in the recent years, one must be careful organising these events

[16] – (2010). Öise Vahtkonna Sinimägede-miitingu kaebus jäi rahuldamata [The Sinimäe complaint of Öine Vahtkond remained unsafisfied]. Delfi, 23.07.2010. Available at: http://www.delfi.ee/news/paevauudised/eesti/oise-vahtkonna-sinimagede-miitingu-kaebus-jai-rahuldamata.d?id=32273933.

[17] Kuul, Marek; Gaškov, Ago ja Linkgreim, Inga-Gretel (2010). Sinimägede üritused möödusid vahejuhtumiteta [Events at Sinimäe passed without incident]. ERR News, 31.07.2010. Available at: http://uudised.err.ee/index.php?06211114.

and manage the risks pre-emptively, especially in the light of the 2009 amendments to the Penal Code.

Öine Vahtkond has organised other protests in addition to the ones at Sinimäe. For example, on April 22nd, 2010 a protest was held in Tammsaare park against NATO and its actions in Afghanistan. It must be noted that the organisation's first choice of location for this protest was the vicinity of the Ministry of Foreign Affairs, but the police did not grant them the permission to have the meeting at that location. Öine Vahtkond went to court against the decision of the police.[18] Smaller protests also took place on the third anniversary of the April protests of 2010.[19]

Another protest worth noting is the one organised by the Centre Party that took place on May 1st on Toompea, where a demonstration against government took place, demanding protection for current and future old age pensioners and the reversal of the raise of minimum age limit of old age pensioners, ending the educational reform shutting down schools and demanding passing an act in *Riigikogu* that would create jobs. Circa 1500 people took part in that protest.[20] On February 2nd, 2010 the members of the Estonian National Independence Party (ERSP) organised a protest in front of the Russian Embassy in Tallinn demanding returning the land lost to Russia after the Tartu Peace Treaty. The protest was peaceful.[21] On May 9th, 2010 a protest organised by the Nationalists' Tallinn Club was held in Tammsaare park for

[18] – (2010). Fotod: Öine Vahtkond avaldas NATO vastu meelt [Photos: Öine Vahtkond protested against NATO]. Delfi, 22.04.2010. Available at: http://www.delfi.ee/news/paevauudised/eesti/fotod-oine-vahtkond-avaldas-nato-vastu-meelt.d?id=30603439.

[19] – (2010). Aprillirahutuste aastapäev möödus rahulikult [The anniversary of the April riots passed quietly]. Postimees, 26.04.2010. Available at: http://www.tallinnapostimees.ee/?id=255241.

[20] – (2010). Keskerakond tänab meeleavaldajaid [The Centre Party thanks the demonstrators]. Kesknädal, 3.05.2010. Available at: http://www.kesknadal.ee/est/uudised?id=14621&sess_admin=f16d2f75a58983a2968b4f090da3b613.

[21] Jüriso, Katrin (2010). Rahvuslased avaldasid Vene saatkonna ees meelt [The nationalists demonstrated in front of the Russian embassy]. ERR Uudised, 2.02.2010. Available at: http://uudised.err.ee/index.php?06193157.

the protection of Estonian *kroon* and against adoption of the euro. Circa 50 people took part in this assembly.[22]

Summary

The events of 2010 indicate that severer provisions regarding the right to public assembly have not proved to be an obstacle in organising various protests. Possibilities for organising public assemblies are available and the limitations are not unreasonable. Yet the small number of people participating in protests indicates the low level of democracy in the Estonian society as people are not interested in protecting their rights and expressing their opinions in matters important to them.

The positive development is the Chancellor of Justice's recommendation on registering public assemblies. According to this recommendation the authority registering the assembly does not have the automatic right to refuse to register it if the time and place of the assembly coincides with another assembly. In that case the responsible authority must offer alternatives.

[22] Koppel, Nataly (2010). Tammsaare pargis toimus meeleavaldus krooni kaitseks [A protest in support of Estonian kroon took place in Tammsaare park]. Õhtuleht, 9.05.2010. Available at: http://www.ohtuleht.ee/index.aspx?id=377909.

Prohibition of discrimination

THE AUTHOR

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RIGHTS

ECHR Article 14 – Prohibition of discrimination

- The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

CHAPTER 8

Prohibition of discrimination

The prohibition of discrimination in Estonia is stated in the Constitution. In addition to that it is also regulated in a more specific manner in the Gender Equality Act[1] and the Equal Treatment Act[2]. Prohibition of discrimination is also stated in several other acts, for example the Employment Contracts Act, the Public Service Act and the Penal Code.

So far the characteristic feature of the Gender Equality Act and the Equal Treatment Act has been the lack of case law. The lack of practice is confirmed by absence of any cases in the court statistics database that would be based on the Gender Equality Act and the Equal Treatment Act. The criminal policy surveys "Crime in Estonia 2009" and "Survey of crime victims 2009" published by the Ministry of Justice in 2010 show that no cases based on Gender Equality Act and the Equal Treatment Act had been brought to court.

However, in 2010 the Administrative Chamber of the Supreme Court did pass a judgment concerning implementation of Equal Treatment Act (17 May 2010 judgment no. 3-3-1-13-10).[3] It was analysed in that particular case whether the administrative court would need to additionally apply Equal Treatment Act upon solving an alleged incident of discrimination in a service relationship, which is regulated by § 36^1(2) of Public Service Act. The Administrative Chamber of the Supreme Court found that the Trade Unions Act regulates

[1] Gender Equality Act. RT I 2004, 27, 181 ... RT I 2009, 48, 323.
[2] Equal Treatment Act. RT I 2008, 56, 315 ... RT I 2009, 48, 323.
[3] Administrative Chamber of the Supreme Court judgment in administrative case 3-3-1-13-10 (17.05.2010).

unequal treatment of public servants and points out circumstances that are not considered unequal treatment. On the other hand, the Trade Unions Act does not regulate attributes, bases or principles of unequal treatment, nor does it create an integrated regulation for solving disputes of discrimination, but Equal Treatment Act does precisely that. The Chamber thus adopted a position respectively based on § 2(3) of the Equal Treatment Act in conjunction with § 36^1(2) of the Public Service Act that the public servant is to refrain from discriminating in vocational training, career counselling, in the course of enabling retraining or continuing education or in gathering practical work experience because of the fact that the public servant represents the interest of the workers or belongs to a workers' union. This Supreme Court judgment is a positive step towards emergence of court practice based on the Equal Treatment Act. This judgment confirms that it is important to consider the Equal Treatment Act and the principles, traits and bases for equal treatment contained within, in addition to other acts.

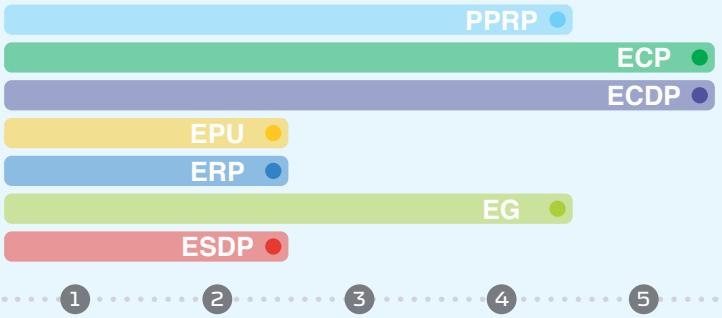
The Chancellor of Justice has also detected unequal treatment in his practice. In 2010 the Chancellor of Justice gave an overview of his activities, pointing out the occurrence of unequal treatment in provision of housing services.

> *"The partial absence of necessary regulations for provision of housing services in several local governments has proved to be a general problem. There may also be constitutional problems with dissimilar treatment of persons receiving the service, which is often hard to explain with a reasonable and relevant cause."*[4]

§ 2(1) point 7 of the Equal Treatment Act states that discrimination of persons is prohibited on the grounds of nationality (ethnic origin), race or colour in relation to access to supply of goods and services available to the public including housing. Unfortunately, it isn't stated in the overview of the Chancellor of Justice what the grounds for discrimination of these persons in relation to access to services were.

[4] Chancellor of Justice (2011). Ülevaade õiguskantlseri 2010–2011. aasta prioriteetide täitmisest 2010. aastal [overview of execution of priorities of the Chancellor of Justice for the years 2010–2011 in 2010]. Available at: www.oiguskantsler.ee/.../prioriteedid/_levaade_prioriteetide_t_itmisest_2010 _l_puks__5_.pdf.

Prohibition of discrimination
(1 - most problematic; 5 - least problematic)



Source: see Appendix - Survey of Political Parties

Age

Another issue of the publication by the Statistics Estonia titled "Social Trends" was published in 2010.[5] The fifth issue of the publication concentrated on older people on the labour market. The survey counted on the probable retreat of the older workers from the labour market (retirement) which may have several outputs: reaching the retirement age, voluntary retreat from work before reaching the retirement age (incl. going on an early-retirement pension) and forced leave from work (**also because of discrimination**).

The survey of Statistics Estonia comes to the following conclusion:

> *"The labour market position of older workers can be evaluated in two ways. High employment indicators, which prior to the arrival of retirement age (55–64 years)*

[5] Statistics Estonia (2010). Social Trends 5. Available at: http://www.stat.ee/publication-download-pdf?publication_id=21171.

are comparable with those of the people in their prime working age and also exceed significantly (60%) the goals set in the Lisbon Strategy for the EU (50%), should be pointed out. On the other hand, workers in the age group 50–64 are undervalued by their employers. Economic and social restructuring in Estonia has resulted, among other things, in younger people achieving rather good positions on the labour market, since they were preferred to older workers. Transition to the market economy came with risen importance of human capital and education. However, employers considered the quality of education acquired at the end of the 1980s and at the beginning of the 1990s to be better than the one acquired earlier than that and a better position on the labour market was taken by younger persons who were preferred to older people. Lower labour force positions of older people can now be due to statistical discrimination characteristic of developed countries, and the employee motivation and productivity related prejudices. Results show that despite education, occupation, gender and ethnic nationality, age is a major influencing factor, when it comes to pay. Also, Estonians had better pay opportunities than non-Estonians and the males compared to females."

The results of the analysis demonstrate the persistence of stereotypes about older employees that may cause discrimination of older employees in the labour market.

Equality in access to education[6]

The Praxis survey "Fair access to higher education in Estonia" was published in 2010.[7] The experts who were interviewed stated that adults in Estonia do not have the opportunity for bringing their knowledge up to the necessary level in subjects that are prerequisite to studying in technical departments, if these subjects necessitate reminding knowledge from upper secondary school. This gives the upper secondary school graduates the advantage. Therefore, a certain group of people is not able to acquire a certain kind of education because the

[6] See also chapter 10 on right to education and chapter 12 (Integration and ethnic cohesion in the Estonian society).

[7] Mägi, Eve; Lill, Liis; Kirss, Laura; Beerkens, Maarja and Orr, Dominic (2010). Missugune on Eesti üliõpilaskond? Uuringu „Õiglane ligipääs kõrgharidusele Eestis" lõpparuport [Full length final report on the survey "Fair access to higher education in Estonia"]. Praxise Toimetised no. 2/2010. Praxis. Available at: http://www.praxis.ee/fileadmin/tarmo/Projektid/Haridus/Oiglane_ligipaeaes/Toimetised_2_2010.pdf.

state has not created a measure to support it. Departments were pointed out that were clearly dominated by adults (humanitarian and social sciences subjects). Access to fields that state affords priority to, such as natural and exact sciences and technological, manufacturing and engineering fields seems to be harder for the adult student. This appears to be precisely because of the need to recall the knowledge acquired in the upper secondary school.

The survey also established that a young person's belonging to a **minority** (cultural, ethnic, language etc) or the status of an immigrant also influences his or her equal access to higher education. A mere quarter of people belonging to Russian minority evaluate their opportunities for access to higher education equal to ethnic Estonians, mostly because of the language barrier. It stems from the analysis that young Russian persons are less likely to study on non-state budget places of public universities. Students of Russian ethnicity also evaluate the economic situation of their parents as somewhat lower than that of parents of students of Estonian ethnicity, which may partially influence educational choices for ethnic Russians of lower socio-economic status, especially when it comes to studying on non-state budget places. September 2010 issue of the publication of the Estonian Chamber of Disabled People titled "Sinuga" emphasised that everyone including people with **disabilities** should have access to education. Acquiring a higher education cannot and should not be obstructed by inaccessibility. Institutions of higher education have often failed to figure out an integrated system for allowing every student and employee to be a valuable member of the institution of higher education and to take part in all of the offered services – participate in work that takes place in lecture rooms, visit the library and move about freely in various buildings of the institution of higher education, sit exams and obtain attainable study materials.[8]

Chair person of the board of Estonian Chamber of Disabled People, Monika Haukanõmm emphasised in her December 3rd, 2010 interview to the television news program "Aktuaalne kaamera" that one of the negative consequences

[8] Estonian Chamber of Disabled People (2010). Sinuga. September 2010. Available at: http://www.epikoda.ee/failid/sinuga_09-2010-web.pdf.

of the economic depression is the increasingly obstructed availability of supporting services for persons with disabilities.[9] The conference devoted to the International Day of People with Disabilities titled "Persons with disabilities today and in the future" discussed the problems of persons with disabilities and the fact that people with disabilities are waiting for the state to ratify the convention, which would obligate the society to fill the requirements of people with disabilities and help them with problem solving.[10]

The Commissioner and the implementation of the Equal Treatment Act

A new Gender Equality and Equal Treatment Commissioner was installed in 2010. From 2005 to 2010 Margit Sarv had filled the post of Gender Equality and Equal Treatment Commissioner. The Minister of Social Affairs appointed Mari-Liis Sepper, who had previously worked as the adviser to the commissioner the new Gender Equality and Equal Treatment Commissioner.[11]

The commissioner observes the implementation of the Equal Treatment Act and councils persons who suspect they have been discriminated against. In order to deliver an opinion, the commissioner has the right to receive comprehensive information (including information concerning earnings) from the persons involved to ascertain the circumstances of the discrimination case. The Labour Inspectorate which has the right to perform state supervision in certain areas (regulated by § 115 of the Employment Contracts Act) does not have the right to perform supervision in implementation of principles of equal treatment. This arrangement requires the alleged victim of a

[9] Randlaid, Sven (2010). Puuetega inimeste koda: teenuseid on üha raskem saada [The Chamber of Disable People: the services are increasingly hard to obtain]. ERR news, 3.12.2010. Available at: http://www.err.ee/index.php?06220311.

[10] Ottender, Siiri (2010). Puuetega inimesed ootavad konventsiooni vastuvõtmist [Persons with disabilities are awaiting the adoption of the convention]. ERR news, 3.12.2010. Available at: http://www.err.ee/index.php?06220301.

[11] Mäekivi, Mirjam (2010). Uueks võrdõiguslikkuse volinikuks sai eelmise nõunik [The adviser of the previous commissioner became the new Gender Equality and Equal Treatment Commissioner]. Postimees, 28.09.2010. Available at: http://www.postimees.ee/?id=317538.

discrimination to be the one who becomes aware of the fact that s/he has been discriminated against and seek help for the protection of his or her rights. This, however, implies a high level of awareness of the people. The principle that a private person has to monitor whether he is being discriminated against in an employment relationship was confirmed by the Minister of Justice Rein Lang (the interpellation of February 7th, 2011 regarding working conditions):

> *"I do not see the need or the legal possibility, within the current legal framework, to give the state more right to control legal relationships between private persons – there is adequate protection for the rights of the parties already. As long as the Reform Party is in the government, there will be no national bureaucracy obsessively checking whether a discriminating employment relationship is in effect somewhere. It is up to the private subjects to make sure the contracts are adhered to. If there is reason to believe discrimination is taking place, the opportunities for legal protection in Estonia are quite adequate."*[12]

It can therefore be concluded from the speech of the Ministry of Justice that from his point of view the legal protection available to the victims of discrimination in Estonia is completely adequate. Unfortunately, it isn't possible to contrast the standpoints of the victims to the statement of the Ministry of Justice as not one victim of discrimination has yet turned to the respective instances (including law enforcement authorities) for the protection of his or her rights. Therefore, there isn't yet any court practice discussing cases including the Equal Treatment Act that could be relied on.

Information and awareness

On May 22nd, 2010 the European Commission partnership project event "Party on Wheels" (POW) took place. The commission was represented by an information campaign "For differences. Against discrimination." at the whole family event on Tallinn Song Festival Grounds. The objective was to

[12] *Riigikogu* (2011). 11th *Riigikogu* shorthand notes for the 9th session. 7.02.2011. Available at: http://www.*Riigikogu*.ee/?op=steno&stcommand=stenogramm&date=1297080300&pkpkaupa=1&paevakord=7997#pk7997.

emphasise the equality of all citizens and increase awareness of citizens to notice potential discrimination cases. The event combining music, sport and art carried the message of advantages of a diverse society.[13]

The Law School of the Tallinn University of Technology did its part in informing people of their fundamental and human rights by carrying out a project in 2010 that had the objective to increase awareness of Estonia's society in matters of equal treatment and to fight against intolerance. In 2010 the focus lied on the fight against racism and homophobia, which saw several events take place, including the international conference "Diversity Enriches". The role of the principle of equal treatment in Estonian legal system was discussed at the conference, as well as the question whether the Equal Treatment Act has brought about changes in everyday life or whether it has remained a set of rules without any practical effect adopted on the pressure of the European Union.[14]

Reports on Estonia by international organisations

There are three relevant report-recommendations regarding the topic of prohibition of discrimination that have been passed on to Estonia by various international organisations. On March 2nd, 2010 the European Commission against Racism and Intolerance (ECRI) published a report on Estonia (fourth monitoring cycle), which described the situation up to July 3rd, 2009.[15] The Estonian delegation presented the UN Human Rights Committee the third periodic report on Estonia on the measures undertaken to implement the provisions of the International Covenant on Civil and Political Rights

[13] European Commission (2010). Kampaania „Erinevuste poolt. Diskrimineerimise vastu" toimub peagi teie naaberlinnas! [Campaign "For Diversity. Against Discrimination." Will soon take place in your neighbourhood!] Available at: http://ec.europa.eu/employment_social/fdad/cms/stopdiscrimination/news_events/news025.html?langid=et.

[14] Information about the conference: http://www.erinevusrikastab.ee/en/events/conference-diversity-enriches.

[15] European Commission against Racism and Intolerance (2010). ECRI report on Estonia (fourth monitoring cycle). CRI(2010)3. Available at: http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/estonia/EST-CbC-IV-2010-003-ENG.pdf.

in Geneva on July 12–13th, 2010.[16] On August 4th, 2010 the UN Human Rights Committee (CCPR) published a consideration of reports submitted.[17] In addition, on September 23rd the Committee on the Elimination of Racial Discrimination (CERD) published concluding observations based on Estonia's ninth and tenth periodic report.[18]

These organisations made several suggestions to Estonia.

- ECRI suggested Estonia amended the **Equal Treatment Act** to include discrimination based on language and citizenship. Protection from discrimination based on religion and other beliefs should also be extended to access to social protection and education as well as the possibility to use public goods and services (ECRI).
- It was advised to develop the independence of **the Gender Equality and Equal Treatment Commissioner. The Commissioner** should be allocated sufficient resources: financial resources as well as adequate employee resources in order to increase the efficiency of her function (ECRI, CCPR). It would be advisable to include legal and various other help to the victims in the jurisdiction of the commissioner (ECRI).
- It was advised to employ measures to train judges, prosecutors, employers, employment agencies, officers and lawyers in order to acquaint them with the Equal Treatment Act and ensure it is implemented in practice in the full. The judges, prosecutors and police authorities should be trained to recognise racist motives in criminal offences. Police officers should be trained in human rights, including the right

[16] Ministry of Foreign Affairs (2010). Pressiteade: Eesti esitles kodaniku- ja poliitiliste õiguste rahvusvahelise pakti täitmise aruannet [Press release: Estonia presented the report on implementation of the International Covenant on Civil and Political Rights], no. 230-E. 13.07.2010. Available at: http://www.vm.ee/?q=node/9688.

[17] UN Human Rights Committee (2010). Concluding observations: Estonia, CCPR/C/EST/CO/3 (4.08.2010). Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/440/92/PDF/G1044092.pdf?OpenElement.

[18] UN Committee on the Elimination of Racial Discrimination (2010). Concluding observations: Estonia, CERD/C/EST/CO/8-9 (23.09.2010). Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/452/45/PDF/G1045245.pdf?OpenElement.

to be free from racism and racist discrimination, in order to fight against discrimination in police forces. Further steps should be taken to increase awareness of the Equal Treatment Act in public; also measures should be implemented that are specifically aimed at minorities (ECRI).

- **Data** should be **gathered** for improvement of the situation of the minorities, a consistent and diverse data gathering system (regarding ethnicity, language, religion and citizenship) should be created. Potential double or multiple discrimination should be considered (ECRI, CERD).
- The prejudice of the society must be fought to reduce **racial discrimination and inciting hatred**, this includes ensuring the right to go to court against those who incite hatred (including the media) according to § 151 of the Penal Code. At the moment incitement of hatred is punishable only in the case of substantial damage to the rights of the victim, if it results in danger to the person's life, health or property. Therefore, the Penal Code does not have a punishment for inciting hatred irrespective of specific consequences. The Penal Code should be amended to qualify ordinary criminal offences based on racism as racist crimes. The Penal Code should have a clearly stated punishment for all racist crimes and a special provision prohibiting racist organisations (ECRI, CERD). Special attention should be paid to cyber crimes, racist and xenophobic acts via the internet should be criminalised (CERD).
- Solving the problems of the **Roma** should be paid attention to. There are still stereotypes and prejudices in force about them, which the media sometimes enforces. The Roma are especially vulnerable to discrimination in employment. The children of the Roma have been sent to special schools even when there has been no objective reason for it. The Roma children without disabilities should be removed from special schools and it should be ensure that such unfounded placements will not occur in the future (ECRI, CERD).

