Human Rights in Estonia 2008-2009

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INTRODUCTION

This report is the second general report issued by the Human Rights Centre (HRC) on the situation of human rights in Estonia. HRC is an independent research centre at Tallinn Law School of Tallinn University of Technology. One of HRC's tasks is to observe and analyze the situation of human rights in Estonia. The Human Rights Centre will continue as an independent foundation in 2010. Additional information on activities of HRC is available on its website www.humanrights.ee.

Freely available public information from various sources has been used upon drawing up of this report, including annual statements of state agencies, reports and opinions of non-governmental organisations and international organizations, as well as materials gathered by HRC. The purpose of the report is to provide a general overview of events in protection of human rights in 2008 and 2009 in various domains. Information from previous years is occasionally presented to provide a background and for comparison. It is a legal research with analyses of application of acts by state agencies, rather than a sociological one on societal beliefs and values.

This report was concluded based on principles of objectivity and independence. The sources have been analyzed independently and critically; and the report has not been submitted for approval by any of the state agencies prior to publication. A diverse material from state agencies, international organizations and non-governmental organizations has been used as source material, as well as compared analytically where possible.

The authors of this research chose some topics that were afforded greater media attention. In 2008 and 2009 those topics were post-sentence preventive detention, partnership of same-sex couples and equal treatment. Some topics were chosen by the authors with the intent of drawing attention to situations that have not enjoyed wide attention before in Estonia. Therefore, for example, the alternative service for conscription

service is viewed in depth, as well as a specific case of conflicting human rights.

HRC would like to thank Estonian Institute of Human Rights and Network of Estonian Non-profit Organizations for their cooperation in putting together this report, as well as everyone who helped in gathering and forwarding of necessary background information.

HRC would greatly appreciate any feedback at the following email address: aastaaruanne@humanrights.ee.

Marianne Meiorg

RIGHT TO LIBERTY AND SECURITY

Post-sentence Preventive Detention

2008 and 2009 could be best described, in the context of personal liberty, by the amendments made to the Penal Code, the Criminal Procedure Act (CPA), and to an extent, by those made to the Imprisonment Act.[1] These amendments had to do with the people who have served their full sentence in prison. The aforementioned amendments have extended the option of being subject to supervision of conduct, which previously affected only those who were released before the prescribed time. They also prescribed the additional option of being subjected to post-sentence preventive detention. Accordingly, a convicted offender, who has already served his or her prison sentence, may not necessarily be released from the penal institution.

Post-sentence preventive detention is not in itself a measure that violates human rights. This recourse, in one form or another, is used by several European states.[2] The European Court of Human Rights (ECtHR) has had the opportunity to analyse this measure and has not deemed it necessary to ban it.[3] It is, however, a measure that greatly limits a person's right to personal liberty. This, in turn, means that the circumstances in which this measure is applied, and on which conditions, are of utmost importance. The changes made to Estonian acts may not have been given thorough enough consideration in this regard.

Post-sentence preventive detention in Estonia

According to the amendments made to the Penal Code and CPA, a person may be kept in detainment after he has served his sentence in prison. The need for such a measure shall be determined by the court along with the initial judgment. In other words, the decision to detain a

[1] RT [State Gazette] I 2009, 39, 261 (entry into force on 24 July 2009).

[2] Explanatory memorandum to the draft Act refers to 8 states (Austria, Belgium, Lichtenstein, Norway, Sweden, Germany, Great Britain, Switzerland). – Government of Republic, Explanatory memorandum to "The act that amends the Penal Code, the Law of Criminal Procedure and Imprisonment Act" (Draft Act 382). Sootak has also referred to 6 more European states (Spain, Netherlands, Italy, Slovak Republic, Czech Republic, Hungary). - Jaan Sootak, *Mida teha, kui isiku ohtlikkus on süüst suurem? Saksamaa kogemuse mittekaristuslike mõjutusvahendite osas* [What to do if a person's hazardousness outweighs his guilt? Germany's experience in non-punitive sanctions], Juridica VII/2006.