Summary

Equal treatment and discrimination are being discussed more and more in the society. As the Estonian legal system requires the individuals to be highly aware of their rights, it is essential to inform people of their fundamental rights and specifically of the right not to be discriminated against. The individuals need to know that discrimination is any such activity, which results in one person being treated worse because of the attributes of the person. Such attributes may be the colour of their skin, race, age, disability, gender, political convictions, creed or sexual orientation.

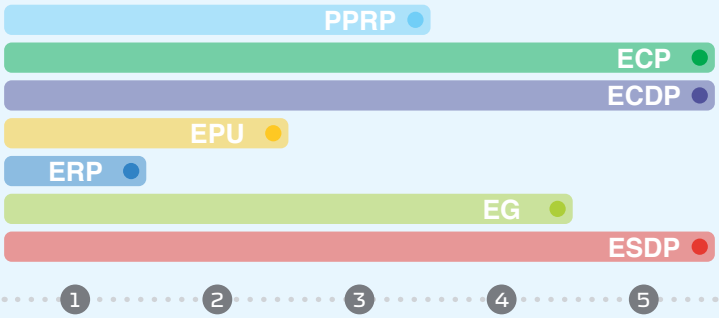
As there is no national court practice regarding discrimination, it is impossible to make any conclusions about implementation of the Equal Treatment Act in the courts. The absence of court practice may refer to victims' low level of awareness of their rights, the fear of retribution, the lack of trust for the police and the legal system or the low level of attention of the authorities for discrimination cases.

Recommendations

- Greater attention should be paid to increasing people's awareness (including those belonging to minorities) not to be discriminated against and to presenting the Equal Treatment Act. Special training on the implementation of the Equal Treatment Act should also be given judges, prosecutors, employers, officials and lawyers.
- The activity of the Gender Equality and Equal Treatment Commissioner should be supported in every way, especially financially, and the restriction of the commissioner's activity by tightening the resources must be stopped.
- Prejudices regarding minorities prevalent in the society should be addressed. People should be ensured the right to turn to court against those who incite hatred, including the media. The punishment for incitement of hatred should not be contingent on the consequences on the person's life.

Is Your Party in favour of stating hate crimes as a separate crime in the Penal Code?

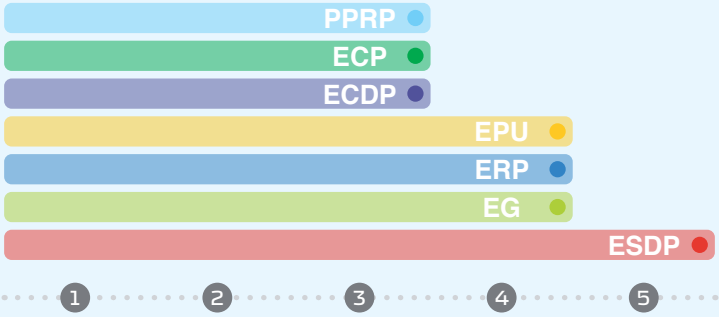
(1 – not at all in favour; 5 – completely in favour)



Source: see Appendix – Survey of Political Parties

Is Your Party in favour of increasing the effectiveness of § 151 (incitement of hatred) of the Penal Code?

(1 – not at all in favour; 5 – completely in favour)



Source: see Appendix – Survey of Political Parties

Right to Protection of Property

THE AUTHOR

Marianne Meiorg

RIGHTS

ECHR Protocol 1 Article 1 – Protection of property

- Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

CHAPTER 9

Right to Protection of Property[1]

There is a ECtHR judgment concerning Estonia that stands out in the sphere of right to possessions in 2010.[2] The ECtHR, in the case involving 45 former Soviet army servicemen, analysed the alleged unfair treatment of the applicants in calculating the pension for the work done after leaving the army, considering Article 14 of the ECHR (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property). The court stated that there can be discrimination only if equals have been treated unequally. The applicants in this case were special subjects, who were subject to special rules and are therefore not in a comparable situation to the other old age pensioners who receive pension from Estonia after having worked in Estonia for 15 years. In deciding this the court took considered the following facts.

- The agreement between Estonia and Russia is applicable only to those persons who received a pension from Russia at the time of signing it (§ 61).
- The retired army servicemen who decided to remain in Estonia were fully aware of the fact that if they receive a pension from Russia and continue to work in a civil sector in Estonia they do not have the

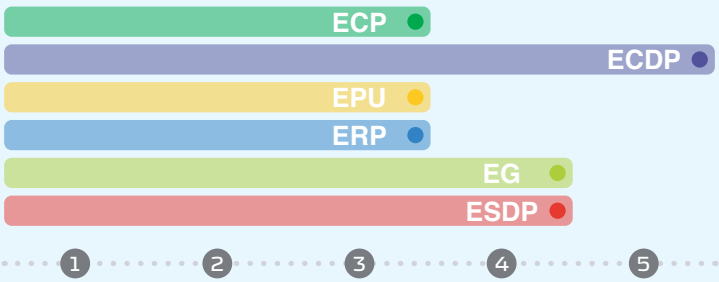
[1] With thanks to Rene Kullör for the help in analysing and gathering the information.
[2] European Court of Human Rights. 4 November 2010 judgment Tarkoev and Others v. Estonia. Applications no. 14480/08 and 47916/08.

right to receive a pension from the Republic of Estonia for their latter work (§ 62).

- The aforementioned agreement guarantees the veterans a pension from Estonia, which is at least the equivalent of the minimum pension paid by the Republic of Estonia; in reality the pension of the veterans equals the average pension in Estonia (§ 63).
- The veterans are eligible to pension from the Republic of Estonia on certain terms including if they are not already receiving pension from Russia. In that case their service in the Soviet army will not be considered. The service in Soviet army is not considered for anybody according to Estonian legislation, which is why no special treatment is taking place (§ 64).
- Although Estonia and Russia are negotiating on changing the agreement, it does not render the current agreement discriminatory (§ 65).

This is why the court came to the decision that Estonia had not violated Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property).

Right to protection of property
(1 - most problematic; 5 - least problematic)



Source: see Appendix - Survey of Political Parties

Right to education

THE AUTHOR

Tanel Kerikmäe

Tanel Kerikmäe has a reputation in the field of European and International law. He is a member of several law associations, a member of the editorial office of the Baltic Yearbook of International Law and other scientific publications and an author of more than 50 articles and publications. Tanel has acted as an expert in European law, constitutional law and human rights law for international organisations and the Government of the Republic of Estonia. He has also lectured at several foreign universities. Tanel is currently the Acting Director of Tallinn Law School at Tallinn University of Technology and a Professor of European Law at the Jean Monnet Chair of European Law of Tallinn Law School at Tallinn University of Technology.

RIGHTS

ECHR Protocol 1 Article 2 – Right to education

- No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

CHAPTER 10

Right to education

Access and right to education is despite the non-hierarchal nature of human rights the most important premise to building a civil society. Precisely thanks to eruditeness the individual is able to fathom the extent of his or her rights and freedoms and to be considerate about fundamental rights of others whether it comes across in his or her attitude or behaviour. Right to education merited media coverage on several occasions in 2010.[1] Content analyses were also carried out.[2]

We are becoming more like a state of law thanks to the discussions. On the other hand, we have to face choices due to economic and political pressures, which conceptually define the right to education in Estonia.

The following review brings out the most important questions of 2010 throughout the levels of education as well as regarding access to education by less protected social groups (foreigners and elderly people).[3]

[1] Marianne Mikko (2008). Põhiõigus Euroopa Liidus – õigus haridusele [Fundamental rights in European Union – right to education] Pärnu Postimees 31.05.2008 Available at: http://www.parnupostimees.ee/020608/arvamus/10085973.php.

[2] Anu Uritam (2010). Õigus haridusele – kas tasu eest või tasuta? [Right to Education – for a fee or without a fee?] RiTo [the Journal of the Estonian parliament] 22, 2010. Available at: http://www.*Riigikogu*.ee/rito/index.php?id=14204.

[3] The topic of education has also been covered in chapters 8 (prohibition of discrimination) and 12 (Integration and ethnic cohesion of the Estonian society).

Basic and Upper Secondary Level

The controversy surrounding uniting basic level schools continued in 2010. The closing of schools because of financial reasons caused difficulties for pupils who now have to go to school much further from home. Because of this situation several local governments have turned to the state to avoid having to close the local secondary schools, or to gain additional funding. Their applications often contain the petition to found a state sponsored secondary school (in Jõgeva, Viljandi and Haapsalu). Several heads of schools have admitted that this subject has not been thought through and therefore the efficiency of the state sponsored secondary schools in unpredictable.[4] It could also severely affect the conditions for access to education.

The problems of special schools have been given special attention. Chancellor of Justice of the Republic of Estonia has spoken out about enforcement of surveillance over the process of working out the necessary legal regulation in order to apply the concept of schools for special needs children.

On November the 5th, 2010 a verification visit to Kaagvere special school took place. It occurred, among other findings, that the Ministry of Education and Research has not compiled the draft amending the Juvenile Sanctions Act by which the provisions stated in Special Schools' Conceptual Bases could be enforced.[5] Charges for discrimination arose regarding special schools. European Commission against Racism and Intolerance pointed out the discrimination against Roma in its 2010 report on Estonia.[6] Minister of

[4] Sirje Tohver (2010). Viljandi kiirustab riigigümnaasiumi looma [Viljandi in a rush to found a state sponsored secondary school] Õpetajate leht, 26.02.2010. Available at: http://www.opleht.ee/admin/pages/preview/?archive_mode=article&articleid=3034.

[5] See Chancellor of Justice (2011). Ülevaade õiguskantlseri 2010–2011. aasta prioriteetide täitmisest 2010. aastal [overview of execution of priorities of the Chancellor of Justice for the years 2010–2011 in 2010]. Available at: www.oiguskantsler.ee/.../prioriteedid/_levaade_prioriteetide_t_itmisest_2010 _l_puks__5_.pdf.

[6] European Commission against Racism and Intolerance (2010). ECRI report on Estonia (fourth monitoring cycle). CRI(2010)3. Available at: http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/estonia/EST-CbC-IV-2010-003-ENG.pdf.

Education has denied the accusations in media[7] and the representative of the ministry claims the Roma are studying in schools for special needs children exclusively with the consent of their parents[8]. In Estonia's report to the Council of Europe the state points out the methods for increasing efficiency of language training, which enable everyone regardless their language and ethnic background an equal access to education.[9]

Higher Education

A survey was carried out in 2010 by Praxis, in association with SA Archimedes Primus program regarding access to higher education.[10] The survey gained the attention of the Federation of Estonian Student Unions, which pointed out that only 5% of students come from families of low socio-economic background. 19.5% of Estonian population lives in relative poverty. Stipend-based support system increases the inequality occurring in higher education and therefore it depends on the income of the student's parents and their place of residence whether a person has access to education. The survey also shows that 66% of students in Estonia work, which is the highest such figure in Europe. 51% of full time students also work full time and spend the least amount of time on studies of the students in Europe.[11]

The act amending the Tartu University Act, which mainly regulated questions regarding intra-university study disciplines, was passed in 2010. The Act

[7] Ratt, Kadri (2010). Lukas: mustlaste diskrimineerimine on pastakast välja imetud süüdistus [The accusation of discrimination against Roma is unfounded] Postimees 2.03.2010. Available at http://www.postimees.ee/?id=231825.

[8] Randlaid, Sven (2010). Ministeerium: mustlasi ei sunnita erikooli minema [The Ministry: the Roma are not forced to go to special school] ERR, 3.03.2010. Available at: http://uudised.err.ee/index.php?06196108.

[9] The Republic of Estonia (2010). Third Report Submitted by Estonia Pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities. Available at: http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_SR_Estonia_en.pdf.

[10] Mägi, Eve; Lill, Liis; Kirss, Laura; Beerkens, Maarja and Orr, Dominic (2010). Missugune on Eesti üliõpilakond? Uuringu "Õiglane ligipääs kõrgharidusele Eestis" täispikk lõpparaport [Full length final report on the survey "Fair access to higher education in Estonia"] Praxise Toimetised no. 2/2010. Praxis. Available at: http://www.praxis.ee/fileadmin/tarmo/Projektid/Haridus/Oiglane_ligipaeaes/Toimetised_2_2010.pdf.

[11] Federation of Estonian Student Unions (2010). Uuring: Kõrgharidusele ligipääs on Eestis ebavõrdne [Survey: Access to higher education in Estonia is unfair]. FESU website, 20.01.2010. Available at: http://www.eyl.ee/index.php?article_id=553&page=49&action=article&. 20.01.2010.

Amending Tartu University and the Universities Act[12] adopted in *Riigikogu* on 16 February 2011 also ties in with the question of running the university, more specifically what is the relationship between the board of governors and its council? This discussion concerns the wider society. The board of governors' (which comprises of persons outside the university) effect on the autonomy of the university (and therefore also to the access of education) has not been sufficiently analysed. The first conflict has already occurred.[13] Passing the specific law may place universities in an unequal standing and thereby regulate free access to education.

September 16th, 2010 the government passed the document "Ülevaade Eesti kõrghariduspoliitika arengutest 2006–2009"[14], which concedes that the "[m]ain deficiencies are to do with limitations of funding from the state budget". It clearly has to do with disproportionate funding and unfounded policies of study programmes and universities. A part of this document is titled "Linking higher education to the needs of Estonia's society and the expectations of the labour market", which refers to the fact that the policy regarding higher education is in essence protectionist and does not consider the principle of freedom of movement of the EU, nor does it see the increase of foreign students as a priority or admit the fact that the graduates often end up working in a foreign country.

The topics of higher education fees and free higher education were also discussed in 2010.[15] These topics do not stem from educational strategy documents of Ministry of Education and Research or from their enforcement doc-

[12] The Act amending Tartu University Act. RT I, 3.03.2011, 4.

[13] Mets, Risto (2010). Professorite kiri: Tartu Ülikooli kuratoorium ületas oma volitusi [Professors' address: The Board of Governors of Tartu University exceeded its authorization]. Postimees 27.12.2010. Available at: http://www.tartupostimees.ee/?id=362799.

[14] See Ministry of Education and Research. Haridus: Arengukavad ja strateegiad. [Education: development plan and strategies]. Available at: http://www.hm.ee/index.php?03236.

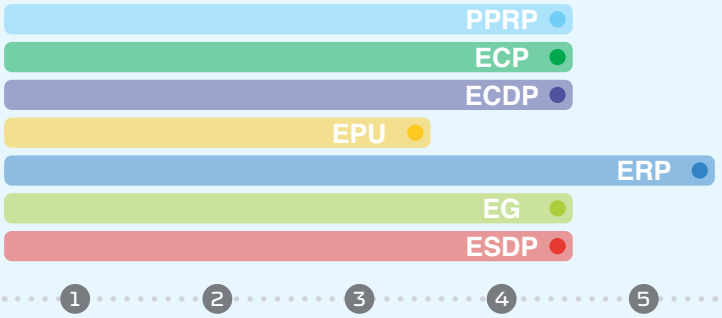
[15] See for example Lukas, Tõnis (2010). Tasuta kõrgharidus? [Free higher education?] Postimees 20.09.2010. Available at: http://www.postimees.ee/?id=31518; Lukas, Tõnis (2010). Üldine tasuta kõrgharidus pole utoopiline [General free higher education is not utopia]. Postimees, 20.11.2010. Available at: http://www.postimees.ee/?id=345021; or Lukas, Tõnis (2010). Tasuta kõrgharidus peaks olema meie tee [Free higher education should be our choice] 20.09.2010, Äripäev. Available at: http://www.ap3.ee/?PublicationId=f3f60fcd-cc69-44fd-9be8-98c1762f6be9.

uments. This has planted the feeling of lack of legal certainty, as it is unsure, which criteria determine the allocation of free higher education, who finances it and how the state aid is divided (and by whom) between various specialties and universities. Various other topics that have not yet been discussed also tie in with the question of access to higher education, for instance the conditions set by associations of the field to gain access to activities in the field for the person who has acquired higher education, as well as the ongoing discrimination in the current law. § 29 subsection 3 of the Bar Association Act[16] states that the professional suitability assessment committee which determines the suitability of the candidate includes *ex officio* a jurist from Tartu University. Also the examination board for judge's examination includes a representative of Tartu University. Since there are three universities teaching law that have been recognised by the state the equal treatment of students of these universities should be expressed in laws. It would be fair to employ a rotation or to prescribe the representation of all the universities in such examination boards. Otherwise it will not be the academic content of the university but the words awarded by the executive power "unnecessary duplication" that are of utmost importance when it comes to choosing a university (in the field of medicine, law, architecture and other disciplines). This refers to the need to gather certain study programmes in one university; this would limit the student's freedom of choice and minimise healthy competition. The term used by the Minister of Education "principle of feasibility"[17], which has been used to justify education policy decisions, has remained unclear and potentially restrictive to academic freedom and access to education.

[16] RT I 2001, 36, 201 … RT I, 14.03.2011, 3.

[17] See for example the discussion on the draft amending the Institutions of Professional Higher Education Act in the Government of Estonia. Government of Estonia (2000). 5. The draft amending the Institutions of Professional Higher Education Act. Government's 23.05.2000 session info and agenda. 23.05.2000. Available at: http://www.valitsus.ee/et/uudised/istungid/istungite-paevakorrad/6922/valitsuse-23052000-istungi-info-ja-paevakord or Lukas, Tõnis (2007). Mis muutub lähiaastail meie kõrgharidusmaastikul? [What will change in our higher education in the next few years?] Põhjarannik 3.08.2007. Available at: http://www.pohjarannik.ee/modules.php?name=News&file=print&sid=5908.

Right to education
(1 – most problematic; 5 – least problematic)



Source: see Appendix – Survey of Political Parties

One must agree with the authors who claim that Estonia needs systematic and professional analyses in order to solve our educational problems.[18] This claim would make consensus between political parties possible.

A positive example for eradicating age discrimination is a project called "the university of the dignified", which allowed several hundred of the elderly (at the average age of 70) to begin with self-improvement studies. The representatives of refresher courses in Tartu University claim:

> *"Tartu University's university of the dignified has been founded on the principles of lifelong education to flexibly react to changes and needs of the society and to offer refresher courses to various groups of people. The university of the dignified*

[18] Reps, Mailis and Läänemets, Urve (2010). Ideoloogiad ja hariduspoliitika [Ideologies and educational politics], The Journal of Estonian Parliament 22, 2010. Available at: http://www.*Riigikogu*.ee/rito/index.php?id=14178.

in Tartu is also supported by the town of Tartu and the Ministry of Education and Research."[19]

The concept of the university of the dignified also works regionally. Nearly 350 people over the age of 50 have graduated from courses in Tartu University's Pärnu College.[20]

Refunding study loans

One of the acute topics in 2010 was the topic of refunding (or to be more precise: not refunding) the study loans. That is without a doubt an important factor in access to education. Refunding study loans for workers in the public sector and their parents was discontinued by the second State Budget Act for 2009, in connection to the act amending other acts, which was passed in *Riigikogu* on June 18th, 2009. The act also influences refunding the interest of the study loan. The Federation of Estonian Student Unions claim alternatives should have been considered.[21] The Federation gathered 12,725 signatures[22] for continuation of refunding the study loans and is according to their representative ready to proceed all the way to European Court of Human Rights to challenge the infringement of the principle of legitimate expectation. Interpreting the act has caused ambivalence. Administrative Court of Tallinn passed the decision, which required the municipality to continue refunding the study loan for the teacher of a secondary school.[23] Other instances of turning to court have been known to occur and one may assume that the final

[19] University of Tartu (2010). Väärikate Ülikool [University of the dignified]. Available at: http://www.tk.ut.ee/vaarikate-ulikool.

[20] Paluoja, Silvia (2010). Mari Suurväli: Pärnu väärikate ülikooli mõtte näppasid teisedki [Mari Suurväli: other universities have borrowed the concept of the university of the dignified]. Pärnu Postimees, 05.08.2010. Available at: http://www.parnupostimees.ee/?id=295845.

[21] Mälzer, Maris (2010). Maris Mälzer: Õppelaenude hüvitamise lõpetamisel oleks pidanud kaaluma alternative [Maris Mälzer: alternatives should have been considered for discontinuing refunding of the study loans] The FESU website 02.12.2010. Available at: http://www.eyl.ee/index.php?page=30&article_id=686&action=article.

[22] Raun, Alo (2010). Tudengid viivad Ergmale 12 725 protestiallkirja [The Students to take 12,725 protest signatures to Ergma] Postimees 16.11.2010. Available at: http://www.postimees.ee/?id=342615.

[23] Tamm, Merike (2010). Õpetajale õppelaenu hüvitamise kohtuotsus jõustus [Court ruling regarding refunding a teacher's study loan entered into force] Postimees 1.03.2010. Available at: http://www.postimees.ee/?id=231214.

assessment for the act's accordance with the Constitution will hopefully be given by the Supreme Court in the near future.

Summary

The continuing problem of 2010 is the uniting of schools, which will result in closing of several schools in the rural area and this may also mean potentially more difficult access to education for children in that area. Problems in access to education are also present in higher education, however, the main problem here has proved to be the economic possibilities. The topic of not refunding the study loans which reached the courts in 2010 also plays a role in access to education.