[3] The latest chance for it presented itself in the case of M v Germany (17 December 2009).

person post-sentence is made before the person even starts serving his or her sentence (Penal Code §87^2(2)). In order to even consider the application of post-sentence preventive detention at all, the following conditions must be met (Penal Code §87^2(2)):

- The person is convicted of a violent crime, which was directed at "the most essential of legal rights"[4] (life and health, sexual offences, offences against liberty, extremely dangerous offences, and offences, which as an element necessary to constitute the offence entail the use of violence – for example robbery, extortion);
- The criminal offence is committed intentionally;
- "The person is sentenced to at least two years imprisonment without parole";
- "The convicted offender has been convicted on at least two prior occasions … of one of the named offences and has been sentenced to at least one year in prison each time" (in certain cases the person may have no prior convictions or have been convicted only once (Penal Code §87^2(3) and (4)); and
- "There is reason to believe – considering the person convicted, his previous life and living conditions, as well as circumstances surrounding the committed offences – that the person will, because of his proclivity to crime, commit more offences of a similar nature when released into society".

Post-sentence preventive detention is not subject to a time limit. The prerequisite to the person being released is the discontinuation of his/her harmfulness or threat he/she poses to society (Penal Code §87^3(1) and CPA §426^2(1)). Whether the person is still harmful or not is evaluated on the same basis as upon application of post-sentence preventive detention initially. In addition to that, his behaviour whilst serving his or her sentence and post-sentence detention is kept in mind. As a rule, it is forbidden to continue the post-sentence preventive detention for more than ten years (Penal Code §87^3(2)). The need for continuation of the detention is checked upon by a judge routinely, at least bi-annually, whereas the first check-up must take place immediately after his original sentence has been served. Release can be applied for by the offender, his legal representative (for the first time after the passing of a year after the end of hisor her sentence and the start of his or her post-sentence preventive detention and from there on after, up to once a year) and the release may also be applied for by the head of the penal institution (at any time) (CPA §426^2(3) and (4)).

[4] Explanatory memorandum to the draft Act (reference 2), p 8.

Such post-sentence preventive detention is very similar to that prescribed by the German system, which the Ministry of Justice, who initiated these amendments, seems to have based the Estonian system on.

Accordance with human rights

Any kind of detention of a person must be prescribed by law – this condition has been met in this instance. In addition to that the detention cannot be arbitrary – it must have a legitimate aim and the detention must be in accordance with that purpose.[5] The purpose, according to the explanatory memorandum to the draft legislation, is to increase safety in society by decreasing repeating offences.[6] The question as to whether this purpose is the kind that is prescribed by Estonian Constitution and European Convention of Human Rights (ECHR) has caused great controversy among Estonian legal scholars.

The explanatory memorandum to the draft legislation has suggested that in the case of post-sentence preventive detention two possible situations allowed by ECHR can be mentioned – detention based on the judgment of conviction (Constitution §20 p 1 and ECHR, Art 5(1a)) or detention for the prevention of an offence being committed (Constitution §20 p 3 and ECHR, Art 5(1c)). The latter must be cast aside as the ECtHR has demanded that the suspicion be founded on reasonable doubt, which requires sufficiently specific details as to place, time and the victim of the offence.[7] This is not a measure that would require such a level of specificity for its application.

The first of these allowed objectives, which can be the basis of post-sentence preventive detention, holds considerably more weight. The ECtHR, in its recent decision concerning Germany, has upheld the applicability of this measure for this purpose.[8] The reason for this is the fact that post-sentence preventive detention is decided along with a convicting judgment. Therefore, post-sentence preventive detention as such does not violate personal liberty, if the need for it is proved with sufficient clarity and the conditions, which must be met to allow the application of the measure, having the objective of the measure in mind.

One of the biggest reproaches made to the amendment that entered into force in 2009 is that the Ministry of Justice has not managed to prove the need for post-sentence preventive detention. Nobody denies the fact that

[5] European Court of Human Rights, Kurt v Turkey (25 May 1998).
[6] Explanatory memorandum to the draft Act (reference 2), pp 1, 20.
[7] M v Germany (reference 3), para 102.
[8] M v Germany (reference 3), paras 94-5.

there are repeating offenders, who upon release from prison are as dangerous if not even more dangerous than when they began their sentence. However, the Ministry of Justice is reproached for lack of analysis as to the circumstances that have caused this situation.[9] The way in which the system has failed has not been investigated and neither has the possibility of whether it can be improved in a way that burdens human rights less.