The topic of special schools also gained the attention of the pubic in 2010, especially the Chancellor of Justice's criticism about the Kaagvere special school. The Chancellor of Justice accused the Ministry of Education and Research of inactivity in working out the necessary amendments for the Juvenile Sanctions Act, which would increase effectiveness of the purpose of special schools.

The unequal treatment of institutions of higher education has also proved to be a problem which has been exemplified by several developments in 2010, for example the disproportionate funding and politics, also appointing experts based on possession of a diploma from one preferred university.

The activity of the Federation of Estonian Student Unions in debates has been a welcome sign. Problems become clearer in the course of discussion and that is the prerequisite to finding solutions suitable for a state of law. The topic of education has been more central in 2011's general elections than ever. Hopefully some benefit will arise from the discussion surrounding the election promises and the access to education will become more available to all the social groups.

Recommendations

- Monitor and analyse the practice of uniting basic level secondary schools and ensure access to basic secondary education.
- Analyse problems connected with higher education fees and take measures to guarantee access to higher education for secondary school graduates from lower income families.
- Strategies of higher education should consider the principle of balance of rights of various interest groups and the principle of legitimate expectation.
- Work out a draft to the act amending the Juvenile Sanctions Act, which would make it possible to implement the Special Schools' Conceptual Bases.

Right to free elections

THE AUTHOR

Kari Käsper

RIGHTS

ECHR Protocol 1 Article 3 – Right to free elections

- The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

CHAPTER 11

Right to free elections

No major changes in regulation of elections took place in 2010, nor did any elections themselves take place. Even though the right to free elections has not been analysed in previous reports, it is still reasonable to analyse the weak points related to issues of elections, which have continuously proved to be a topic, including in 2010. These topics have to do with prohibition of outdoor political advertising prior to elections on the one hand and with restriction prisoners' right to vote on the other.

In Estonia, *Riigikogu*, local governments' councils and the European Parliament elections are free, uniform and secret. The election of the President, however, is not direct. Estonian citizens who are of voting age have the right to vote in general elections,[1] citizens of other Member States of European Union whose permanent residence is in Estonia have the right to vote in European Parliament elections,[2] aliens who resides in Estonia on the basis of a long-term residence permit or the right of permanent residence have the right to vote in local government council elections.[3] All elections are free, general,

[1] *Riigikogu* Electon Act. RT I 2002, 57, 355 ... RT I, 10.12.2010, 1. § 4.
[2] European Parliament Election Act. RT I 2003, 4, 22 ... RT I, 10.12.2010, 1. § 4.
[3] Local Government Council Election Act. RT I 2002, 36, 220 ... RT I, 10.12.2010, 1. § 5.

uniform, direct and secret and their results are ascertained according to the principle of proportionality.[4] Each voter has one vote.[5]

The subject of the public debate has been the loose regulation of funding of elections, problems of which the former Chancellor of Justice Allar Jõks has repeatedly referred to.[6] The act amending Political Parties Act and other relevant acts adopted in *Riigikogu* on November 25th, 2010 which entered into force on April 1st, 2011 substantially changed the regulation of funding of parties, erasing a special provision in the Penal Code regarding accepting anonymous, covert donations or donations from legal persons. It also provided a more specific regulation regarding the funding of auxiliary organisations and a new monitoring commission for party funding was created, which consists of representatives of parties belonging to the Parliament, the Chancellor of Justice, the Auditor General and elected members of the Estonian National Electoral Committee. The Commission is eligible to appoint penalty payment for violations and its decisions can be contested in court. Whether the monitoring of party funding will become more efficient thanks to the new system will be possible to ascertain after the act has entered into force and the commission has started work in 2011.

Prohibition of outdoor political advertising

Outdoor political advertising during active election campaigning was banned in Estonia in 2005. Chancellor of Justice considered banning the outdoor advertising unconstitutional as it excessively restricts the right to vote. Although *Riigikogu* discussed this topic on the request of Chancellor of

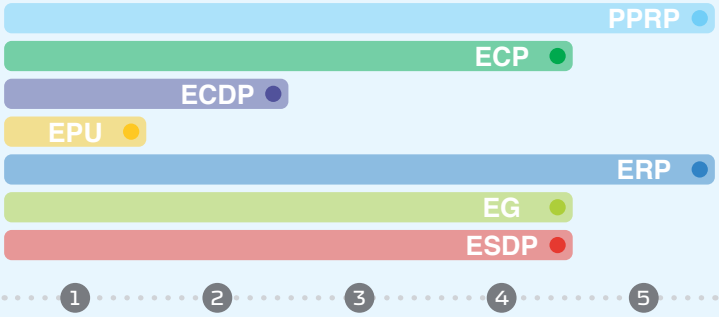
[4] Estonia is one of the few states in the world where pre-elections can be voted in electronically.

[5] The public debate in 2009 yielded the idea to give parents a vote in the name of their children. Even though this idea was favoured by several conservative politicians, it did not gain any further public attention. The survey carried out November of 2010 proved this idea upopular. See Tammiksaar, Arbo (2010). EMORi uuringu tulemused – november 2010 [results of the EMOR survey – November 2010]. 13.12.2010. Available at: http://nooreesti.edicypages.com/arutelu/emori-uuringu-tulemused-november-2010.

[6] In December of 2010 the Security Police obtained information about the leader of the Center Party Edgar Savisaar's alleged proposal for funds from Russia. Website of the Security Police, 21.12.2010. Available at: http://www.kapo.ee/est/pressinurk/32/kaitsepolitseiameti-teave-edgar-savisaare-raha-kusimise-kohta-venemaalt.

Justice the alleged unconstitutional situation had not been eliminated by the end of 2009. Therefore the Chancellor of Justice turned to the Supreme Court on December 18th, 2009 with the appeal to declare void the provisions of the European Parliament Election Act, the Local Government Council Election Act and the *Riigikogu* Election Act that restricts outdoor advertising.[7]

Right to free elections
(1 – most problematic; 5 – least problematic)



Source: see Appendix – Survey of Political Parties

On the evaluation of Chancellor of Justice these provisions limit the right to run as a candidate, the right to vote and the right to nominate candidates and may have a limiting effect on basic rights of parties (freedom of activity contained in the freedom of the party), freedom of political speech (because the measure restricts the right to receive public information), property rights (buildings, public transport, taxis etc which may be used as a vehicle for outdoor advertising, the right of owners to freely assert ownership and determine

[7] See Chancellor of Justice (2009). Taotlus nr 2 Euroopa Parlamendi valimise seaduse, kohaliku omavalitsuse volikogu valimise seaduse ja *Riigikogu* valimise seaduse poliitilist välireklaami keelustavate sätete põhiseaduspärasuse kohta [Application no. 2 regarding unconstitutionality of provisions of the European Parliament Election Act, the Local Government Council Election Act and *Riigikogu* Elections Act prohibiting outdoor advertising]. 18.12.2009. Available at: http://www.oiguskantsler.ee/public/resources/editor/File/NORMIKONTROLLI_MENETLUSED/Taotlused_Riigikohtule/Riigikohus_Taotlus_nr_2_(v_lireklaam).pdf.

the use of their property), freedom of enterprise (as the prohibition of outdoor advertising has an adverse effect on the business of outdoor media enterprises) and the freedom of contract. Although these rights may be restricted for legitimate purposes, the necessity of the prohibition is questionable in the Chancellor of Justice's opinion, nor is the chosen prohibition effective in his opinion:

> *"Prohibition of outdoor political advertising is not an effective measure of freeing the public space from election advertising. This could result in the campaign moving to an earlier time and into other channels and become bothersome for the voters in some other time and place. The perception of outdoor advertising as negative, however, is highly subjective. It is also highly questionable whether a candidate wishing to promote himself and his views would knowingly and wilfully advertise against his interests."*[8]

Because the right to free elections is interfered with so intensely (as outdoor advertising formed a large part of total cost of election campaigns in 2003) and the effectiveness of the interference is so low, the Chancellor of Justice believes the prohibition is unconstitutional. The Minister of Justice finds the prohibition disproportionate and unconstitutional:

> *The prohibition in questions is not a suitable measure for raising the quality of political argument in the opinion of the Minister of Justice. The prohibition does not restrict what is being expressed in the election advertisement. The candidates are free to convey messages of poor content in other channels of communication without restriction. The improvement of the content of election campaigns after the prohibition of outdoor political advertising has not been proved. Nor is the prohibition suitable for decreasing the importance of money in the election results. The money that was used for outdoor advertising is being channelled to other methods of advertising. Decrease in costs of election campaigns after the prohibition of outdoor advertising has not been proved. The prohibition of outdoor political advertising is only suitable for freeing the public space from political advertising.*[9]

[8] Supreme Court *en banc*. Judgment no. 3-4-1-33-09 (1.07.2010). Point 12.
[9] Judgment no. 3-4-1-33-09. Point 18.

Supreme Court *en banc* let its July 1st, 2010 decision on prohibition of outdoor political advertising stand.[10] The Supreme Court found that the principle of clarity of law has not been breached and matters possessing more than one interpretation should be solved in courts. The Court has stated on an earlier occasion that one of the objectives of prohibition of outdoor political advertising is "ensuring the equality of parties, independent candidates and election coalitions through decreasing the parties' cost on election campaigns and the importance of money in gaining political power."[11] In comparing various measures for gaining desired objectives (decreasing the importance of money in gaining political power by cutting down election costs, increase content of political argumentation, free the public space from excessive outdoor advertising, which may cause reluctance for political advertising and politics as a whole, ensure equal treatment of participants in elections and decrease influencing of voters with unsuitable methods used in outdoor advertising) the court came to the conclusion that the effect of the prohibition is not clear and that "the possible ineffectuality of the outdoor political advertising may not be the basis for declaring it unconstitutional. In *en banc*'s opinion, it is rather an argument for low intensity of the prohibition."[12]

The court found that:

> *"The prohibition will not eliminate free distribution of information during active election campaigning. The prohibition will not limit the topics that opinion may be expressed about publicly during active election campaigning. Restrictions prohibiting public discussion on certain topics would be considered very intense. The prohibition of outdoor advertising does not obstruct from passing on political views and discussing social life in other ways (for example at election meetings, through direct communication with voters, in print media, television, radio, direct posting, advertising indoors, via so-called new technologies). The prohibition merely directs political discussions to different channels, where they stand a greater chance of having more content than the outdoor advertisements*

[10] Judgment no. 3-4-1-33-09.
[11] Judgment no. 3-4-1-33-09. Point 51.
[12] Judgment no. 3-4-1-33-09. Point 62.

> *consisting of prevailing slogans and images. These channels also have less chance of influencing the voter in an unsuitable manner. The prohibition does not remove the option of gaining information for making a conscious decision from other channels."*[13]

The court, referring to § 1 of the Constitution stated that "the right to vote and the right to run as a candidate and the freedom of activity of the party, as well as freedom of political expression as a basic right, which make the democratic system possible have, in the opinion of the *en banc*, been restricted in the interest of using those same rights to ensure better functioning of the democratic decision process".[14] Therefore the Supreme Court *en banc* found in a paradoxical manner that the restrictions of election rights had in this case been in the interests of the election rights. It is remarkable that not all justices of the Supreme Court concurred with the majority opinion Supreme Court *en banc*. Justice of the Supreme Court Jüri Põld found the abovementioned opinion unconvincing in his dissenting opinion.[15] He also found that the money meant for outdoor advertising is presumably used for other purposes and that would not actually reduce election costs; the period of campaigning also lasts longer (outdoor advertising is carried out before the beginning of active election campaigning). There would be much less severe methods for restricting outdoor political advertising: restrict their duration, size, location etc.

Jüri Põld stated in his dissenting opinion that:

> *En banc also sees increasing political argumentation as the objective of this measure. The objective of increasing political argumentation is a commendable one. However, as long as it is presumably possible to influence voters through propaganda lacking argumentation, the prohibition of outdoor political advertising will not help to increase political argumentation in the electoral process. The slogan-like advertising and wordy promises will just transfer to another channel to a great*

[13] Judgment no. 3-4-1-33-09. Point 63.
[14] Judgment no. 3-4-1-33-09. Point 67.
[15] See Judgment no. 3-4-1-33-09. Justice of the Supreme Court Jüri Põld dissenting opinion to the judgment of Supreme Court *en banc* regarding constitutionality in case no. 3-4-1-33-09, which is joined by justices Jüri Ilvest, Jaak Luik and Märt Rask – It was also supperted in her dissenting opinion by justice Julia Laffranque.

> *extent, for example advertising pages bought from print media, television, radio, letterboxes, inside supermarkets. It is possible to increase the importance of political argumentation if the participating forces of the electoral process find that presenting positions backed up by arguments is more effective than advertisements. This is why I consider a total ban on outdoor advertising during active election campaigning for the purpose of increasing political argumentation an unsuitable measure and a breach of basic freedoms that does not lead to desired outcome.*[16]

The ECtHR has stated in its earlier case law that the states' discretionary power in restricting freedom of political expression is more limited than in other forms of freedom of expression. The court has also explained that the effectiveness of the advertising channel (the more effective it is the smaller the allowed restrictions) is essential in the analysis of restriction of outdoor political advertising. Yet the court has agreed that certain restrictions of freedom of expression may be in the interest of ensuring free elections and the will of the people.[17]

Therefore it isn't clear whether the prohibition of outdoor political advertising in Estonia is contradicting the European Convention on Human Rights or not. Although it is a short term ban and its effect is largely unclear, it is a restriction of freedom of political expression. Any state intervention in freedom of speech and organisation of elections should be clearly reasoned and be based on specific analyses. An integrated legal solution, which covers not just one advertising channel but the whole campaign would be preferable, or the freedom of political expression should not be restricted in this context at all.

Restriction of the prisoners' right to vote

The other important question regarding substantial breach of right to vote, which may be in violation of international human rights is the restriction of prisoners' right to vote. This prohibition is stated in § 4(3) of the *Riigikogu*

[16] Dissenting opinion in case no. 3-4-1-33-09.
[17] See for example ECtHR 11 December 2008 judgment *TV-Vest and Rogaland Pensjonistparti v. Norway*. Application no. 21132/05.

Election Act and § 4(3) point 2 of European Parliamentary Election Act, which state that a person shall not have the right to vote if he or she has been convicted of a criminal offence by a court and is serving a prison sentence. A corresponding prohibition is stated in § 5(4) of the Local Government Council Election Act, according to which "[a] person who has been convicted by a court and is serving a sentence in a custodial institution shall not participate in voting". Those convicted of a criminal offence by a court serving a prison sentence are also prohibited to run as a candidate in elections.

It stems from the ECtHR's practice that the uniform and unfounded prohibition of all persons serving a prison sentence is not in accordance with Article 1 of Protocol no. 1 of the ECHR. The ECtHR decided in the Hirst judgment that even though the states have a wide discretion in regulating organisation of elections, any restrictions to right to vote must have a legitimate purpose and be proportionate. The ECtHR has previously decided that the prisoners are generally subject to all basic rights and freedoms stemming from the convention, excluding the right to freedom, and that the states may not prohibit their right to vote solely because of a negative public opinion. All the same the convention does not prohibit measures aimed at protection of rights and freedoms of others and therefore in the case of severe crimes against law, state or democracy or crimes of abuse of power may additionally be punishable by prohibition of the right to vote.[18]

The ECtHR stated criteria which the restrictions of the prisoners' right to vote had to comply with in the Hirst judgment:

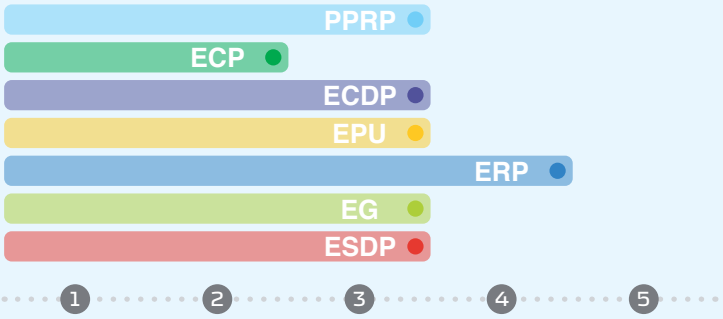
- the subject of the restriction may be a specifically defined group of convicted offenders serving a long term sentence;
- there has to be a direct link between the basis of the offence they were imprisoned for and the removal of their right to vote as a sanction;

[18] ECtHR 6 October 2005 judgment *Hirst no. 2 v. United Kingdom*. Application no. 74025/01; confirmed by ECHR 8 April 2010 judgment *Frodl v. Austria*. Application no. 20201/04.

- the removal of their right to vote should preferably be the result of a separate reasoned decision of the court, not an automatic application of the law.

Is Your Party in favour of eliminating restrictions on right to vote for most convicted offenders?

(1 – not at all in favour; 5 – completely in favour)



Source: see Appendix – Survey of Political Parties

The restriction of the right to vote in Estonia does not comply with the above-mentioned criteria of the ECtHR in the opinion of the author. The restriction of prisoners' right to vote has been applied to all criminal offenders serving a prison sentence regardless of the length of their sentence or the relative severity of their offence. There probably is no direct link between the offence and the restriction of the right to vote in most of these cases. The restriction of the right to vote is automatic and the court lacks the discretion to allow the convicted persons to participate in elections during serving his or her prison sentence. It stems from the aforementioned that the provisions of the *Riigikogu* Elections Act, European Parliament Elections Act and the Local Government Council Elections Act prohibiting all persons convicted by a court serving a prison sentence to vote in elections contradict Article 3 of Protocol no. 3

of the ECHR. There may be additional contradiction with European Union law, including Articles 20 and 22 of the Treaty on the Functioning of the European Union, Articles 39 and 40 of the Charter of Fundamental Rights of the European Union and Council Directives 93/109/EC and 94/80/EC in the case of the European Parliament Elections Act and the Local Government Council Elections Act.

Recommendations

- Analyse the actual effect of prohibition of outdoor political advertising and depending on the outcome consider removing or specifying the restriction to better ensure the purpose and proportionality of it.
- Amend the *Riigikogu* Election Act, the European Parliament Election Act and the Local Government Council Election Act so that convicted offenders serving a prison sentence would not be prohibited to vote, excluding as an additional punishment in reasoned cases.

Situation of national minorities

THE AUTHOR

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CHAPTER 12

Integration and ethnic cohesion of the Estonian society

The issues of inter-ethnic relations in 2010 continued to attract considerable attention in Estonia as well as at the international level. Estonia has largely managed to avoid violent, ethnicity-based manifestations, with the exception of the 2007 Bronze solder events. At the same time, it is difficult to deny that ethnicity does play a role in the socio-economic and political opportunity structures, where belonging to an ethnic minority group is rarely an advantage.[1] This chapter aims to highlight the main trends and some of the central problematic issues discussed in the Estonian society in 2010.[2]

INTERESTING FACT

Estonian population is divided based on ethnicity as follows: 69% Estonian, 26% Russian and 5% other nationalities.[3]

The *Integration Strategy Monitoring Report 2010* (2010 IMP) identified a number of positive trends. Thus, interactions between ethnicities and proficiency of ethnic minorities in the Estonian language during last five years

[1] Saar, Ellu (ed.) (2009). Immigrant Population in Estonia. Eesti Statistika. Tallinn. Available at: http://www.stat.ee/publication-download-pdf?publication_id=18391.

[2] The term ethnic minorities is defined for the purpose of this chapter as all permanent residents, irrespective of their citizenship, whose mother tongue and/or ethnicity is other than Estonian. Note, however, that under Estonian law, one of the main conditions is also Estonian citizenship.

[3] Estonian Cooperation Assembly (2010). Integration Fact Sheet 2010. Available at www.kogu.ee/public/Integration_at_a_glance_2010.pdf.

have increased.[4] The level of political activity among various ethnic groups has increased and the political values among ethnic groups have become increasingly shared.[5] The public visibility of cultural projects and support of cultural activities of various minority groups is also gradually increasing.[6] Radical positions in the public sphere among ethnic groups are becoming less frequent. Conversely, the statistical data and surveys repeatedly indicate significant socio-economic gap between ethnic groups and a very low trust in political institutions by ethnic minorities. Last year, in fact, a number of Estonian sociologists and political scientists including, Pettai, Hallik, Toomla, Vetik and Heidmets have publicly urged to re-consider the state policy on inter-ethnic integration and to take urgent steps to remedy growing socio-economic divide and the brain drain.[7]

INTERESTING FACT

At the political level opinion leaders and Estonian mainstream media still seem to rely on ethnic stereotyping and consider ethnic diversity as a threat rather than an opportunity. According to IMP report the percentage of ethnic Estonians (56,8%) who are of the opinion that politics of the Estonian government disturbs cooperation between ethnic communities has increased.

[4] Vetik, Raivo et.al. (ed.) (2010). Uuringu Integration Strategy Monitoring Report 2010 Raport [Integration Strategy Monitoring Report]. Rahvusvaheliste ja Sotsiaaluuringute Instituut, Tallinn, pages 3–21.

[5] Toomla, Rein (2010). Mitte-eestlaste ühiskondlik-poliitiline aktiivsus ja osalemine [Social and political activity and participation of non-Estonians]. Tartu: University of Tartu, Riigiteaduste Instituut.

[6] As a good example see an Internet-based portal www.etnoweb.ee financed by the Ministry of Culture.

[7] See e.g. Toomla (2010); Klara Hallik, Политика натурализации у нас провалилась [Our failed naturalisation policy]. ERR News, 22.11.2010. Available at http://rus.err.ee/radio4/5f5aca44-fd02-4b16-ae3a-74eb1bea4856; Iris Pettai (2010). Социолог: государство должно задуматься о роли русских в Эстонии [Sociologist: the state needs to understand the role of Russians in Estonia]. ERR News, 28.09.2010. Available at http://www.uudised.err.ee/index.php?26216054; Vetik, Raivo (2010). Ühtsustunde ohtlik puudumine [Dangerous absence of unity] Postimees, 15.09.2010. Available at http://www.postimees.ee/?id=313168.