The criminal policy in force thus far saw the conviction of a person not only for the purpose of condemnation of their deed, but also for the purpose of making society safer and in the end for the purpose of directing the convicted person toward law-abiding behaviour.[10] The Imprisonment Act provides that the conviction should work towards achieving these objectives and places specific measures for achieving that end (§6(1) and 16). The outcome of imprisonment has to eventually be re-socialisation of the person.[11] According to the explanatory memorandum to the draft legislation, the objectives of post-sentence preventive detention are the same, though perhaps in a different hierarchy and excluding the element of punishment.[12] Since Estonian criminal policy was set about to achieve the same objectives as those that now serve as the objectives for post-sentence preventive detention, this will bring no additions. Therefore, the need for post-sentence preventive detention cannot be grounded on this justification.

One possible justification for post-sentence preventive detention may be the creation of additional motive for the convict – if they do not behave in accordance with society's norms they will not be released. However, the longer a person stays in prison, the less likely he or she is to return to society as a fully-fledged member.[13] Such convicts, serving prolonged sentences, do not see release as a realistic possibility and therefore do not work toward it. The outcome is effectively that the person goes to prison not knowing when he or she will be released. This is the equivalent of an endless conviction for him. The legislator may call post-sentence preventive detention a measure of influence, yet the person, who is subject to the measure, perceives this as a punishment without a date of expiration.[14] It is likely that the post-sentence preventive detention shall

[9] Mare Allas (Chief specialist to the department of legal knowledge, Supreme Court), On the act that amends the Penal Code, the Law of Criminal Procedure and Imprisonment Act, letter to Ministry of Justice no 10-4-1-7 (29.09.2008).
[10] Explanatory memorandum to the draft Act (reference 2), p 20.
[11] Sootak (reference 2), p 526.
[12] Explanatory memorandum to the draft Act (reference 2), p 20.
[13] This matter of fact has been pointed out by Sootak in his article (reference 2), p 526.
[14] M v Germany (reference 3), paras 74, 126, 130; also Sootak (reference 2), p 524.

make the person's re-socialisation harder. As a result of this, prisons hold people with problems due to the lack of a better solution.

It is no use to anyone just having convicts 'killing' their time in a penitentiary institution, if no active work is done towards making these people less dangerous upon release into society. Jüri Saar has criticised the "lack of tradition of socio-therapeutic institutions for criminals and experience of founding them in Estonia".[15] If there are no such institutions at the moment, and their absence hinders achieving the objective of re-socialising convicts to society, then what is the use of the continuation of detention of criminals? This, in essence, means that those people are simply kept off the streets without any actual attempts to rehabilitate them. In the absence of any special programmes and staff, a person previously considered dangerous does not become any less dangerous just from having spent time in jail. The changes to law that came to effect this summer do not state anything new in this regard.

Without special measures directed towards the rehabilitation of the person post-sentence preventive detention is not in accordance with human rights. The ECtHR emphasizes the importance of the special programmes referring to opinions of the Council of Europe Commissioner for Human Rights and European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[16] People who undergo post-sentence preventive detention need psychological help and support even more than people who are serving their sentence. Measures directed at them cannot be the same as those directed at those serving their sentence as those measures have clearly not had an effect on these people before and they are not capable of working towards rehabilitation on their own. It is also important to keep in mind that the detention of those people does not have a prescribed end date and therefore a special approach is needed.

ECtHR as well as the European Committee for the Prevention of Torture referred to a general lack of motivation of post-sentence preventive detainees in Germany. Most of them are primarily just killing time in penitentiary institutions and do not consider their eventual release a realistic possibility. The court stated that such detainees need to be in contact with a trained multidisciplinary staff. But this all requires a specific action plan and a programme that includes all the steps that make eventual release a probability.

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[15] Jüri Saar, *Karistusjärgne kinnipidamine ja Eesti kriminaalpoliitika* [Post-sentence preventive detention and Estonian criminal policy], Juridica II/2009, p 120.
[16] M v Germany (reference 3), paras 76-77, 129.

There are no programmes in place directed towards the rehabilitation of persons in post-sentence preventive detainees in Estonia. The amendments that came into force in July does not contain any provisions as to how the decrease of dangerousness of these persons is achieved or as to the special preparations to facilitate their return to society. As a result, there is a danger that a group of detainees will form, who are simply counting the time until their ten years are up, after which they will be released, whether they are a threat to society or not. According to the publicly available information, the Ministry of Justice does not plan to incorporate such programmes for post-sentence preventive detention into Estonian law. Therefore, post-sentence preventive detention does not seem to be capable of being effective in achieving the objectives posed to it.