Legislative and Institutional Changes and Civil and Political Participation

The Citizenship Law and naturalization procedures, requirements on the language proficiency stipulated in the Language Act, as well as competencies of the Language Inspectorate, remain largely unchanged in 2010. The naturalization rate among ethnic minorities continued to fall in 2010 as well as the trust in political institutions and satisfaction with the state of democracy in Estonia.

Estonian Integration Programme 2008–2013 (EIP) is the central policy document determining the aims of the integration process.[8] In the Russian language media, the EIP is strongly criticized.[9] Although proficiency in Estonian language is considered important by ethnic minorities they do not share a central assumption of the EIP that a mere improvement in the proficiency of the Estonian language would result in a more cohesive and less divided Estonian society.[10]

INTERESTING FACT

According to 2010 data on legal status of the population within the ethnic minority group: 24% of ethnic minorities are stateless, i.e. not holding citizenship of any country, 50% hold Estonian citizenship, 23% hold citizenship of the Russian federation and 3% are citizens of other countries'.

[8] Reimaa, Annely (2010). Kultuurilise mitmekesisuse osakonna infokiri 6/2010 [Information Letter 6/2010]. Ministry of Culture, Department of Cultural Diversity. Available at: www.kul.ee/.../Kultuurilise_mitmekesisuse_osakonna_infokiri_nr_6.doc, p 2.

[9] The EIP is often considered as a mere rhetoric rather than a real attempt to promote a real sense of integration in the Estonian society. It is argued, that integration in practice is reduced to the imposition of majority language and historical understandings on ethnic minority groups with insufficient efforts to foster two-way integration process. For strong criticism see for example Kablukova, Irina (2010). В гробу я видела такую интеграцию! [I saw integration in a coffin!]. День за Днём, 3.11.2010. Available at http://www.dzd.ee/?id=336155. See also Boroditš, Deniss (2010). Deniss Boroditš: tundmatud naabrid [Deniss Boroditš: unknown neighbours]. Postimees, 25.05.2010. Available at: http://www.postimees.ee/?id=267422; – (2010). Интеграция умерла! Да здравствует Интеграция! [Integration is dead! Long live integration!] Internet Forum Podmoga, 5.11.2010. Available at http://www.baltija.eu/news/read/13405.

[10] Integration Strategy Monitoring Report 2010, pages 19–21.

According to 2010 data 102,338 residents in Estonia (7,5% of total population) still do not have citizenship of any country[11] and thus, do not enjoy full political rights. The rates of naturalization are increasingly falling[12] since 2006 and the number of stateless residents is unlikely to decrease[13] unless citizenship law is liberalized. In relation to the naturalization policy ethnic groups have opposite opinions

> *"most Russian-speakers still heavily criticize the naturalization policy as overly restrictive and as a violation of human rights, while ethnic Estonians think that the national citizenship politics are normal and adequate by international standards."*[14]

Sociologist Klara Hallik, upon discussing the current citizenship policy concludes that the naturalization policy adopted in 1995 could largely be considered a failure because it resulted in a high number of minorities accepting Russian Federation citizenship or resorting to statelessness.[15] Moreover, she points out that from the political point of view, the fact that naturalization rates dropped severely to the level where almost no naturalization took place is an indication of the protest that takes a form of a collective resistance to the state citizenship policy.[16] Hallik explains "We [Estonians] have imposed conditions for naturalization that are considered to be completely normal in all

[11] Estonian Cooperation Assembly (2010). Lõimumise faktileht 2010 [Integration Fact Sheet 2010]. Available at: www.kogu.ee/public/Integration_at_a_glance_2010.pdf.

[12] In 2010 only 1,184 individuals received citizenship thorough naturalization procedure. – Police and Boarder Guard (2010). 1992–2010 naturalisatsiooni korras Eesti kodakondsuse saanud isikute arv [Statistical data on citizenship and migration]. Available at http://www.politsei.ee/dotAsset/163198.pdf.

[13] For attitudes among ethnic minorities see Integration Strategy Monitoring Report 2010, p 92; see also – (2010). Local Russians Distrustful of Government. ERR news, 15.09.2010. Available at: http://news.err.ee/politics/7924607e-9f53-45b3-923e-4acc81005d35.

[14] Poleshchuk, Vadim and Järve, Priit (2009). EUDO Citizenship Observatory Country Report: Estonia. Available at: http://ec.europa.eu/ewsi/en/resources/detail.cfm?ID_ITEMS=11473.

[15] Hallik (2010); see also Vetik, Raivo (2010). Kodakondsuspoliitika tõrgub töötamast [The citizenship policy does not work]. Õhtuleht, 19.09.2010. Available at: http://www.ohtuleht.ee/index.aspx?id=395030.

[16] Hallik (2010).

states, on those people that in fact are members of our society permanently living here".[17]

INTERESTING FACT

Trust in political institutions diminished further compared to 2008. Only 7% of ethnic minorities trust the parliament; 9% trust the government; 14% trust the president and 31% trust the police. The trust in public institutions among Estonians is also rather low (respectively 18%; 32%, 67% and 60%) but still considerably higher than among ethnic minorities.[18]

Political attitudes among ethnic groups are "surprisingly similar", as well as interest in national politics and levels of political participation.[19] At the same time, trust in political institutions and satisfaction with state of democracy in Estonia is drastically different. While ethnic minorities assign high values to democratic freedoms in general, 2/3 of the ethnic minorities are disappointed with democracy in Estonia.[20] Toomla concludes that this is a very alarming indicator and something must be done about it immediately.

Socio-Economic Conditions and Educational Reform

The socio-economic gap between ethnic groups continued to grow, coupled with the rather pessimistic outlook among ethnic groups for the economic well-being and the quality of life in the future. Against the general consensus, the consensus among ethnic groups on the necessity to reform the current educational system and to improve the proficiency in Estonian language is a conflicting one, especially regarding the methods and the necessary

[17] Hallik (2010). See also the opinion of Estonian historian David Vseviov quoted by Hallik.
[18] Vetik, Raivo (2010). Estonian Integration Strategy monitoring 2010, presentation at the meeting of the school directors of Tallinn city. 20.10.2010. Available at: http://www.google.com/url?sa=t&source=web&cd=1&sqi=2&ved=0CBQQFjAA&url=http%3A%2F%2Fwww.tallinn.ee%2Fest%2Fg7675s52383&ei=nya5TZqvFcrqOYmbgZcP&usg=AFQjCNECrul6vzP7pPOg_FFnVp0W5hf1XA.
[19] Toomla (2010).
[20] 20% are very much disappointed and 50% rather disappointed – Toomla (2010); see also Raun, Alo (2010). Pronksöö pani Eesti slaavlasi demokraatias pettuma [The bronze night disappointed Estonian Slavic's in democracy]. Postimees, 24.09.2010. Available at: http://www.postimees.ee/?id=317659.

conditions for the success of the reform. Proficiency in Estonian language among ethnic minorities continues to grow. However, the number of ethnic minorities who are fluent in Estonian language is still rather modest. Interest in language learning among ethnic minorities is high.

The survey measuring self-evaluation of personal economic hardship found that only 6% of ethnic minorities live well with the current income and are able to save money (in comparison to 21% of Estonians).[21] On average, income of ethnic minorities is considerably lower.[22] In this context, the most disadvantageous group is that of female ethnic minorities earning only 55% of the average Estonian man.[23] The unemployment rate is very high.[24]

Sociologist Iris Pettai, upon discussing high proportion of ethnic minorities among unemployed stated:

> *"As a solution to this problem Russian speakers are repeatedly offered to learn the language [Estonian]. However, on the example of the youth, that have excellent skills in Estonian language but are still not competitive on the Estonian labor market, it is evident that this is not a solution. More than that, talented Russian youth do not feel needed in the country where they live and prefer to go to work abroad. In my opinion – it is a tragedy."*[25]

This air of warning and disappointment is equally supported by the findings of the 2010 Human Capital Report.[26] This report identified a growing tendency of young Russian school graduates to continue their studies abroad

[21] Integration Strategy Monitoring Report 2010, p 142. See also Pors, Merje (2010). Narvalanna: parim amet Eestis on eestlane [The best occupation in Estonia is as an Estonian]. Postimees, 13.12.2010. Available at: http://www.postimees.ee/?id=356478.
[22] Immigrant Populaiton in Estonia (2009); see also Integration Strategy Monitoring Report 2010, p 139.
[23] Immigrant Populaiton in Estonia (2009).
[24] Statistics Estonia (2010: ML 111) reports that unemployment rate among ethnic minorities in 2010 was 23,4% while for ethnic Estonians 13,4%. Available at: www.stat.ee.
[25] Pettai (2010).
[26] Estonian Cooperation Assembly (ed.) (2010). Eesti inimvara raport (IVAR): võtmeprobleemid ja lahendused [Estonian human resources report: key problems and solutions]. Tallinn: Säästva arengu komisjon.

and leave Estonia.[27] This is coupled with a quite widespread and a pessimistic understanding among ethnic minorities that on the labour market employers tend to prefer ethnic Estonians and their very low self-confidence.[28] The Human Capital Report warns that the leaving of young Russians from Estonia is a serious threat to the Estonian society and the economy.[29] Against the growing socio-economic disparities among ethnic groups and low representation among the public elite this tendency is not unexpected and is most likely to continue.

INTERESTING FACT

More than 30% of the ethnic youth consider themselves to be on the lowest rung in the society (in contrast with 12% of the ethnic Estonian youth. Marju Lauristin, upon commenting on this statistical data pointed out that "the fact that there is such a large group of people with low self-esteem is actually the result of very many factors – teachers, parents and the local environment, as well as the media and the views among Estonians".[30]

The educational reform in 2010 was actively discussed in Estonian and Russian media as well as by the politicians. Gradual transition to the Estonian language of instruction started in Russian language secondary and upper secondary schools from 2007. The responses to the transition to the Estonian

[27] Pages 26–27; see also Tänavsuu, Hille (2010). Ainult keeleoskusest lõimumiseks ei piisa [Language skills are not enough for integration]. Postimees, 11.12.2010. Available at: http://www.postimees.ee/?id=355648; see also Kosmõnina, Tatjana (2010). Üha enam vene noori eelistab edasi õppida Venemaal [More and more young Russians prefer to study in Russia]. ERR News, 25.07.2010. Available at: http://uudised.err.ee/index.php?06210548.

[28] Integratsiooni Monitooring, p 144–149; Similarly according to the EU Minorities and Discrimination Survey 2010, 59% of ethnic minorities in Estonia believe that discrimination is widespread in Estonia – EU Agency for Fundamental Rights (2010). Data in Focus 5 - Multiple discrimination. EU-MIDIS European Union Minorities and Discrimination Survey. 2.02.2011. Available at: http://www.fra.europa.eu/fraWebsite/attachments/EU_MIDIS_DiF5-multiple-discrimination_EN.pdf.

[29] Pages 26–27. See also e.g. Raagmaa, Garri (2010). Kas rahvusvähemused on Eesti inimvara? [Are minorities Estonia's human resource?] Õhtuleht, 24.07.2010. Available at: http://www.ohtuleht.ee/index.aspx?id=387873.

[30] (2010). Low Self-Confidence Among Young Russians a 'Complex Problem'., ERR News 4.11.2010. Aavailable at http://news.err.ee/Culture/62b1ff40-3467-41bd-8579-0e44459fb687.

language of instruction in Russian language schools are mixed. Although it seems that there is a general consensus among ethnic communities, especially among the youth, that proficiency in the Estonian language is an important asset the means to achieving this goal are debated.[31] While majority of Estonians support the current educational reform, the ethnic minority community insist on a more balanced and gradual transition.[32]

The current parallel system of education is clearly unsatisfactory (among other factors) because it is not able to adequately secure the sufficient proficiently of the ethnic minority youth in Estonian language. The decisions in educational policy that do not adequately consider the results of the scientific studies and the position of the ethnic minority groups could lead to more social problems than solutions. In the opinion of the author, the problem is not the lack of motivation but rather the lack of the qualified personnel and teaching materials, which would allow for a smooth and gradual transition to the quality language learning, especially in the regions with high density of ethnic minority groups.[33]

[31] For differences in the attitudes and expectations among ethnic groups related to the education reform see i.e. Lindemann, Kristina and Saar, Ellu (2010). Educational careers of Estonians and Russians in Vetik, Raivo. and Helemäe, Jelena. (eds.) Segregated Disparity: the Russian Second Generation in Two Estonian Cities, Amsterdam University Press, 2010; Raitviir, Tiina (ed) (2009). Rahvuste Tallinn. Statistilis-sotsioloogiline ülevaade [Tallinn of nations. Statistical-social overview]. Eesti Avatud Ühiskonna Instituut; Kirss, Laura (2010). Eraldatud haridus – eraldatud kodanikud? [Separated education – separated citizens?], PRAXISe Toimetised No. 1/2010; Masso, Anu and Kello, Katrin (2010). Implementing Educational Changes: Teachers. Attitudes Towards Transition to Estonian as a Language of Instruction in Russian-Medium Schools in Mikk, Jaan; Veisson, Marika and Luik, Piret (eds.) Teacher's Personality and Professionalism, Peter Lang, 2010.

[32] Based on 2008 sociological survey, 92% of ethnic Estonians as compared to 51% ethnic minorities support current educational reform see Proos, Ivi and Pettai, Iris (2008). Eestivene noored: uue põlvkonna positsioon ja ootused [Estonian Russian youths: the position and expectations of the new generation]. Sotsioloogilise uurimuse materjalid; For critical review of the current educational reform in Russian language media see e.g. article – (2010). 'Эстонцам нет никакого дела до качества русского образования [Estonians do not care about the quality of Russian-language education]. День за Днем, 3.12.2010. Available at: http://www.dzd.ee/?id=351704.

[33] Interview with Ilmar Tomusk, director of the Language Inspectorate. – (2010). Ethnic Russian Teachers Still Struggle with Estonian. ERR News, 18.08.2010. Available at: http://news.err.ee/culture/c98c2300-3cac-4a9b-a205-f8b90445379d#comments. Similarly see for example Kirss, Laura and Vihalemm, Triin (2008). RIP 2008–2013 Vajadus ja teostatavusuuringu lõpparuanne, II osa Hariduslik integratsioon [RIP 2008–2013 Concluding report of survey on need and applicability, II part Educational integration]. Tartu: Institute of Baltic Studies.

The recent study on educational inequalities among the ethnic groups points to growing differences in the educational levels of the ethnic groups.[34] Some of the reasons for growing inequalities are the institutional conditions and political choices adopted after 1991:

> *"instead of a gradual change in the education system the government chose to start a quick transition to teaching in only Estonian language in higher education. At the same time the quality of Estonian language instruction in Russian secondary school was rather poor … it means that Russian speaking school leavers find themselves at a disadvantage in access to higher education. […] We suppose that the termination of public education in the Russian language at the secondary level as well as decreasing follow ups to higher educational institutions has contributed to the lowering of the educational level of young Russians."*[35]

The close monitoring is necessary to evaluate whether currently ongoing upper secondary education reform would not contribute even further to the educational inequalities among ethnic groups.[36]

The latest statistical data suggest that roughly 50% of ethnic minorities can understand, read, communicate and write in Estonian on medium and advanced levels.[37] Free of charge language courses, as for example in other EU countries are, however, still not widely available, although there is apparent need for them among ethnic minority groups. [38]

[34] Lindemann, K and Saar, E, (2010); See also sociologist Elena Helimäe as quoted in article – (2010). Уровень образования у второго поколения русских в Эстонии ниже, чем у первого [The quality of education for second generation Russians in Estonia lower than that of the first generation]., День за Днём, 07.12.2010. Available at: http://www.dzd.ee/?id=353594.

[35] Lindeman and Saar (2010), p 21.

[36] The topic of education is also discussed in chapters 8 (prohibition of discrimination) and 10 (right to education).

[37] Integration Strategy Monitoring Report 2010, p 3.

[38] There are two main programs that aim to facilitate language learning among ethnic minorities. Both reimbursements are limited by the amount of 302 euros and can be claimed only post factum based on the proof of successful results of the language exam. According to the estimation provided in the Human Capital Report (p 27), the amount of reimbursement is calculated considering 120 hours of teaching hours while in practice number of hours actually necessary to learn the language for the next level of proficiency, depending on the student, is on average 240 hours and more.

Assessment of the developments in Estonia by human rights international monitoring bodies

In 2010 there were three periodic reports by international human rights monitoring bodies that addressed the issues of inter-ethnic relations in Estonia: European Commission against Racism and Intolerance (ECRI)[39]; UN Human Rights Committee[40] and UN Committee on the Elimination of Racial Discrimination (CERD)[41]. All three reports, while acknowledging a number of positive developments, had a rather critical tone. The responses to the criticism and recommendations of the international reports have been mixed. Ranging from heavy criticism, especially by some political

[39] The ECRI recommends to Estonian authorities to ratify Protocol No. 12 to the ECHR (non discrimination protocol); to ensure provision of free of charge good quality of Estonian language courses irrespective of the success in language exam; establish monitoring mechanisms involving Russian speaking minorities on the work of the Language Inspectorate; enhance provisions of the Criminal Code to strengthen punishment for all racist crimes; ensure quality of education and respect for cultural identity in undertaking educational reforms; raise awareness on the compliance with the Equal Treatment Act and protection provided by this Act; take measures to reduce statelessness and enhance consolations with the representatives of ethnic minorities and combat racism and racial discrimination in policing; to adopt a law on the rights of national minorities. European Commission against Racism and Intolerance (2010). ECRI Report on Estonia (fourth monitoring cycle), CRI(2010)3. Available at: http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Estonia/EST-CbC-IV-2010-003-ENG.pdf. See also chapter 8.

[40] The HRC focused on inequalities on the labor market; low trust among Russian speaking residents in the State and its public institutions; lack of initiative on the side of the Estonian state to consider collective reparation for persons deprived of their liberty following the 2007 Bronze Solder events. The HRC recommends state authorities to further strengthen active labor market measures aiming at the professional and language training as well as to take steps to increase confidence and trust of the of Russian speaking minorities in the State and its public institutions. – UN Human Rights Committee (2010). Concluding observations: Estonia, CCPR/C/EST/CO/3 (4.08.2010). Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/440/92/PDF/G1044092.pdf?OpenElement.

[41] The CERD heavily criticized the "punitive elements in the language regime"; The CERD Committee recommends to "adopt a non-punitive approach to the promotion of the official language and revisit the role of the Language Inspectorate". Furthermore, the Committee called to consider "a dual language approach as regards delivery of public services, particularly in light of the prohibition of discrimination in access to public goods and services as provided for by the State party's legislation." CERD also considered the extremely low trust in State and public institutions, recommending the State to "redouble its efforts to ensure greater participation by members of minorities in public life, including in Parliament, and take effective steps to ensure that they participate in the administration at all levels." – UN Committee on the Elimination of Racial Discrimination (2010). Draft Concluding observations: Estonia, paras 2–3. CERD/C/EST/CO/8-9 (23.09.2010). Available at: http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-EST-CO-8_9.doc. See also chapter 9.

leaders expressed in the Estonian language media[42] to support by Russian language media and representatives of the NGOs.

In addition to the state reports in 2010 the European Court of Human Rights (ECtHR) rendered three decisions concerning complaints by Estonian ethnic minorities.[43]

Conclusion

Positive indicators of 2010 have been: a rather peaceful coexistence among main ethnic groups, improving Estonian language proficiency, as well as increasingly strong and constructive opinions voiced in the Estonian media by academics calling for reforms of the current integration policy.

Negatively, the socio-economic distance between ethnic groups further enlarged, the trust in political institutions further dropped and representation of ethnic minorities among decision makers remained weak.

Thus, if developments in the sphere of cultural-linguistic integration are positive, then developments in the socio-economic and civil-political spheres are negative.

The reactions of the political elites on the criticism of international monitoring bodies indicate, *inter alia*, that ethnic issues are still perceived to be highly politicized and emotional. This lack of self-critical assessment of the

[42] See e.g. Sulbi, Raul (2010). Tulviste: raporti koostasid ebakompetentsed inimesed [Tulviste: the report was drawn up by incompetent people]. Postimees, 3.03.2010. Available at: http://www.postimees.ee/?id=232337; Ratt, Kadri (2010). Lukas: mustlaste diskrimineerimine on pastakast välja imetud süüdistus [Lukas: the charge concerning discrimination of Roma is made up]. Postimees, 2.03.2010. Available at: http://www.postimees.ee/?id=231825.

[43] In case of *Mikolenko v. Estonia* concerning the right to reside in Estonia of the former Soviet military servicemen the ECtHR found that Estonia violated Article 5 § 1 of the Convention and awarded non pecuniary damages to the complainant. ECtHR judgment 8 October 2009. Application no. 10664/05. In *Tarkoev and Others v. Estonia* see chapter 9. Finally, the ECtHR found party admissible collective complaint *Aleksandr Korobov and others v. Estonia*, by seven individuals related to the Bronze Solder events. ECctHR judgment 14 September 2010. Application no. 10195/08 .

integration policy on the political level (but not on academic level) is regrettable and could lead to long-term economic development problems and social conflicts.

Recommendations

- Consider numerous analyses and surveys from the field of social sciences and apply them in processes regarding integration and minorities.
- Increase integration by changing the approach centred on Estonian language into a two-way dialogue.

LGBT situation in Estonia

THE AUTHOR

Lisette Kampus

Lisette Kampus has been actively involved in various organisations of the civic society for ten years now. In 2005 she took up a position with a Polish state-wide organisation Campaign Against Homophobia in Warsaw. Her greatest achievements of two years' work as the coordinator of European Union relations were the organisation's successful appeal of two cases in the ECtHR against Poland, and devising and leading of several cooperation projects (including training courses and materials etc) with institutions of the European Union, as well as developing the organisation's capability through several training courses.

CHAPTER 13

LGBT situation in Estonia

There has been no substantial progress in the protection of LGBT[1] persons' rights in 2010. The state's practice regarding discrimination based on sexual orientation is still very sparse – there is no official statistical data available or any case law, despite the possibilities given in legislation. The number of complaints submitted with the Gender Equality and Equal Treatment Commissioner and the office of Chancellor of Justice is also negligible. It can be concluded that the LGBT community itself is not yet sufficiently informed or brave enough to turn to the Chancellor of Justice, the commissioner or other relevant institutions for the protection of their rights.

§ 151 of the Penal Code criminalising inciting hatred based on sexual orientation has not yet been implemented in practice either. Even though complaints referring to this paragraph have been lodged with the police none of these have been accepted and resulted in proceedings being initiated.[2] Complaints referring to the same paragraph based on, for example, inciting hatred based on nationality, however, have been accepted.[3] Therefore it can be concluded that § 151 of the Penal Code lacks an effect on fighting discrimination stemming from sexual orientation.

In the summer of 2010 the UN Human Rights Committee published its recommendations to Estonia on implementing the UN Covenant on Civil and Political Rights.[4] The recommendations entailed several remarkable points

1 LGBT – lesbians, gay, bisexual and trans-persons.
2 Lisette Kampus, notice of appeal to the Northern Police Prefect 10/2007; Reimo Mets, NGO Sexual Minorities Protection Union, notice of appeal to the Northern Police Prefect 01/2009.
3 Criminal Chamber of the Supreme Court judgment in a criminal case no. 3-1-1-117-05 (10.04.2006).
4 UN Human Rights Committee (2010). Concluding observations: Estonia, CCPR/C/EST/CO/3, (4.08.2010). Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/440/92/PDF/G1044092.pdf?OpenElement.

regarding LGBT persons. Most criticism was directed at the fact that only singular cases of discrimination had been documented in Estonia, based on any ground for discrimination including sexual orientation. The Human Rights Committee had thereby also raised the question of the actual effect and efficiency of the Equal Treatment Act.

It must be pointed out that even though sexual orientation is one of the bases for discrimination, which the Equal Treatment Act[5] tries to afford protection from, the whole act's effect on LGBT persons is still limited.[6] § 2 of the Equal Treatment Act states the scope of application of the act, which differs depending on the grounds of discrimination. Discrimination of persons on the grounds of nationality (ethnic origin), race or colour is prohibited among other things in relation to social protection, social security and health care and social advantages, education and access to and supply of goods and services which are available to the public, including housing. Yet protection from discrimination on the grounds of sexual orientation for the aforementioned areas is not afforded. Therefore the Equal Treatment Act does not extend the protection of LGBT persons' rights in comparison to what has been provided for in the EU Directive 2000/78, which sets the general framework for equal treatment in employment and occupation.[7]

The transgender persons and their situation in Estonia has not been afforded any attention, especially outside the topic of equal treatment. The rights and legal regulation of transgender persons is still confusing as it is divided between several different acts of law.[8] Therefore it is difficult to have an overview of their rights and obligations.

[5] The Equal Treatment Act. RT I 2008, 56, 315 ... RT I 2009, 48, 323.
[6] See chapter 8 for prohibition of discrimination in general.
[7] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal L 303/16 (2.12.2000).
[8] European Union Agency for Fundamental Rights (2010). Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. 2010 Update. Comparative legal analysis. Available at: http://www.fra.europa.eu/fraWebsite/attachments/FRA-LGBT-report-update-corr2010.pdf.

In 2010 the LGBT topic came to the public attention in three occasions. In spring and summer the media offered long term coverage of the so-called Viimsi case and the court's decision; in autumn and winter the *Riigikogu* candidates were questioned about their stances regarding same-sex partnership and other similar topics. The 2011 general elections were the first time when political stances on the issues of LGBT persons were explored. 32 of the candidates who were elected to *Riigikogu* (including alternate members) were in favour of the same-sex partnership act, 40 candidates were not in favour and 21 candidates did not give a reply to the question.[9] This indicates the readiness of the society to approach this as an important issue.

The extensive campaign "Diversity Enriches" had the most success with bringing the topic of rights of LGBT persons to the public attention. The project co-funded by the Ministry of Social Affairs in the course of the European Commission program "Progress", lead by the Human Rights Centre at the Tallinn University of Technology focused on homophobia and racism in 2010.

The outdoor advertising campaign of the project "Diversity Enriches" that took place in autumn created a widespread public discussion.[10] More than 90 posters were put up for 2 weeks in 5 towns in Estonia bearing slogans based on questions introducing a personal aspect such as "What if your sister falls in love with her female friend?".

The outdoor media campaign brought a lot of public attention and resulted in several opinion articles containing for and against arguments. It is worth noting that a special insert focused on homophobia titled Möte[11] in the daily paper Eesti Päevaleht published in the summer of 2010 in the course of the same project did not cause a wider discussion, even though the insert

[9] NGO Estonian Gay Youth (2011). 101 vastust küsimusele „Kas Eestis võiks seadustada samasooliste kooselu (tsiviilpartnerluse)?" Kokkuvõte ERRi Valijakompassi vastustest [101 answers to the question "Could Estonia legalise same-sex (civil) partnership?" Summary of ERR Valijakompass]. Available at: http://egn.ee/101seisukohta/partnerlus.html.

[10] Raun, Alo (2010). Aga kui sinu õde armub oma sõbrannasse? [What if your sister falls in love with her female friend?] Postimees, 27.09.2010. Available at: http://www.postimees.ee/?id=318228.

[11] EPL special insert Möte. June 2010. Available at: http://www.epl.ee/rubriik/mote.

contained more opinions and arguments on the subject matter than the poster slogans.

Rights of same-sex couples

Compared to 2009 there have been no developments in Estonia in the protection of the rights of same-sex couples on the legislative level. Rather, the decision of the Ministry of Justice to abandon the draft allowing registration of partnerships (either same-sex or opposite sex) separate from the institution of marriage could be considered a substantial regression.

As there has been no court practice regarding the LGBT topic, the 2010 Tallinn Circuit Court judgment where one of the parties was a same-sex couple with a large family who was refused compensation for children's travel expenses and school dinner by the local government can be considered a certain progress.

A family of three children raised by a same-sex couple applied to their local government – Viimsi municipality for school and kindergarten dinner compensation according to the Viimsi council regulation no. 16 of 25 April 2007, which states that the families with three or more under age children are entitled to the aforementioned compensation:

> *"A family member – is a person, his/her spouse or life partner, their dependent children and parents if they live in the same household, this means: use their income commonly and share a common household."*

Prior to submitting the application the applicant specified with the municipality's social and health care worker in a telephone conversation that the parents do not need to be married, but just have to live as a common household to qualify.

The applicant received a reply on the day of submitting the application, which stated that Viimsi municipality refuses to pay the support, giving the following reasoning:

> *"Viimsi municipality has sometimes as an exception done the persons a favour and accepted factual marriage or the so-called cohabitation, even though it is not regulated in legislation. But as the currently valid § 1(1) of the Family Law Act states that marriage is contracted between a man and a woman the factual cohabitation of two same-sex persons cannot be considered a family, which is why you lack the grounds for qualifying for the compensation as a minimum of three children are required for assigning the compensation."*[12]

It is also important to note that the Viimsi council regulation no. 16 did not contain a restrictive provision stating that a family must consist of parents of opposite sexes and their children.[13]

The applicant turned to the Chancellor of Justice with the request to check whether the denial to pay benefits was in accordance with the applicable legislation.

On May 19th, 2009 the Chancellor of Justice Indrek Teder emailed Viimsi rural municipality government the summary of the legislative proceedings[14], which suggested elimination of the violation and expressed the stance that Viimsi municipality's decision to refer to the provision of the Family Law Act stating marriage is contracted between a man and a woman is irrelevant in the matter as chapter 9 of the act defines foster-parents as family members without specifying the gender of the foster-parent. Chancellor of Justice also suggested Viimsi municipality to reconsider the application.

After receiving the Chancellor of Justice's summary of the legislative proceedings Viimsi rural municipality government adopted an amendment in the regulation concerning social benefits with 9 June 2009 Viimsi council decision no. 16, which specified the status of a family member:

[12] Viimsi municipality's social worker R.H. in an email to the applicant S.O. 28.01.2009.

[13] Viimsi municipality council regulation no. 16. Viimsi valla eelarveliste sotsiaaltoetuste määramise ja maksmise kord [order of ascertaining and paying Viimsi municipality budgetary social benefits] (25.04.2007). Available at: http://www.viimsivald.ee/public/valla_eelarveliste_sots.toetuste_maar.ja_maksm.kord_16.02.10_nr4redakts.pdf.

[14] Chancellor of Justice (2009). Ettepanek rikkumise kõrvaldamiseks Viimsi vallavalitsusele [Suggestion to the Viimsi rural municipality government to eliminate the breach], no. 7-5-090297/0903201. E-mail 19.05.2009.

"A family member – is a person, his/her spouse or a cohabitating life partner of the opposite sex, their dependant children and parents if they live in the same household, this means: use their income commonly and share a common household."

The application was then reconsidered according to the suggestion of Chancellor of Justice and the applicant was given a negative decision with the following reasoning:

> *"The aforementioned benefits in Viimsi municipality are afforded to families within the meaning of § 1(1) of the Family Law Act, which the alleged cohabitation of S with K could not be considered. […] The order can be contested in Tallinn Administrative Court (Pärnu mnt 7, Tallinn) or by submitting a challenge to Viimsi rural municipality government within 30 days of giving notice."*[15]

The same-sex couple who had applied for the benefits decided to turn to court for the protection of their rights.

The Tallinn Administrative Court made a judgment[16] on October 19th, 2009 annulling the order of Viimsi rural municipality government, which denied the couple benefits and also obligating Viimsi rural municipality government to reconsider the application in the light of the court judgment. Viimsi municipality appealed to Tallinn Circuit Court which on June 15th, 2010 decided[17] to let the judgment of Tallinn Administrative Court stand. According to the judgment Viimsi municipality had acted unlawfully denying travel and school dinner benefits for the children of the same-sex couple. Viimsi municipality did not make a further appeal.

It could be said on the basis of the Viimsi case that even though there is no clear definition of the concept of a family in Estonian legislation, persons not bound by a legal contract may define themselves as a family or a household and in that way be subject to social benefits afforded to families and

[15] Viimsi municipality's social worker RH.. in an email to the applicant S.O. 28.01.2009.
[16] Tallinn Administrative Court judgment no. 3-09-1489 (19.10.2009).
[17] Tallinn Circuit Court judgment in an administrative case no. 3-09-1489/33 (15.06.2010).

households. On the other hand, as the appeal by way of cassation was not followed through the Supreme Court did not have the opportunity to give a legally binding statement, which means the case lacks wider legislative effect and it cannot be precluded that a similar case may be interpreted differently in another court.

Same-sex partnership

Another important development in 2010 is the polemics concerning the possible partnership act, which could afford same-sex couples rights and obligations equal to those of opposite sexes. The Minister of Justice Rein Lang promised that he would begin work developing a partnership act regulating the relationship of same-sex couples in 2009.[18] The Ministry of Justice carried out a survey on rights and obligations of the cohabitees towards each other according to the current regulation and pointed out three possible options for regulating such relations more clearly.

> *"1. Leave the current legislation largely unchanged, remove a few facts from a few acts which place non-married cohabitating partners in an unfavourable position compared to married partners (for example regarding residential lease relations). […]*
>
> *2. Create a different type of contract for non-married cohabitating couples. The partnership contract would set a so-called standard package of legal questions which cause problems in a non-marital cohabitation. […]*
>
> *3. Open up the marriage institution to same-sex couples. This would not need a separate act, it would suffice to amend the Family Law Act and a few other acts. This option requires deciding the issue of adoption."*[19]

[18] Ibrus, Kadri (2008). Homopaarid saavad peagi kooselu seadustada [Gay couples can soon legalise their cohabitation]. Eesti Päevaleht, 3.07.2008. Available at: http://www.epl.ee/artikkel/434315.

[19] Olm, Andra (2009). Mitteabieluline kooselu ja selle õiguslik regulatsioon [Non-marital cohabitation and its legal regulation]. Ministry of Justice. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=44568/Partnerlussuhted_anal%FC%FCs_09.07.2009.pdf.

In August the Minister of Justice announced that the partnership act will not be developed as the Union of Pro Patria and Res Publica, one of the parties in the coalition, is against it.[20]

The 2009 report of human rights in Estonia emphasized that the Family Law Act[21] coming into force in summer of 2010 would bring up two important questions lacking clarity of law. Firstly, issuing Estonian citizens wishing to get married to a same-sex partner in a foreign country a document stating absence of circumstances preventing marriage; secondly, recognition of same-sex marriages contracted in a foreign country.

§ 1 of the current Family Law Act states that a marriage is contracted between a man and a woman and § 5 of the act states circumstances hindering contraction of marriage. This means the current legislation does not allow issuing Estonian citizens wishing to get married to a same-sex partner who is a citizen of a state that has legalised same-sex marriage a document stating absence of circumstances preventing marriage as that constitutes a circumstance hindering contraction of marriage according to the Estonian Family Law Act.

§ 10 (1) of the Family Law Act states that a marriage is void if persons of the same sex are married. This means that the marriage of couples from states that have legalised same-sex marriage cannot be legally recognised in Estonia as their marriage is void according to the current legislation.

The EU Agency for Fundamental Rights, referring to the EU Directive 2004/38/EC (which Estonia adopted with the Citizen of European Union Act) has repeatedly stated its position that even though the EU legislation does not obligate the Member States to legalise or acknowledge same-sex partnerships or marriage, it does place the obligation to treat same-sex couples equally to

[20] BNS (2010). Justiitsministeerium loobus mitteabielulise kooselu reguleerimisest [Minister of Justice discarded the regulation of non-marital cohabitation]. Postimees, 2.08.2010. Available at: http://www.postimees.ee/?id=294844.

[21] Family Law Act. RT I 2009, 60, 395 ... RT I, 21.12.2010, 4.

the opposite sex couples in implementation of the EU law (including freedom of movement, migration and legislation concerning asylum).[22]

The Chancellor of Justice Indrek Teder initiated proceedings on the appeal of NGO Sexual Minorities Protection Union, which asked the Minister of Justice for additional explanation regarding acknowledging same-sex marriage in Estonia if it was contracted in a foreign country.[23]

In the appraisal of the Minister of Justice:

> *"the questions of allowing/prohibiting same-sex marriage are of matters of principle and since the legislator has knowingly and in clear words ruled out that possibility in Estonia, a position must be taken that acknowledging such marriages contracted elsewhere is a breach of the public order in Estonia".*

Then again in 2008 the Ministry of Internal Affairs claimed that it sees no impediments stemming from the Citizen of European Union Act to Estonia acknowledging the same-sex marriages that have been contracted in other countries.[24]

[22] European Union Agency for Fundamental Rights (2009). Same-sex Couples, Free Movement of EU citizens, Migration and Asylum. Fact sheet. Available at: http://fra.europa.eu/fraWebsite/attachments/Factsheet-homophobia-couples-migration_EN.pdf.

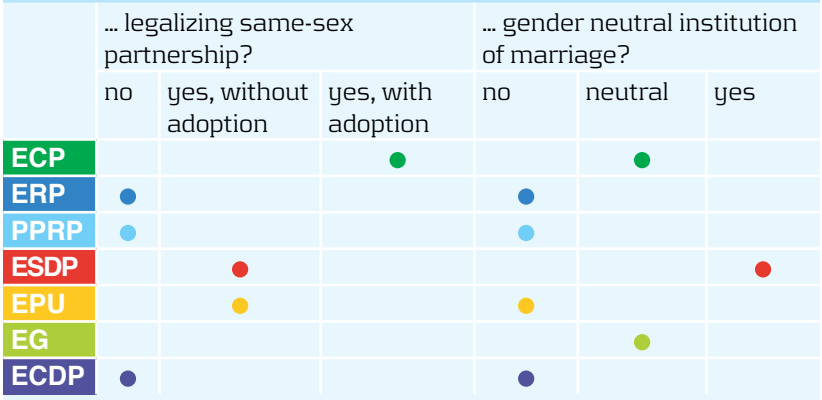
[23] See – (2011). Õiguskantsler uurib samasooliste abielu tunnustamist Eestis [The Chancellor of Justice is investigating acknowledging same-sex marriage in Estonia]. Delfi, 8.02.2011. Available at: http://www.delfi.ee/news/paevauudised/eesti/oiguskantsler-uurib-samasooliste-abielu-tunnustamist-eestis.d?id=39909987.

[24] Haruoja, Merle; Käsper, Kari and Meiorg, Marianne (2008). Thematic Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation (Estonia). EU Agency for Fundamental Rights, February 2008. Available at: http://fra.europa.eu/fraWebsite/attachments/FRA-hdgso-NR_EE.pdf, p 15.

Recommendations

- Ensure supplementary training for specialists (teachers, health care workers, police officers, officials etc) on the topic of equal treatment to guarantee more efficient protection of the rights of LGBT persons in everyday life.
- Monitor the functioning of § 151 of the Penal Code (inciting hatred on the grounds of sexual orientation) in all walks of life.
- Increase the LGBT community's awareness of their rights.
- Initiate work on a draft act regulating relationships between same-sex couples or open up the institution of marriage to same-sex couples.
- Set out from the obligation stemming from EU law regarding the duty to treat same-sex couples equally to opposite sex couples in implementation of EU law (including freedom of movement, migration and legislation concerning asylum) in order to ensure legal certainty.

Is Your Party in favour of ...?



Source: see Appendix – Survey of Political Parties

Rights of refugees and asylum seekers

THE AUTHOR

Kristi Toodo

Kristi Toodo has participated in several European Union and Council of Europe expert groups on the issue of refugees since 2006. She has also compiled numerous research papers for European Commission. Kristi has also been a Project Manager in many projects on refugees. As of 2011 she is the leader of a project in Estonian Human Rights Centre establishing a legal clinic for providing legal help to asylum seekers.

RIGHTS

ECHR Protocol 4 Article 4 – Prohibition of collective expulsion of aliens

- Collective expulsion of aliens is prohibited.

ECHR Protocol 7 Article 1 – Procedural safeguards relating to expulsion of aliens

- An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
  1. to submit reasons against his expulsion,
  2. to have his case reviewed, and
  3. to be represented for these purposes before the competent authority or a person or persons designated by that authority. ...

CHAPTER 14

Rights of refugees and asylum seekers

The Universal Declaration of Human Rights states that: "Everyone has the right to seek and enjoy in other countries asylum from persecution."[1] Estonia joined the 1951 UN Convention relating to the Status of Refugees and its 1967 New York Protocol in 1997, taking upon itself an international obligation to offer asylum to foreigners who correspond to requirements stated in the convention and who ask Estonia for protection.

The process for applying for asylum and other questions pertaining to person that have international protection is regulated in Estonia mainly by the Act on Granting International Protection to Aliens[2], which takes relevant EU as well as UN legislation into consideration.

Statistics including the whole of Europe (including EU Member States) published by the United Nations High Commissioner for Refugees (UNHCR) establishes Estonia as the least popular state among asylum seekers.[3] In 2009 there were 40 persons seeking asylum in Estonia, which is more than half as in the previous twelve years. In 2010 there were 33 persons seeking asylum in

[1] The Universal Declaration of Human Rights. UN General Assembly Resolution A/RES/217 (10.12.1948). Art 14(1).
[2] Act on Granting International Protection to Aliens. RT I 2006, 2, 3 ... RT I, 9.12.2010, 1.
[3] UN High Commissioner for Refugees (2009). Asylum Levels and Trends in Industrialized Countries 2009: Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries. Available at: http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4ba7341a9&query=asylum%20applications%20in%202009.

Estonia.[4] There are still few people who have the clear objective of coming to Estonia and staying here. Probably because of the small social benefits the asylum seekers want to travel on to Finland and Sweden. Many asylum seekers have remained in Estonia from fate's will; there have been cases where the person applied for asylum on the impression that he was already in Finland and withdrew the application when he realised he was in Estonia.[5]

Reception of asylum seekers

The housing and essential services to the asylum seekers during the asylum proceedings are provided and organised by Illuka Reception Center for Asylum Seekers. The reception center is a state agency administered by the Ministry of Social Affairs that operates pursuant to the Constitution, the relevant acts and other current legislation. The reception centre is located in a forest behind Jaama village in the rural municipality of Illuka in Ida-Viru County, about 220 km from Tallinn. The nearest town Jõhvi, is located 50 km from the centre.[6] Any connection to the reception center is complicated because of its isolated and remote location and that fact has been the cause of criticism for years, from Estonian and international organisations both. Providing services prescribed by law to the asylum seekers is highly irregular or completely absent because of the poor accessibility of the reception center. There is a lack of legal, psychological and social counsellors; the prescribed Estonian language lessons take place irregularly because of lack of teachers.[7] The availability of the service of interpretation is also insufficient, including in getting medical help, communicating with the personnel of the reception center and explaining the asylum seeker his or her rights and obligations.