In addition to shortcomings in justifying the necessity of the post-sentence preventive detention, the critics of this measure have also referred to deficiencies in its rules of application. When most of the preconditions for the application of post-sentence preventive detention are formal and an extensive analysis is not necessary to determine their presence, the determination of the level of dangerousness is more complicated.[17] This requires a certain prognosis of the person's behaviour some time in the future. It is difficult not to agree with Jüri Saar's claim, that "post-sentence preventive detention is similar to psychiatric coercive treatment but it is applied without a diagnosis" because the court "is dealing with a future danger stemming from characteristics of personality".[18] Giving such appraisals presupposes competent expertise, which is not compulsory according to amendments that entered into force this summer (CPA §432(3)). Public Prosecutor's Office as well as Chancellor of Justice have expressed their concern about this in the explanatory memorandum to the draft legislation.[19] Despite their warning this seemingly problematic provision remained in the Act that was adopted.

The validity of the necessity for post-sentence preventive detention is doubtful in a situation where the sentence itself is long and therefore the

[17] Jüri Saar (reference 15) (p 118) has also referred to another prerequisite, which he considers too vague for a measure this serious – list of criminal offences, which may cause a post-sentence preventive detention, "is open and ends with the words "other intentionally committed criminal offences, which as an element necessary to constitute an offence entail use of violence (for example robbery)"."

[18] Saar (reference 15), p 116.

[19] Norman Aas (the Chief Public Prosecutor, Public Prosecutor's Office), *Eelnõu kohta arvamuse avaldamine, kiri justiitsministeeriumile* [Opinion on the draft, a letter to Ministry of Justice] no RP-1-8/08/1689 (25.09.2008), p 2; Legal Affairs Committee at the Parliament, Explanatory memorandum to the act that amends the Penal Code, the Law of Criminal Procedure and Imprisonment Act, 08.06.2009, p 4.

judge has to in fact make a decision as to a person's state of mind 10 or 15 years in advance.[20] Several researches have shown that it is not possible to predict a person's behaviour upon release solely based on his behaviour in prison.[21] The same reservations were expressed by the Council of Europe Commissioner for Human Rights in his synopsis of the visit to Germany.[22]

Conclusion

Any measures limiting human rights have to be considered thoroughly. Post-sentence preventive detection is a measure that restricts human rights. This measure has to be the last resort for achieving the specific objective. This not only means that it has to be the last resort considering the specific person, his behaviour and state of mind but it also means it has to be the last resort available for the state. The objective of post-sentence preventive detention is the protection of society. Whether this is, in this particular form, the only available measure for achieving this aim in Estonia remains unclear. The state has to use measures for achieving its aims that burden human rights as little as possible and still achieve the objectives posed – in this case protecting society from dangerous repeat offenders.

The preceding analysis shows that post-sentence preventive detention may not in fact achieve the posed objectives. Nor does it become evident either from the explanatory memorandum to the draft legislation that introduced this measure to Estonian law or from other explanations from the Ministry of Justice if the same objectives could be achieved through alternative measures. The reasoning that other states use this measure is not sufficient. As is apparent from the decision of the ECHR in the M v Germany case, Germany has significant shortcomings in its post-sentence preventive detention system and they have not gone without notice from the international organisations.

These are the circumstances and issues that should have been thoroughly investigated before introducing the measure of post-sentence preventive detention into Estonian law. Curtailing person's liberty in this form could be classified as arbitrary. The Supreme Court is of the opinion that litigation over constitutionality of this limitation will follow and has apparently therefore refrained from giving an extensive substantive opinion.[23]

[20] Aas (reference 19), p 2.
[21] Saar (reference 15), p 117.
[22] Report by the Commissioner for Human Rights, Thomas Hammarberg, on his visit to Germany, 9-11 and 15-20 October 2006, CommDH (2007) 14 (11 July 2007), para 203.
[23] Allas (reference 9).

RIGHT TO FAIR TRIAL

Access to Justice

In principle, access to justice is guaranteed in Estonia. However, there are problems in specific aspects, such as the administration of state legal aid. Questions have been raised also in regard to the independence of the court.