[4] Police and Border Guard (2010). Varjupaigataotluste arv 1997–2010 [Number of applications for asylum 1997–2010]. Available at: http://www.politsei.ee/dotAsset/163200.pdf.
[5] Roonemaa, Holger (2009). Asüüli tahtjate arv kasvab kiiresti [The number of asylum seekers is rising fast]. Eesti Päevaleht, 28.12.2009. Available at: http://www.epl.ee/artikkel/485547.
[6] Illuka Reception Center for Asylum Seekers website: http://www.ivv.ee/.
[7] UN High Commissioner for Human Rights (2010). Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1: Estonia. A/HRC/WG.6/10/EST/2 (10.11.2010). Available at: http://www.ohchr.org/EN/HRBodies/UPR/PAGES/EESession10.aspx.

At the moment the service of support persons is offered to the asylum seekers and persons afforded international protection by the Johannes Mihkelson Centre in Tartu on a project basis.[8] In 2011 a project of the Estonian Human Rights Centre commenced, which is to create a legal counselling clinic for the asylum seekers to supply legal help and represent them in a court of law if need be.[9] The Ministry of Justice has also promised to commence with language lessons taking place twice a week to facilitate speedier integration into Estonian society and faster entry into labour market of persons who have been afforded international protection.

Another problem in addition to the remoteness of the location of the reception center, which hinders from providing asylum seekers sufficient amount of services is the centre's extremely modest budget.[10] The budget of the reception center located near the Russian border should be increased to ensure implementation of legal obligations and the provision of services to the asylum seekers. The topic of changing the location of the reception center has once again risen in the Ministry of Social Affairs as well as in the Ministry of Internal Affairs. It is most preferable to move the reception center closer to Tallinn as the Police and Border Guard's Citizenship and Migration Bureau's Status Determination Bureau that performs the asylum proceedings is also located in Tallinn.

Asylum proceedings

Concern is continuously being expressed by various international organisations: UNHCR[11] and the European Commission against Racism and

[8] Johannes Mihkelson Centre (2009). HMN projekt 12.1-5/1657 „Tugiisikuteenuse rakendamine pagulastele" [HMN project 12.1-5/1657 "Application of the support persons' service to refugees"]. Available at: http://www.jmk.ee/uus/?language=ee&root=5&sub=149.

[9] Estonian Human Rights Centre (2011). Pagulasabi project [Project for providing help for the asylum seekers]. Available at: http://inimoigused.ee/page.php?page=68&parent=3.

[10] Chancellor of Justice (2010). Kontrollkäik Illuka Varjupaigataotlejate Vastuvõtukeskusesse [Monitoring visit to the Illuka Reception Center]. Available at: http://www.oiguskantsler.ee/public/resources/editor/File/OMBUDSMANI_MENETLUSED/Kontrollkaigud/2010/Kontrollk_igu_kokkuv_te_Illuka_varjupaigataotlejate_vastuv_tukeskus.pdf, p 22.

[11] UNHCR (2010).

Intolerance (ECRI)[12] regarding the so-called speedy review of asylum claims at the border, which impedes the asylum seekers' full ability to put their case at the border and present sufficient evidence about the need for an asylum. The rejection of the claim and deportation of the asylum seeker from Estonia may put the asylum seeker's life at risk.[13] The asylum seekers have to be guaranteed humane treatment and housing conditions and the possibility to communicate with UNHCR as well as various local non-governmental organisations in order to receive well rounded help and counselling during review of their asylum claims at the border.

Training has been organised for the border guards to provide this, funded on a project basis as well as from the state budget, but since there are few asylum claims the border guards have few occasions for using their training in practice. At the moment the possibility of monitoring asylum claims at the border and carrying out additional training and counselling of the border officials is being discussed.[14]

One of the most important issues when requesting protection from another state is the asylum seeker's right to receive within fifteen days as of the submission of the application for asylum or residence permit oral and written information concerning his or her rights and obligations and the consequences of the failure to perform the obligations in the asylum proceedings.[15] In 2010 the office of the Chancellor of Justice paid a monitoring visit to the reception center, which resulted in several findings of shortcomings in this area.

Introduction of rights and obligations to the asylum seekers at the moment is unsatisfactory. The asylum seekers are introduced to the behavioural guide, however, these materials do not cover other rights and obligations of the asylum seeker stemming from legislation. The information material given to

[12] European Commission against Racism and Intolerance (2010). ECRI report on Estonia (fourth monitoring cycle). CRI(2010)3. Available at: http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/estonia/EST-CbC-IV-2010-003-ENG.pdf.
[13] UNHCR (2010).
[14] ECRI recommendations 2010.
[15] Act on Granting International Protection to Aliens. § 10(2).

asylum seekers does not contain information on bases for payment of benefits or the size of benefits, on interpreting, health services that are provided, organisation of transport or any other services. Neither does the information material cover the house rules that the asylum seekers have to follow at the reception center and the conditions allowing the asylum seeker to live outside the reception center.

An order should be established regarding execution of relevant rights in order to efficiently use all of the rights; it should also be clearly defined who the asylum seeker should address with a specific question. Neither do these materials provide a clear answer as to who the asylum seeker has the right to turn to with complaints regarding the use of his or her rights. It is necessary to determine and distinguish the options of making complaints within the institution and without the institution (Ministry of Social Affairs, Chancellor of Justice, administrative courts).[16]

The unsatisfactory legal counselling, interpretation service and level of information make it impossible for the asylum seeker to know the particularities of the Estonian legal system, including the fact that he has to apply for a stay of deportation for the duration of the appeal prior to lodging an appeal contesting a negative decision. This is an important aspect as the contestation of the decision to reject an application for asylum does not postpone expulsion, unless the court has not suspended the execution of the precept to leave.[17] Ignorance of this fact may mean that the asylum seeker cannot stay in the state during his or her appeal proceedings, which, however, is one of the basic rights. That right is prescribed in § 24 of the Constitution of the Republic of Estonia, which states that everyone has the right to be tried in his or her presence.

The asylum seekers are generally not placed in custodial institutions, including expulsion centres, but if the asylum seeker submitted an application for asylum during his or her stay at the expulsion centre, in a prison or a house

[16] Kontrollkäik Illuka Varjupaigataotlejate Vastuvõtukeskusesse [Monitoring visit to the Illuka Reception Center].
[17] Act on Granting International Protection to Aliens. § 26(4).

of detention, he will remain at the expulsion centre, in the prison or a house of detention, respectively, until the termination of the asylum proceedings.[18] The applicant may, according to legislation, be accommodated at the initial reception centre or the offices of the Police and Border Guard. The applicant may be detained at the initial reception centre or the offices of the Police and Board Guard for primary performance of acts in the asylum proceedings but not for longer than 48 hours; in cases determined by legislation an extension may be given by an administrative court judge.[19]

The greatest change of 2010 is the creation of the unified office of the Police and Border Guard on January 1st, 2010 and passing over of the asylum proceedings to the Status Determination Bureau's International Protection Division in that office. The officials have noted improvement in cooperation between different units after the creation of the unified Police and Border Guard. Several cooperation agreements have been set, including with the Migration Surveillance Bureau and the Border Guard Department; the area of asylum proceedings has now been introduced to the Public Order Police Department officials. The quality and speed of the proceedings have always been the main priorities. There has been no change in that regard in 2010, the decisions are still being made as fast as possible. Even though the number of employees in the department in 2010 is significantly smaller than in the department of refugees in the office of Citizenship and Migration in 2009, the speed of proceedings can still be considered good.[20]

[18] Act on Granting International Protection to Aliens. § 33(1).
[19] Act on Granting International Protection to Aliens. § 32.
[20] Police and Border Guard (2011). Information from an official of the Police and Border Guard's Status Determination Bureau's International Protection Division. 16.02.2011.

Persons who have been afforded international protection or refugees and persons afforded temporary protection

Most people who have been given refugee status in Estonia will leave the country and there are several reasons for it. This raises the question of whether one reason isn't the lack of sufficient help from local government units in integrating the persons who have received international protection into the society.

Most of the persons who have been given international protection have waited at the reception center for several months after receiving a residence permit for the organisation of their accommodation in a local government unit as is stated by legislation. The negotiations with local governments have not been successful so far and an administrative agreement, which would be the basis of accepting a person who has been given international protection into a local government unit and also covering the associated costs, has not been adopted.

The absence of regular language lessons during the asylum proceedings and the lack of Estonian-speaking environment stemming from the remoteness of the reception center mean that the person who has been given protection does not speak a word of Estonian, which in turn complicates his or her entrance into labour market. In practice various non-governmental organisations have helped the persons who have been given protection to find work and accommodation in Estonia for the past few years; the third sector has also supported refugees' language, trade or supplementary training and execution of various adaptation courses.

Conclusion

One might say that the Act on Granting International Protection to Aliens that entered into force in 2006 is in accordance with most of the EU legislation concerning right to applying for international protection as well as obtaining it. The issue of asylum does not have priority in Estonia because of the

small number of asylum seekers, neither is there much experience in solving various situations and questions. The availability of many legal services is hindered by lack of money and the state's burden is shared by the third sector via various funders and projects.

Recommendations

- Continue efforts in moving the reception center closer to Tallinn and increase its budget in order to ensure the state's obligations to asylum seekers are fulfilled.
- Analyse and implement the recommendations of international organisations to Estonia regarding asylum proceedings, including the border guards' rights to so-called speedy review of asylum claims at the border and the monitoring of it.
- Increase efforts in enabling the person who have been given protection to leave the reception center and settle down somewhere else.

Rights of the child

THE AUTHOR

Kristel Valk

Kristel Valk received her Master's in law in 2008 and has worked at Tallinn Entrepreneurship Office ever since, having previously worked as an adviser in the law department of the Defence Resources Agency. Kristel has been interested in human rights and developments in human rights in Estonia since she was a student as it was unavoidable due to the study programme and her personal interest. Her thorough knowledge and interest in the ombudsman for children stems from following the discussion of creating the institution.

CHAPTER 15

Rights of the child

Three real developments for the protection of children's rights have taken place in the last few years. As of January 1st, 2009 it is possible to notify of a child in danger by calling the phone number 116 111, which is uniform in all of Europe. A department of children and families was created in the Ministry of Social Affairs in 2010. Child protection services also started work in Police and Border Guard prefectures in 2010. In addition to that several different discussions (written and oral) on the topic of protection of children's rights have taken place.

In 2006 a division was created for appraising the human right standards and obligations of the UN Member States, which reminds the states of their obligation to fully respect and implement all of the human rights and basic freedoms. The purpose of the division is to analyse data of all 192 UN Member States regarding human rights every four years. The state has to present a report on the implementation of human rights obligations in the course of the periodic monitoring. The report also has to entail issues regarding children's rights and what has been done to ensure children's rights in the state. Estonia presented its first report in 2011. The government of the Republic of Estonia approved Estonia's state report, according to which the state's child protection entails health care, education, work, spending of free time, hobby activity and children's social care. The state guarantees the presence and monitoring of

relevant legislation, develops the area of child protection, works out strategies and development plans and participates in international cooperation.[1]

The report discusses, among other things, the need for amending the Child Protection Act as well as the topic related to violence against children and the creation of the institution of children's ombudsman. The Ministry of Justice commenced work on "Development plan for children and families for years 2011–2010", which aims to better guarantee the rights of children and to raise the quality of life for families.

On April 1st, 2010 the government approved the "Development plan for reducing violence for years 2010–2014" and its implementation plan for years 2010–2014.[2] The purpose of the development plan includes as its purpose the reduction and prevention of violence against children. A framework against family violence was created within the development plan, which entails representatives of various ministries, state offices, the police, prosecutor's office, non-profit organisations, shelters, support centres and institutions of higher education. The purpose of the cooperative framework is to improve exchange of information and cooperation between various organisations and to provide an overview of the developments inside the field in order to gain input for perfecting the development plan. The framework will convene regularly and the meetings are to take place at least once a year. The first meeting took place on December 6th, 2010.

[1] Ministry of Foreign Affairs (2010). Eesti riiklik aruanne, mis esitatakse ÜRO inimõiguste nõukogu resolutsiooni 5/1 lisa punkti 15 alapunkti a alusel [Estonia's report presented according to resolution of UN Human Rights Committee 5/1(15) subsection a]. Project, 11.10.2010. Available at: https://dhs.riigikantselei.ee/avalikteave.nsf/documents/NT001117A2/$file/Eesti%20riigiaruanne-toimetatud.rtf, p 12.

[2] Vabariigi Valitsuse 1.04.2010. a korraldus nr 117 „„Vägivalla vähendamise arengukava aastateks 2010–2014" ja selle rakendusplaani aastateks 2010–2014 heakskiitmine". RTL 2010, 18, 324. Ministry of Justice (2010). Vägivalla vähendamise arengukava 2010–2014. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=49975/V%E4givalla+v%E4hendamise+arengukava+aastateks+2010-2014.pdf; Ministry of Justice (2010). Rakendusplaan vägivalla vähendamise arengukava elluviimiseks aastatel 2010–2014. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=49976/Rakendusplaan+arengukava+elluviimiseks.pdf.

The next sections will focus on the main recent developments such as the Child Protection Act, prohibition of physical punishment of children and the creation of the institution of children's ombudsman.

The Child Protection Act

There is not much legislation on protection of children in Estonia. Rearing and treatment of children is one of society's priorities, which is why the protection of children's rights and preventative measures should be given special attention to avoid later negative consequences. Existence of relevant legislative regulation and its effectiveness could, among other things, be considered preventative measures.

The Republic of Estonia Child Protection Act was passed 8 June 1992 and entered into force 1 January 1993.[3] The biggest weakness of the Child Protection Act has been considered to be its general wording and declarative nature, which make implementation of this act ineffective. In 2003 the UN Committee on the Rights of the Child recommended that a child protection act must be effective, and implementation guidelines and money in the budget ought to be provided in order to implement the act. It must be assured that the rights of children are evaluated according to relevant legislation and principles.[4] The need for working out a new draft act for a Child Protection Act was discussed in *Riigikogu* already in 2001.

"Child protection concept" timeline[5] that had been approved by the government 27 January 2005 stated that the new Child Protection Act will have entered into force by January 1st, 2007. The former Chancellor of Justice Allar

[3] Republic of Estonia Child Protection Act. RT 1992, 28, 370 ... RT I 2010, 41, 240.

[4] UN Committee on the Rights of the Child (2003). Committee on the Rights of the Child Concluding observations: Estonia. CRC/C/15/Add.196 (17.03.2003). Available at: http://www.sm.ee/fileadmin/meedia/Dokumendid/Sotsiaalvaldkond/lapsed/lastekaitse/Lapse_Oiguste_Komitee_soovitused_Eestile.pdf, p 2.

[5] Ministry of Social Affairs (2005). Lastekaitse kontseptsioon. Kiidetud heaks Vabariigi Valitsuse protokollilise otsusega 27.01.2005 [Child protection concept. Approved by the recorded government decision 27.01.2005]. Available at: http://www.valitsus.ee/UserFiles/valitsus/et/valitsus/arengukavad/sotsiaalministeerium/LASTEKAITSE_20KONTSEPTSIOON_20l_plik.pdf.

Jõks expressed his opinion in 2009 that „the Minister of Social Affairs who is capable of preparing the new child protection act deserves, without any irony, a statue".[6] Chancellor of Justice Indrek Teder even stated in his 2010 presentation to *Riigikogu* that "one gets the impression that children's rights are like a dusty corner of legislative drafting, where the draft maker doesn't much care to look […] It is high time Estonia had a necessary and a realistically functional Child Protection Act."[7]

One of the reasons why the adoption of the new act has stalled for so long is certainly the lack of state strategy in that field. § 68 of the Child Protection Act states that "details concerning the implementation of this Act shall be regulated by the Government of the Republic of Estonia". This presupposes establishment of detailed guidelines that are based on a state strategy. The UN Committee on the Rights of the Child has drawn attention to the lack of state strategy in its 2003 recommendations.[8] The last state strategy in the field stems from 2004 ("Lapse õiguste tagamise strateegia 2004–2008"),[9] which was established until 2008, which means there has been a vacuum in the field for two years.

A development plan for children and families for the years 2011–2010 is in drafting stages at the Ministry of Social Affairs. One can only hope the development plan will be passed in the near future.

[6] Jõks, Allar (2009). Aasta 2009 - kas teel lasteta ühiskonna poole? Ettekanne Lastekaitse Liidu 2009. aasta 6. novembri konverentsil [Year 2009 – on the road towards a society without children? Presentation at the 6 November 2009 Estonian Union for Child Welfare conference]. Available at: http://www.lastekaitseliit.ee/public/Allar_J_ks_lastekaitseliidu_konverentsil_2009.docx.

[7] Teder, Indrek (2010). 4. punkt „Olulise tähtsusega riikliku küsimuse "Laste õiguste tagamine" arutelu" [4th point. Discussion of "Ensuring children's rights"]. 11th *Riigikogu* shorthand notes for the 7th session. 3.06.2010. Available at: http://www.*Riigikogu*.ee/index.php?op=steno&op2=print&stcommand=stenogram&date=1275548700.

[8] "Noting that the 1992 Child Protection Act reflects some principles and provisions of the Convention, it remains concerned that many of the provisions have not been fully implemented through detailed regulations, in accordance wit article 68 of the Act, and with adequate budgetary allocation." – The Committee on the Rights of the Child Concluding observations, p 2.

[9] Tikerpuu, Anniki and Reinomägi, Andra (2009). Lapse õiguste tagamise strateegia 2004–2008. Strateegia täitmise aruanne [Strategy for guaranteeing children's rights 2004–2008. Report on implementation.]. Ministry of Social Affairs. Available at: http://www.sm.ee/fileadmin/meedia/Dokumendid/Sotsiaalvaldkond/lapsed/lastekaitse/LOTS_2004-2008_taitmise_aruanne.pdf.

The aforementioned clearly illustrates the fact that Estonia lacks a strategy for protection of children's rights and an updated and effective Child Protection Act that provides children realistic protection. The absence of a legal background is certainly one of the reasons why guaranteeing and protecting children's rights is so problematic in Estonia.

Prohibition of physical punishment. Violence against children

The lyrics of a well-known Estonian children's song say that good children do not need a rod, however, reality attests to the fact that many believe that physical violence is a part of child-rearing process. It was revealed in the 2009 gender equality report that 47% of the people who participated in the survey agreed with the statement that physical punishment of children is sometimes unavoidable.[10] Any activity where physical force is used to cause a child pain or discomfort should be considered physical punishment of a child. Physical punishment is understood among other things as pulling children by their hair, pushing and shoving, forced swallowing of food, forcing to stand in uncomfortable poses etc.[11]

The general legislative regulation prohibits physical punishment of children. The Convention on the Rights of the Child[12] adopted by General Assembly 20 November 1989 has been acceded to by Estonia with the 26 September 1991 decision of the Supreme Council, and entered into force for Estonia 20 November 1991. According to Article 19 of the Convention

[10] Biin, Helen; Järviste, Liina and Vainu, Vaike (2010). Soolise võrdõiguslikkuse monitooring 2009. Uuringuraport. [2009 gender equality monitoring. Report.] Sotsiaalministeeriumi toimetised 1/2010. Ministry of Social Affairs. Available at: http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Toimetised/2010/toimetised_20101.pdf, p 144.

[11] Jõks, Allar (2007). Vägivald kui vaimust vaese vahend [Violence as a tool for fools]. Õpetajate Leht, 30.03.2007. Available at: http://www.oiguskantsler.ee/sisu.php?meediaID=46&show=meedia&menuID=173&lang=est.

[12] The Convention on the Rights of the Child. Estonia joined 21.10.1991. Published: RT II 1996, 16, 56.

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Estonia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms[13] in 1996. Article 3 of the convention states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The ECtHR has found in several judgments that physical punishment of children is in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Estonian Constitution also states that every person has the right to dignified treatment, safety and protection from any physical or mental mistreatment or violence, injustice, cruel or demeaning treatment. § 121 of the Penal Code[14] prescribes a punishment for damaging another person's health, or beating, battery or other physical abuse which causes pain, but does not provide special provisions for the case where an adult uses violence on a child for the so-called punitive purposes. If legislation cannot allow violence in relationships between adults it cannot be conceivable to use it on a child. Use of physical violence on children has been prohibited ever since the Constitution came into force 3 July 1992, if one were to look at it from a legal point of view.

In addition to the UN Committee on the Rights of the Child, other monitoring bodies of UN's international treaties, including the Committee on Economic, Social and Cultural Rights, the Human Rights Committee and the Committee against Torture have also condemned physical punishment of children. The prohibition of physical punishment of children became a global objective in 2006. The report presented to UN General Assembly also contained a UN Secretary-General's survey of violence against children. It established 2009

[13] Convention for the Protection of Human Rights and Fundamental Freedoms. Adopted in Rome 4.11.1950. Estonia signed it 14.05.1993. Ratified 16.04.1996.

[14] Penal Code. RT I 2001, 61, 364 ... RT I, 12.11.2010, 1.

as the time limit when violence against children must be prohibited globally. The main message of the survey presented to the UN General Assembly by the Secretary-General in October of 2006 was the following: "Any form of violence against children cannot be justified and every form of violence can be prevented. "[15]

Use of violence in child rearing has been habitual in our society for a long time (either in the form of tweaking child's hair or spanking). Yet the use of violence against a child may result in serious mental problems, it also teaches the child that violence is an inseparable part of solving a problem. Surveys have proved that being a victim of physical mistreatment or neglect increases the probability of committing offences as an adolescent by 59%, of committing offences as an adult by 28% and of committing violent crimes by 30%.[16] According to the aforementioned survey the persons mistreated as children suffered much more often from mental health problems, including attempted suicides and posttraumatic stress, problems with advancement in school (including reading difficulties etc), problems with employment (unemployment, being employed in positions of very low pay etc) and deviant behaviour in later life (prostitution, alcoholism).

Prohibition of physical punishment of children has been discussed in the media[17] for at least as long as the need for the new Child Protection Act. Even

[15] Pinheiro, Paulo Sérgio (2006). An End To Violence Against The Children. World Report on Violence Against Women. UN. Available at: http://www.unicef.org/violencestudy/1.%20World%20Report%20on%20Violence%20against%20Children.pdf.

[16] Traat, Uno (2008). Laste kehaline karistamine ja hälbivus [Physical punishment of children and deviation]. Haridus 7–8/2008. Available at: http://haridus.opleht.ee/Arhiiv/7_82008/7-11.pdf; Widom, Cathy S. and Maxfield, Michael G. (2001). An Update on the "Cycle of Violence". Research in Brief. National Institute of Justice, February 2001. Available at: http://www.ncjrs.gov/pdffiles1/nij/184894.pdf.

[17] For example: Klaas, Urmas (1996). Lastevastane vägivald aktualiseerub []. Postimees, 13.09.1996. Available at: http://arhiiv2.postimees.ee:8080/leht/96/09/13/uudis.htm#neljateistkymnes; – (2004). Küsitlus: Kas laste füüsiline karistamine tuleks keelustada? [Survey: should physical punishment of children be banned?] Eesti Päevaleht, 22.11.2004. Available at: http://www.epl.ee/artikkel/279079; – (2006). Laste väärkohtlemine on globaalne problem [Mistreatment of children is a global problem]. Õpetajate leht, 24.11.2006. Available at: http://www.opleht.ee/Arhiiv/2006/24.11.06/elu/7.shtml; Raun, Alo (2010). Online-väitlus: Eesti peaks keelama laste füüsilise karistamise [Online discussion: Estonia should ban physical punishment of children]. Postimees, 12.03.2010. Available at: http://www.postimees.ee/?id=236015.

though physical violence is prohibited by several aforementioned legal acts, several experts are of the opinion that the current legislative framework is insufficient and requires additional regulation, which directly addresses the prohibition of violence against children. The need for a direct prohibition has been confirmed by experts in the field, politicians and the officials of the Ministry of Social Affairs. And despite all that the amendment of the Child Protection Act with relevant provisions or the adoption of the new child protection act (with the necessary norms regarding violence against children) has stalled.

A department for children and families was created in the Ministry of Social Affairs in the first months of 2010 and one of the objectives of the department was going to be prohibition of violence against children. It cannot be precluded that inserting the relevant elements for an offence in the act (presumably into the Penal Code or the Child Protection Act) may result in reduction of violence. But is this a suitable means for achieving this purpose? Is it the objective to punish as many offenders as possible? Or should the objective be raising awareness of social consequences of mistreatment of children?

In the spring of 2010 the Chief Justice of the Supreme Court presented *Riigikogu* an overview of administration of court, administration of justice and uniform application of acts.[18] The Chief Justice claimed in his presentation that he is not remotely justifying beating of children, but he does not see the enforcement of the punitive norm as the solution.

> *"Clearly, the objective of such separate casuistic norm cannot be a punitive one, but rather it is attempting to change the public opinion via a punitive act. […] State's interference in a very delicate relationship between a parent and a child is unnecessary if parental duties have been fulfilled and the child isn't physically mistreated. I doubt the children are happier if a large portion of parents figures in the punishment register."*[19]

[18] Rask, Märt (2010). Ülevaate kohta kohtukorralduse, õigusemõistmise ja seaduste ühetaolise kohaldamise kohta [An overview of administration of court, administration of justice and uniform application of acts]. Available at: http://www.riigikohus.ee/vfs/994/Riigikohtu_esimehe_ettekanne_*Riigikogu*le_20.5.2010.pdf.

[19] Rask (2010), p 8.

It isn't possible to prevent or substantially decrease the number of offences purely via the criminal or justice system or by the authority of the state; preventative work has to include local governments, economic communities and social organisations. Each person's own responsibility and duty to educate himself and to raise his children as responsible members of the society is, however, of utmost importance.[20]

According to the Developments in Criminal Politics[21] adopted by *Riigikogu* 16 June 2010 the Ministry of Social Affairs in cooperation with local governments has to develop the parental skills of the parents and improve the cooperation of experts in the field. The purpose of the aforementioned point is to prevent crimes committed by minors. As the occurrence of violence against children depends on rearing of children, this measure will help reduce offences committed by minors and also reduce occurrence of physical punishment (violence).

Reduction of violence against children would also be helped by existence of an institution that mistreated children could turn to and which is capable of expertly handling these cases. The same institutions should systematically stand for children's rights and carry out various surveys and social campaigns. The institution of ombudsman for children performs that role in several states. Creation of this institution in Estonia has recently been considered more and more.

Ombudsman for children

Article 4 of the UN Convention on the Rights of the Child obligates the States Parties to create an independent state-wide institution for monitoring

[20] Ministry of Justice (2010). Kriminaalpoliitika arengusuundade aastani 2010 täitmisest [About implementation of criminal policy development directions until 2010], . Kriminaalpoliitika arengusuunad aastani 2018 seletuskiri [Explanatory note to developments in criminal politics unti 2018]. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=48305/KRIMINAALPOLIITIKA+ARENGUSUUNAD+AASTANI+2018+SEL, table 2.

[21] Kriminaalpoliitika arengusuunad aastani 2018 heakskiitmine [Approval of Developments in Criminal Politics until 2018]. RT III 2010, 26, 51, point 13.

children's rights (ombudsman for children), which shall monitor implementation of the convention in the state.

The first position for ombudsman for children in the world was created in Norway in 1981. The ombudsman for children is an independent, autonomous and a politically neutral organ created by a special act. The main purpose of the ombudsman is the protection of children's rights in the society as a whole and monitoring of developments of conditions for child rearing.

In 2003 the Committee on the Rights of the Child accused Estonia of lacking an institution authorised to accept appeals regarding children's rights and solving them based on the interest of the child. The Committee recommends the States Parties to consider creating an institution separate from the institution of Chancellor of Justice or a department or a special body belonging to Chancellor of Justice to monitor and appraise implementation of the convention on a state and local level. The body should be well-supplied, accessible for the children, authorised to receive appeals of violations of children's rights and investigate and solve them in a child sensitive way.[22] A separate institution for monitoring children's rights is set up in the following EU Member States: Finland, Sweden, Denmark, Norway, Lithuania, Poland, Austria, France, Ireland, Luxembourg, Belgium (separate Flemish and Walloon institutions), Cyprus and Malta. Children's right divisions incorporated into the institution of general ombudsman are set up in Latvia, Slovakia, Slovenia, Hungary, Greece, Portugal and Bulgaria. There are just 4 states out of 27 Member States in the European Union (Estonia, Czech Republic, Romania and Germany) that do not have a monitoring body for children's rights or an ombudsman for children. In the committee's appraisal it is best to develop a state-wide well-rounded inclusive human rights institution that affords special attention to children in those states that have less money. The well-rounded inclusive

[22] Lapse õiguste komitee lõppjäreldused, p 3.

institution should either include a special commissioner or a special department for children's rights.[23]

The topic of creating an ombudsman for children in Estonia has been discussed for years. On May 14th, 2009 the Legal Affairs Committee of *Riigikogu* reached a unanimous decision that children's rights need a better protection in Estonia and that function could be fulfilled by a special division to be created with the office of Chancellor of Justice. The Legal Affairs Committee decided to start a working group that would devise the authorities and obligations of the institution of ombudsman for children so that a process for amending legislation could be commenced based on it.

At the beginning of 2010 the Estonian Union for Child Welfare made a note to the President of *Riigikogu*, which stated that the creation of the institution of ombudsman for children would help substantially increase the influence of children in shaping the society, promote participation of children in various decision-making processes and thereby increase cohesion of society. Until there is an institution of ombudsman for children the Legal Chancellor Act should be amended and the Chancellor of Justice should be given wider authority.[24]

Chancellor of Justice Indrek Teder supported the proposal of the Union for Child Welfare and found that *Riigikogu* should finally decide whether to create an independent institution of children's ombudsman or to broaden the authority of the Chancellor of Justice.[25] It was decided at the June 2010 parents' assembly of the Union for Child Welfare that a draft will be passed on to *Riigikogu* amending the Legal Chancellor Act to widen his authorities

[23] Aru, Andres (2009). Kas lastele on vaja ombudsmani? [Do children need an ombudsman?] Märka last, autumn 2009. Available at: http://www.oiguskantsler.ee/public/resources/editor/File/Artiklite_tekstid_2009/ML_ombudsman.pdfAndres_Aru, p 12.

[24] Randlaid, Sven (2010). Liit: Eesti vajab laste ombudsmani [The Union: Estonia needs a children's ombudsman]. ERR news, 3.06.2010. Available at: http://uudised.err.ee/index.php?06205902.

[25] Teder (2010).

to include guaranteeing and monitoring of basic rights of children.[26] On November 9th, 2010 the Constitutional Committee of *Riigikogu* discussed the potential broadening of the authority of the Chancellor of Justice to include duties of ombudsman for children. The president of the Committee stated prior to the discussion that "there may be a specific proposal to broaden the Chancellor of Justice's authorities, but it might as well transpire that the current legislation enables the Chancellor of Justice to tackle these questions".[27] It stems from the shorthand notes that the positions expressed at the discussion will be noted.[28] The topic of creating a children's ombudsman was also covered in the 2009 overview of the Chancellor of Justice.[29]

Chancellor of Justice was active in the field of children's rights even earlier, but it was a sideline to the duties of an ombudsman carrying out constitutional review of legislation of general application, preventing mistreatment. 11 January 2011 the Constitutional Committee of *Riigikogu* initiated the draft act to amend the Legal Chancellor Act, which aims to amend the act in a way to afford the Chancellor of Justice clear authority to deal with children's rights. This act was passed 17 February 2011.

Until now a large portion of duties of the ombudsman for children wasn't fulfilled by any institution in Estonia. Chancellor of Justice was not the one to introduce the Convention on the Rights of the Child in Estonia. Chancellor of Justice did not carry out polls or surveys to unveil the opinions of children nor did he present the children's positions. It wasn't in the competence of Chancellor of Justice to council persons and establishments, nor did he

[26] Tamm, Merike (2010). Lastekaitse liit annab *Riigikogu* menetlusse laste ombudsmani eelnõu [Union for Child Welfare will pass *Riigikogu* a draft of ombudsman for children]. Postimees, 11.06.2010. Available at: http://www.postimees.ee/?id=274902.

[27] BNS (2010). Parlamendikomisjonid hakkavad arutama laste ombudsmani vajadust []. Koolielu, 24.10.2010. Available at: http://koolielu.ee/pg/info/readnews/60088.

[28] *Riigikogu* (2010). 2. Order of the day. Protocol no. 213 of the Constitutional Committee of *Riigikogu* 9.11.2010 session. Available at: http://www.*Riigikogu*.ee/?op=emsplain&content_type=text/html&page=pub_ooc_file&file_id=1215458&u=20101128214710&mnspkl=09.11.2010&fd=15.11.2010&komisjon=PSK.

[29] Chancellor of Justice (2010). Õiguskantsleri 2009. aasta tegevuste ülevaade [An overview of activities of Chancellor of Justice in 2009]. Available at: http://www.oiguskantsler.ee/public/resources/editor/File/Aasta_ulevaated/2009/Ylevaade_2009_.pdf.

participate in devising of legislative acts regarding children's rights. The opportunities of the Chancellor of Justice to carry out training regarding children's rights and surveys on children's rights were limited.[30]

There are advantages and disadvantages to extending the authority of the Chancellor of Justice and affording him the function of ombudsman for children. On one hand, this change makes sense as Chancellor of Justice has partially performed the functions of an ombudsman for children and the public is aware of the fact that one may turn to the Chancellor of Justice with his problems. On the other hand, the Chancellor of Justice has to remain politically independent, and shaping the politics regarding children's rights would not be in accordance with the essence of the institution of Chancellor of Justice. The institution of ombudsman for children requires, in addition to legal measures, also a large extent of psychological and preventative measures.

Chancellor of Justice Indrek Teder in his presentation to *Riigikogu* in September 2010 regarding 2009:

> *"Estonia belongs among the few Member States that do not have the institution of ombudsman for children nor a clear political will to create it. In practice, the rights of children do not matter and it is just a topic full of hot air to be ventilated at conferences and political discussions. In addition to introducing children's rights, the activity of ombudsman for children is necessary and useful for the society through specific projects. Take the topic of children with dependence disturbance for instance – if the Chancellor of Justice had the authority of ombudsman for children he would be able to deal with this topic not on just legal level but more generally. Namely, it would be possible to contribute much more to conceptional directions that are the basis for compiling the regulation via inclusion of experts in the field, child psychologists, for example. It would make it much more likely for the society that the dependence disturbances will be eliminated. Another argument in our money-centric world, other than humanistic and social sustainability, is that successful activity of ombudsman for children would result in fewer clients for courts, prisons*

[30] Aru (2009), pages 12–13.

and the social system, which results in smaller costs. However, a thesis could be proposed – since children do not vote, anything concerning them does not interest politicians? I hope this is not the case."[31]

Amendment of the functions of Chancellor of Justice with the duties of ombudsman for children in the beginning of 2011 certainly refers to a positive development in this field.

Conclusion

Estonia lacks a plan for guaranteeing children's rights. The Child Protection Act is dated and declarative in nature

The Chancellor of Justices composes a systematic annual review of various fields. The Chancellor of Justice has been forced to admit in his 2008 and 2009 reviews that there have been no developments in legislation regarding children's rights.[32] If activities keep stalling in the same way the Chancellor of Justice as well as the editors of the annual Human Rights report will be forced to admit that also the next year.

Recommendations

- Devise a renewed strategy for guaranteeing children's rights.
- Amend the current Child Protection Act or devise a new child protection act, review its principles and most importantly, make it possible to implement.

[31] Teder, Indrek (2010). Aastaettekanne *Riigikogu*le 2009. aasta tegevusest [Annual report of activities of 2009 to *Riigikogu*]. 28.09.2010. Available at: http://www.oiguskantsler.ee/public/resources/editor/File/Aasta_ulevaated/2009/Indrek_Tederi_aastaettekanne_28.09.2010.pdf, pages 3–4.

[32] Õiguskantsleri 2009. aasta tegevuste ülevaade [An overview of activities of Chancellor of Justice in 2009], p 49.

Civil society

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CHAPTER 16

Development of civil society and the situation in Estonia in 2010

In the last year's report we conceded that a strong civil society is based on three equal and mutually influential bases. First of all, the society needs to contain values that favour civic initiative – a widespread understanding of the need for it and the desire to act as an active citizen. Provided these values exist, there need to be opportunities to realise them – an environment that allows fulfilment of such a wish, be it in the form of a non-governmental organisation (either as an officially registered organisation or as a looser, often temporary framework of like-minded people) or as individuals if they so wish. Third of all, there need to be well-rounded skills to use the opportunities well and productively. None of these three bases on its own is enough for a functioning civil society, however, it is noticeable how improvement or decline in one will have an influence on the other bases. For instance, organisations that function remarkably well can instil faith and interest in the civic initiative in less active people, greater participation raises the importance of the topic on the political agenda and stacks as an argument in making necessary changes in legislation or the practice of public power towards civic initiative.

Changes in values, opportunities and skills do not generally take place rapidly even on a personal or a small group level, least on the level of the whole society. The 2009 Estonian Human Development Report draws as one important

conclusion the stagnation and signs of fatigue in several areas of life.[1] What can be pointed out as development during one year in the field of civil society?

Reporting requirements of non-profit organisations

The most important change in the activity of non-governmental organisations could be publishing of annual reports of non-profit organisations in the commercial register. In earlier years it depended on each non-profit organisation itself whether the report was made public, however, the legislative amendment equalised non-profit organisations with other legal persons in this regard. The initial reaction brought on some negative rather than positive media reports, where the journalists mediated some of the more scandalous findings in the reports.[2] Some of the organisations also complained about the complicated reporting requirements,[3] although the only change was the requirement of digital presentation of the report. However, the amendment will create an opportunity to gain an adequate overview of non-profit organisations in Estonia in the long run, the resources available to them and the value they create. This creates advantages for better cooperation with the public sector (for example in inclusion, funding and delegating public services, each of which has a problem with lack of proper information regarding active organisations) as well as with the business sector and the private persons (donating and voluntary work decisions can be based on a much more thorough analysis than before). On the other hand, the question of whether an approach in reporting uniform to all non-profit organisations is right or whether it can have a hindering effect on smaller and less capable organisations and thereby obstruct the civic initiative, is also founded. The changes in the Foundations Act adopted at the end of the year, abolishing the current

[1] Lauristin, Marju (Editor-in-Chief) (2010). Eesti Inimarengu Aruanne 2009. Kokkuvõte [Conclusion of Estonian Human Development Report]. Estonian Cooperation Assembly, March 2010. Available at: http://www.kogu.ee/public/eia2009/EIA_kokkuvote09.pdf.

[2] For example. Vedler, Sulev (2010). MTÜde räpased saladused [Dirty secrets of the non-profit organisations]. Eesti Ekspress, 22.07.2010. Available at: http://www.ekspress.ee/news/paevauudised/eestiuudised/mtude-rapased-saladused.d?id=32237875.

[3] For example, Eero, Endel (2010). Kas surmaotsus väikestele ja vaestele mittetulundusühingutele? [Death verdict to small and poor non-profit organisations?] Videvik, 26.08.2010.

general duty of auditing for foundations without turnover and assets can be pointed out as a positive example.[4]

Inclusion

Another important development in the relations between the public sector and the civic initiative in 2010 was the devising of a development plan for years 2011–2014, which the government authorised in February of 2011.[5] The development plan sets the activities that government offices will take on during those years in order to strengthen the civil society. It consists of five topics: citizens' education, capability and vitality of citizens' associations, citizens' associations as partners in providing public services, inclusion, charity and philanthropy. The development plan includes a plan of action including activities, the responsible institutions and the costs. The effect of this decision will materialise in the following years, but the inclusion process of more than six months gave hundreds of people from the public sector, the third sector and the business sector a reason to think about these topics in detail.

The developments in the immediate cooperation possibilities between the public sector and the civic initiative tended to be rather small. An analysis on inclusion practice in government offices compiled by the PRAXIS Center for Policy Studies and the Institute of Baltic Studies stated that even though the understanding of reasons and objectives for inclusion have become more similar for government offices and the interest groups, the problem is the absence of unified bases for inclusion between various ministries, which results in decisions and skills of specific officials being the deciding factor in inclusion.[6]

[4] Foundations Act. RT I 1995, 92, 1604 … RT I, 17.12.2010, 20.
[5] Ainsalu, Aveli (2011). Kodanikuühiskonna arengukava 2011-2014 [Development plan for civil society for years 2011–2014]. Ministry of Internal Affairs, 08.02.2011. Available at: http://www.siseministeerium.ee/kodar/.
[6] Foundation PRAXIS Center for Policy Studies and NGO Institute of Baltic Studies (2010). Valitsusasutuste kaasamispraktikate analüüs [Analysis of inclusion practice of government offices]. October 2010. Available at: http://www.ngo.ee/uuringud.

Most problems in specific inclusion processes arise from setting their objectives, evaluating the results, initiating the process as well as concluding it. The inclusion is most successful when there is constant communication between the parties. The non-governmental organisations see the formality of the inclusion as the main obstacle, which means the decisions have already been made in the ministry; the officials, however, cite the passiveness of the interest groups and the poor ability to see the big picture besides their own interests.

The National Audit Office of Estonia analysed the capability of the local governments to support non-governmental organisations,[7] which, to a large extent, brought up same old problems as the two-year-old survey on allocation of state budgetary grants; the objectives and purposes and monitoring principles of their use have not been thought through and they function based on custom, a hunch or informal agreements; the line between support of organisations and delegating a public service is hazy.[8] Therefore it is difficult to evaluate the productivity of allocating grants. It is difficult to tell what kind of influence these ongoing budgetary cuts had on the funding of non-governmental organisations and on the delegation of public services (on state and local level) as there is no direct data available. According to the survey of Tallinn University about half of the organisations on average have claimed that their profit has remained the same in comparison to 2009 and a third have stated that their profit has diminished.[9] In the appraisal of the Minister of Regional Affairs Siim Kiisler, the economic depression has caused setbacks

[7] National Audit Office of Estonia (2010). Kodanikuühendustele kultuuri-, spordi- ja noorsootöötoetuste andmine valla- ja linnaeelarvest. Kas toetuste maksmine on läbipaistev? [Payment of grants to non-governmental organizations for culture, sport and youth work from local government and town budget. Is the payment of grants transparent?] National Audit Office's report to *Riigikogu*le, 25.02.2010. Available at: http://www.ngo.ee/uuringud.

[8] Foundation PRAXIS Center and Tallinn University Centre for Civil Society Study and Development (2008). Kodanikeühenduste riigieelarvelise rahastamise analüüs [Analysis of funding of non-governmental organisations]. October 2008. Available at: http://www.ngo.ee/uuringud.

[9] Tallinna University Centre for Civil Society Study and Development (2010). Kodanikualgatuse institutsionaliseerumine Eestis 2009/2010 [Institutionalising of civic initiative in Estonia 2009/2010]. Available at: http://www.ngo.ee/uuringud.

in delegation of public services, as the local governments resorted to cutting back on delegated actions in the environment of budget reductions.[10]

Civic initiative

It is difficult to point out the developments of 2010 in changes of values facilitating civic activity and initiative, as there is a lack of recent studies. Based on the data of the population survey of a few years ago, about a third of the population[11] participates in activities of non-governmental organisations and about a half[12] of the Estonian population takes part in voluntary activities. The traditional "Teeme ära!" day of civil actions in the beginning of May 2010 brought together more than 30,000 people who took part in various cleaning or other actions. Civic initiative has been covered more and more by the media and discussed in social discussions, a sign of the latter has been the increase of election pledges in programmes of political parties for the 2011 *Riigikogu* elections.