The Constitution of the Republic of Estonia firmly guarantees the right to access justice and the subsequent rights:

- The right of effective access to a dispute resolution body,
- The right to fair proceedings,
- The right to timely resolution of disputes,
- The right to adequate redress,
- The right to effective remedy.

These rights are for the most part provided for by law or otherwise upheld by interpretations of the Supreme Court of Estonia. This is not to say that there are no problems or that each of these elements is always efficiently provided for in practice. There is undoubtedly still a need for the Estonian court system and relevant law to be further refined in order to ensure the consistent and effective protection of all the aforementioned rights in relation to access to administration of justice.

Upon close review of cases and subsequent issues that have arisen in this area some of the apparent problem areas include: the length of court proceedings, the influence held by the Ministry of Justice over the courts or otherwise a lack of impartiality, questionable quality of legal aid available to those who do not have sufficient financial needs to obtain such assistance for themselves. Each of these issues shall be considered in detail in following sections of this report.

The right of effective access to a dispute resolution body

As previously mentioned the right of effective access to a dispute resolution body is enshrined in the Constitution and consequently may be relied upon by individuals in national courts. There are extensive limitations as to which claims, by whom and under which circumstances they may be filed. Such restrictions are similar to those which are widely practised in national legal systems worldwide and recognised by institutions such as the European Court of Justice and the European Court of Human Rights (ECtHR).

The *locus standi* requirements in Estonian law are very strict and have, in practice, been interpreted by courts in a similar manner.[24] Namely, the parties other than the individual whose rights or freedoms have been violated are left with a narrow window for turning to court. Claims may be raised by other parties solely in specified cases prescribed by law (for example: a parent can file a claim on behalf of his child, the administrator of the property of a missing person can file a claim concerning the property on behalf of that missing person, an apartment co-operative can file claims on behalf of their members).[25]

The issue of a restrictive approach taken towards *locus standi* is a question of political choices and depends on the structure of legal system, but it is still a matter that needs to be analysed. It is capable of serving as a barrier to access to justice and in certain cases an unjust one. One manner in which this situation could be improved would be to develop a test of conditions by which the need for allowing *locus standi* would be determined rather than prescribing a closed list of possibilities by law and disallowing any other possibilities. This would make the barrier less definitive and allow flexibility in regard to new situations and cases.

Another aspect that ought to be mentioned is that of the special burden of proof in discrimination cases.[26] A unique burden of proof that is applicable solely to discrimination claims, it stipulates that if a complaint is made then it is upon the respondent party to prove that the accusation is not founded. Since the enforcement of the Equal Treatment Act, no such claims have been raised and therefore its practicality is yet to be tested.

Right to participate in legal proceedings

This aspect of access to administration of justice is guaranteed by the Constitution and is not highly restrictive or overly limited. The right to direct inspection of evidence and the standards by which this is ensured in Estonia was brought before the ECtHR in the case of Taal v Estonia. This case arose due to the fact that "neither the applicant nor his representative were enabled to question any of the witnesses at any stage of the proceedings and that none of the witnesses were ever examined by the courts."[27] Here the violation lay in the fact that not enough effort had been asserted by the court to ensure that the witnesses were summoned to court. In light of this judgment the courts have had to reconsider the

[24] Supreme Court, 3-2-1-73-05 (15.06.2005), paras 10-11.
[25] Supreme Court, 3-2-1-83-04 (16.09.2004), para 17.
[26] Equal Treatment Act (RT I 2008, 56, 315; RT I 2009, 48, 323), §8; Gender Equality Act (RT I 2004, 27, 181; RT I 2009, 48, 323), §4.
[27] European Court of Human Rights, Taal v Estonia (22 November 2005), para 35.

lengths that they go to in order to ensure the receipt of summons and other court documents, as they are in fact bound not only by the court decision but also by the Estonian Constitution to achieve "maximum possible level of certainty."[28]

State legal aid

Provision of support from the state to parties who have insufficient financial means in a legal dispute is intertwined with the principle of equality of arms as the lack of funds may affect a party's ability to obtain legal representation and cover legal costs entailed by proceedings. Paragraph 12 of the Constitution provides for the equality of all individuals or parties before the law, this is further supported by §7 of the Code of Civil Procedure which stipulates that "the parties and other persons are equal before the law and the court."