The active process of creating new NGOs continues; about two thousand of them are registered each year. This, however, cannot be taken as a direct sign of increased civic activity as reasons for founding NGOs can be manifold. The new organisations tend to be small in membership size, which has resulted in the decrease of average number of members of organisations: five years ago the average number of members in non-profit organisations was 31, in 2009 the average amounted to just 20 members.[13] A third of the NGOs have up to 10 members, another third have 11–30 members and a fifth of NGOs (five years ago it would have been 28% of NGOs) have more than 50 members.

[10] Vaarik, Daniel (2011). Regionaalminister Siim Kiisler: kolm soovitust kaasatavatele [Minister of Regional Affairs Siim Kiisler: three recommendations to the included]. Hea Kodanik 1/2011. Available at: http://www.ngo.ee/heakodanik.

[11] Hinno, Krista; Lagerspetz, Mikko ja Vallimäe, Tanel (2008). Kolmas sektor arvupeeglis [The third sector in numbers]. Tallinna University International and Social Studies Institute Centre for Civil Society Stufy and Development. Available at: http://www.ngo.ee/uuringud.

[12] Foundation Emor, foundation PRAXIS Center for Policy Studies et al. (2008). Vabatahtlikus tegevuses osalemine Eestis [Participation in voluntary activity in Estonia]. Available at: http://www.ngo.ee/uuringud.

[13] This and the following data from: Kodanikualgatuse institutsionaliseerumine Eestis 2009/2010. [Institutionalising of civic initiative in Estonia 2009/2010].

According to the organisations the number of active members in the organisation is also smaller than before: the average number of active members in 2004/2005 was 18, now it is 8. This decline is relatively greater than the general decrease of number of members. This further increases the leader-centric pattern widespread in Estonian NGOs, where the success of the organisation depends on its leader, whose fatigue endangers the continuity of the whole organisation.

Another apparent trend next to the active creation of organisations is the short life span of the NGOs: about half of the organisations who participated in the survey have been founded within last four years and two thirds of the organisation within last ten years. This is an important indicator, especially in the case of NGOs (less so with foundations) as the age of the organisation tends to help predict its other parameters and behaviour in activities of civic initiative. Younger NGOs tend to have fewer resources, fewer cooperative relations within the third sector as well as without, less knowledge of possible support structures etc. Younger and smaller NGOs also have fewer sources of funding (an average of half the NGOs in Estonia have up to two sources of funding), and therefore a greater danger that a loss of one source may result in extinction of the organisation.

A positive sign is that the inclusion of volunteers has increased, up to two thirds of organisations have a relevant experience as of today. However, the volunteers are not usually included regularly, but mainly as additional labour in organising events, substantially less often as experts and in day to day activities.

Another good sign is the increased networking between the NGOs. Half the NGOs participate in networks on the local level, more than a third on a state level and 13% of the NGOs on an international level. A little bit more than a third of NGOs marked no cooperation relations on any level. Cooperation tends to be informal. For instance, belonging to a network of organisations has not increased over the years. Increased networking indicates arriving at a more mature stage of development – other organisations are less perceived as competition and there is understanding of the fact that goals are easier to

reach when organisations support one another, it also refers to higher visibility of the organisations. The next step towards a stronger NGO could be a merging of similar organisations.

At the same time the number of ties of cooperation outside the third sector has decreased, which is probably explicable by emergence of new organisations which lack such connections and the ability to administer them. The NGOs' main cooperation partners are (in the order of importance): local governments, the business sector, government offices, educational institutions and the media.

Very little cooperation is conducted with political parties. The main forms of cooperation are (in the order of importance): execution of common projects and actions, financial support, devising common positions, support in the form of commodities for execution of activities, information, providing and receiving consultation and expert opinion, devising new initiatives in a field and providing or ordering of remunerated services.

Conclusion

The development of the third sector in Estonia seems to progress somewhat controversially. The smaller part of NGOs is increasingly visible and professional in their activities, include other persons and organisations, and shape the image of civic initiative in Estonia. Yet an increasingly larger part of acting NGOs is young and has little experience as well as a small membership; and they are preoccupied with building their organisation and locating the necessary funds for operating.

APPENDIX

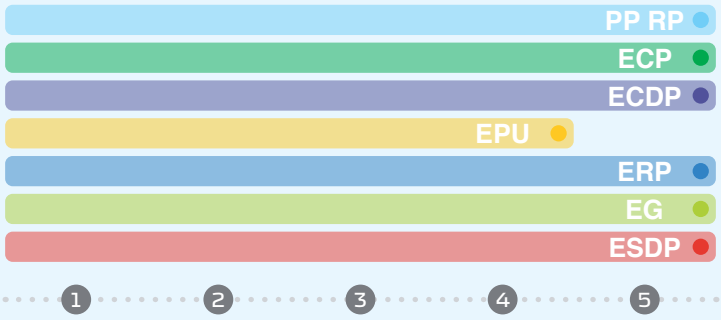
Survey of Political Parties

The foundation Estonian Human Rights Centre conducted a survey among the political parties in Estonia in February/March of 2011 in order to ascertain the views of the parties regarding various human rights. All political parties running for *Riigikogu* were asked to reply to the questionnaire.

A total of seven political parties gave their answers: Estonian Christian Democratic Party (ECDP), Estonian Greens (EG), Estonian Social Democratic Party (ESDP), Estonian Center Party (ECP), Estonian Reform Party (ERP), Pro Patria-Res Publica Union (PPRP) and Estonian People's Union (EPU)

How important is the protection of human rights to Your party?

(1– not important; 5 – very important)



It can be said that all political parties consider the protection of human rights to be an important topic. The replies of the parties tended to be generally quite similar. Greater difference of opinions concerned stating hate crimes as separate crimes in the Penal Code and equalising the duration of the replacement service with that of the conscript service.

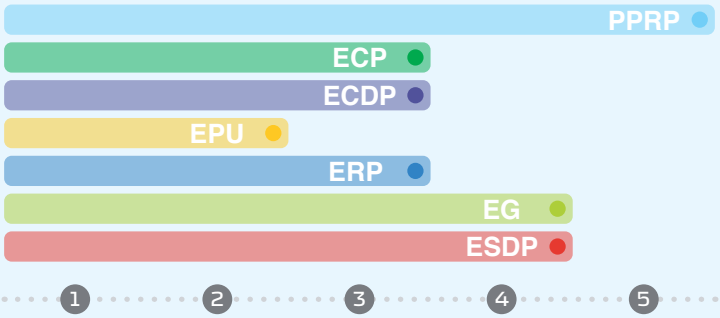
The parties considered the right to education and right to personal liberty as least problematic human rights. The parties thought the greatest shortcomings appeared in the area of efficient court proceedings and the right to private and family life. A more detailed overview of the parties' opinions regarding various human rights can be found at the end of respective chapters.[1]

Institutes providing protection of human rights

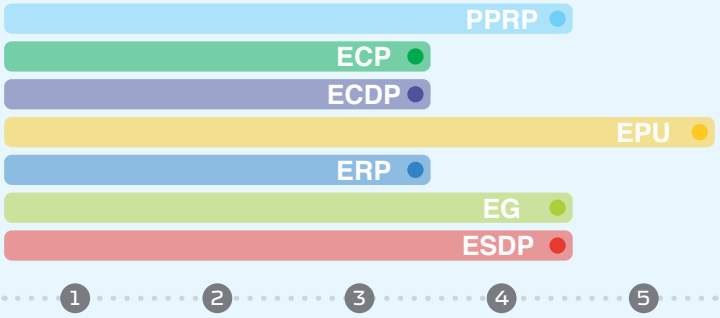
The parties' answers are expressed in the following tables. Three of the parties specified their answers. Estonian Reform Party stated that human rights are far too important to be limited to three or four institutions that provide protection. Estonian Greens stated that the authority of the Chancellor of Justice and the Gender Equality and Equal Treatment Commissioner should be increased, whereas inclusion of the Commissioner's post in the office of Chancellor of Justice should be considered. Estonian Christian Democratic Party would like to give the NGOs more resources and to broaden their authority as the party believes human rights NGOs are often much more active and more motivated than state offices.

[1] **Estonian Greens** gave a more specified answer to the question of efficiency of protection of human rights and stated that even though they believe the state itself does not breach human rights to a substantial degree, the state may not afford sufficient protection to human rights.

Efficiency of Chancellor of Justice
(1 – not efficient; 5 – very efficient)

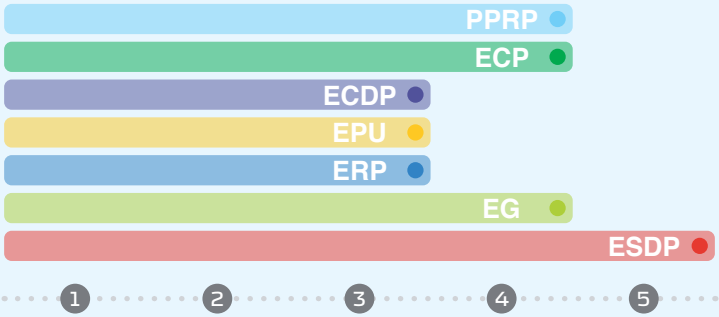


Should, in Your opinion, the authorisation of Chancellor of Justice rights be broadened?
(1 – it should be restricted; 3 – it should remain as it is; 5 – it should be broadened substantially)



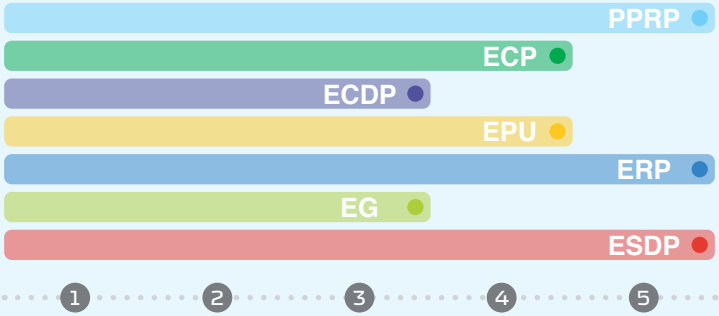
Should, in Your opinion, Chancellor of Justice be afforded additional resources?

(1 – they should be reduced; 3 – they should stay the same; 5 – they should be increased substantially)



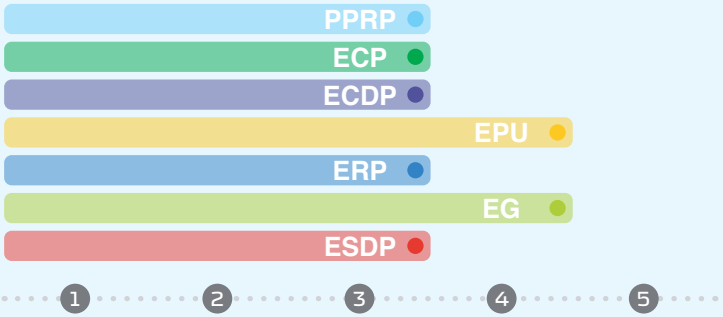
Appraisal of cooperation between Chancellor of Justice and Your Party

(1 – there is no cooperation; 5 – constant cooperation)



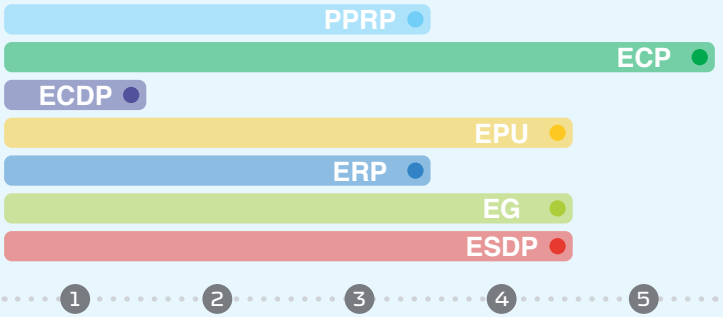
Efficiency of Gender Equality and Equal Treatment Commissioner

(1 – not efficient; 5 – very efficient)



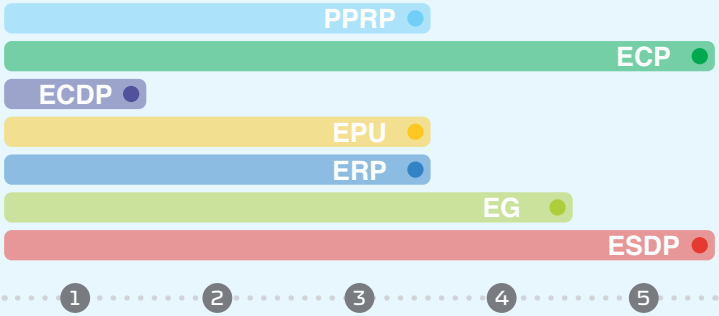
Should, in Your opinion, the authorisation of Gender Equality and Equal Treatment Commisioner rights be broadened?

(1 – it should be restricted; 3 – it should remain as it is; 5 – it should be broadened substantially)



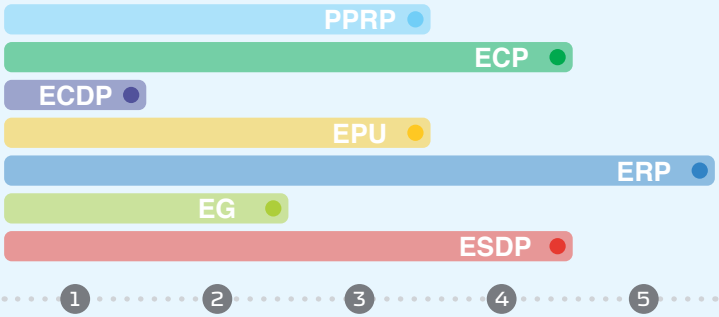
Should, in Your opinion, Gender Equality and Equal Treatment Commisioner be afforded additional resources?

(1 – they should be reduced; 3 – they should stay the same; 5 – they should be increased substantially)

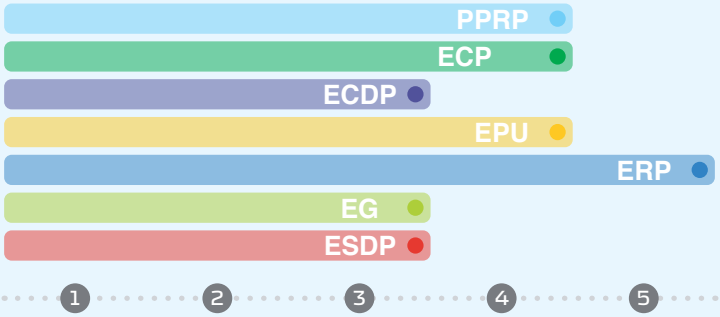


Appraisal of cooperation between Gender Equality and Equal Treatment Commisioner and Your Party

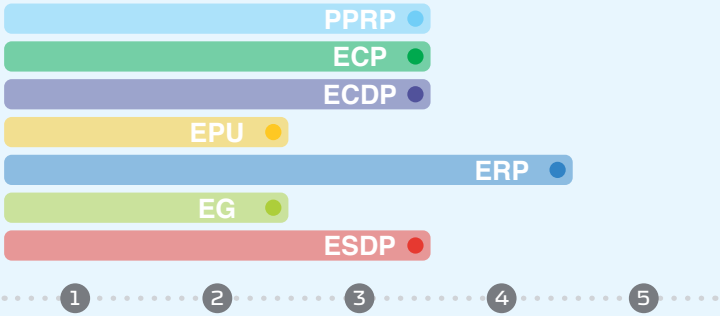
(1 – there is no cooperation; 5 – constant cooperation)



Efficiency of Data Protection Inspectorate
(1 – not efficient; 5 – very efficient)

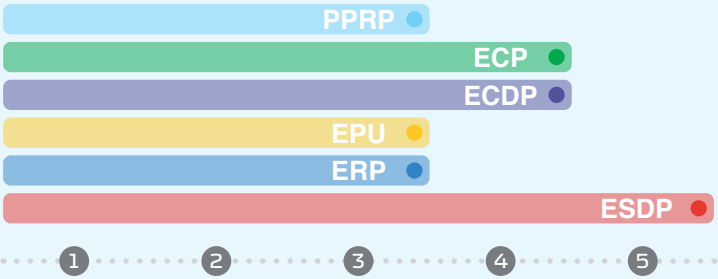


Should, in Your opinion, the authorisation of Data Protection Inspectorate rights be broadened?
(1 – it should be restricted; 3 – it should remain as it is; 5 – it should be broadened substantially)



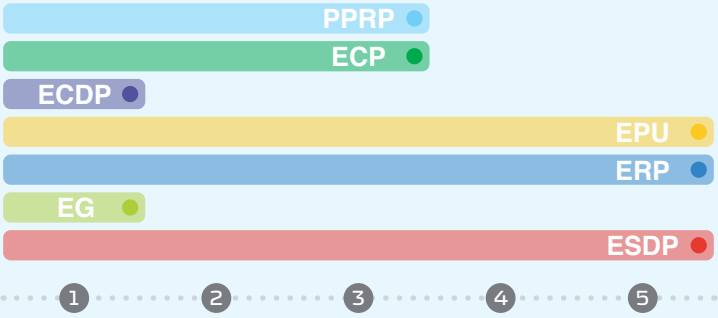
Should, in Your opinion, Data Protection Inspectorate be afforded additional resources?

(1 – they should be reduced; 3 – they should stay the same; 5 – they should be increased substantially)



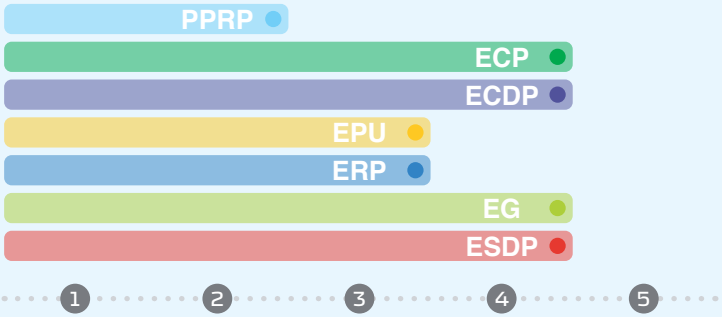
Appraisal of cooperation between Data Protection Inspectorate and Your Party

(1 – there is no cooperation; 5 – constant cooperation)



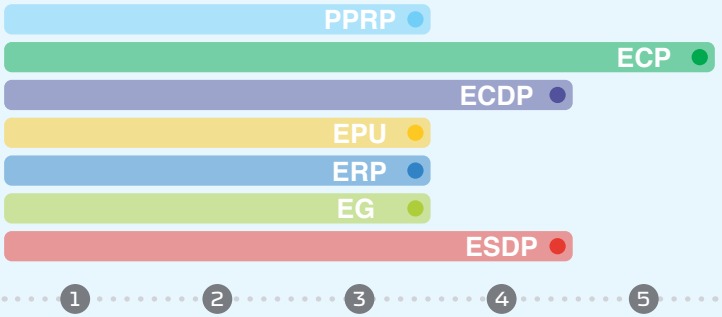
Efficiency of Estonian state-wide NGOs specialised in protection of human rights

(1 – not efficient; 5 – very efficient)



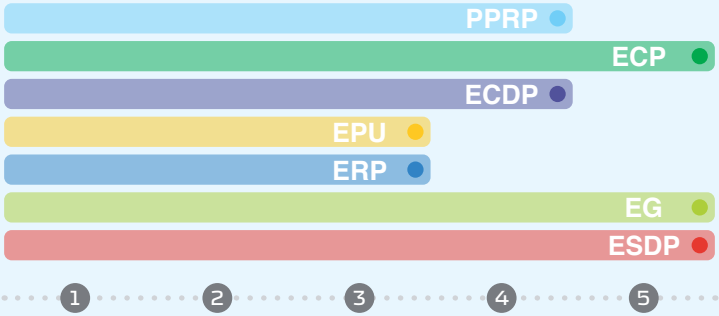
Should, in Your opinion, the authorisation of Estonian state-wide NGOs specialised in protection of human rights rights be broadened?

(1 – it should be restricted; 3 – it should remain as it is; 5 – it should be broadened substantially)



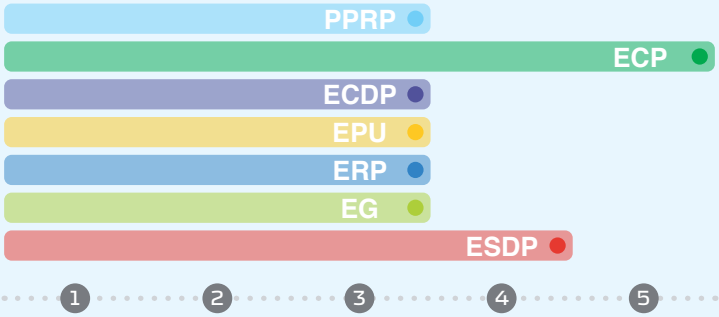
Should, in Your opinion, Estonian state-wide NGOs specialised in protection of human rights be afforded additional resources?

(1 – they should be reduced; 3 – they should stay the same; 5 – they should be increased substantially)



Appraisal of cooperation between Estonian state-wide NGOs specialised in protection of human rights and Your Party

(1 – there is no cooperation; 5 – constant cooperation)



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