There are two separate and in principle unrelated financial issues in relation to court proceedings. The first are the court fees which are dependant upon the actual worth of the case or the amount being sought through the claim. Essentially the claimant will not reach court at all until the relevant costs have been covered. This is a considerable burden which may act as a barrier to access to administration of justice, especially since in certain cases the claimant may eventually be required to cover the respondent's legal costs as well. For this reason there is a possibility for the court to alleviate from payment of these costs in part or in whole, though the cases in which they may do so are very limited.

The second financial issue is that of payment for legal representation and this issue is potentially far more controversial. There are two factors to be taken into account: first, when the state should provide legal representation and, second, how effective the representation is in fact if provided.

Access to free legal representation is far from an absolute right under Estonian law, the provision of it is subject to extensive conditions regarding both the individual requiring it and the case at hand. Initially, it must be established that the person may not represent himself. This is determined by looking at the complexity of the case and whether the person is obliged to have legal representation by law due to the nature of the case these are just some of the conditions and restrictions.[29]

[28] Supreme Court, 3-2-3-10-05 (26.09.2005), para 12.
[29] Taavi Annus, *Riigiõigus* [Constitutional law], Juura 2006, p 400.

Individuals may apply for legal services at the expense of the state under the State Legal Aid Act (SLAA).[30] It is however only given in very limited situations, and the process of application for it and consequential revision of applications has proven to be very time consuming. In accordance with this act only sworn advocates can provide such services.

This requirement can be problematic from two points of view. First, as the amount of sworn advocates is quite limited in certain parts of Estonia, meaning that if the client is not happy with the advocate himself or the services that he provides the only option may be to search for such assistance in another region. This outcome is logistically unpractical and may also lead to further financial burdens upon the individual making the possibility to switch advocates under the SLAA rather ineffective in certain cases.

Secondly, the provision of state legal aid is voluntary for advocates, this combined with the fact that the fees charged for provision of services under the SLAA are set by the Ministry of Justice and are considerably lower than those that would be usually be charged, makes taking these cases extremely unattractive for the majority of successful advocates. This has created a situation where state legal aid is most likely to be provided by incompetent sworn advocates who are not able to find other clients.

The Chancellor of Justice has also come across a problematic instance where the appointment of state legal aid was effected too late.[31]

The Right to Timely Resolution of Disputes

Due to the organization of the court system and a large influx of cases there are still sometimes unacceptable delays in court proceedings, as noted by the Chancellor of Justice.[32] The efficiency must improve, but this requires significant resources and as such is a long term goal to be achieved through the reform of the system.

Independence of the Judicial Body

There are three aspects to the independence of the judicial body: the independence of the courts, the independence of the judges and impartiality to the case at hand itself. Each of these aspects is equally important and interdependent in assuring maximum level of impartiality. The independence of the courts is ensured by §146 of the Constitution. However, there have been concerns raised as to the influence of the

[30] *Riigi õigusabi seadus* [State Legal Aid Act] (RT I 2004, 56, 403; RT I 2009, 67, 460).
[31] Chancellor of Justice, Memorandum, no 7-1/060638/0606055 (09.2006).
[32] Chancellor of Justice, Reply to Inquiry, no 16-4/091365/0905176 (27.08.2009).

Ministry of Justice over the courts of first and second instance in administrative and budgetary matters, which could be used to achieve favourable decisions.

As to judges the primary issue is one that is the root of many problems in the Estonian legal system and that is the tightness of the legal community. For a long time there was only one university in Estonia that provided a higher education in law, which is the reason why the law community is concentrated. Therefore the issue of impartiality must be supervised profusely. A case related to this matter is Dorozhko and Pozharskiy v Estonia.[33] In this case a violation of article 6(1) of the ECHR was found due to the fact that the judge's husband had been the head of an investigating team involved in pre-trial work. It was held that it is very possible that the judge knew of her husband's involvement in the case and, although she may not have let this cloud her judgment, the appearance of such a possibility makes these circumstances unacceptable.[34] This case demonstrates the need for increased control and supervision to ensure that independence is guaranteed.

The issue of impartiality of judges has been raised also due to several scandals over the bribing of judges. On the one hand, it is commendable that such cases have been discovered and the offenders have been apprehended, but on the other hand, such scandals cause the public to question the trustworthiness of justice in Estonia. Since there are a number of these incidents, further analysis is needed on the motives for accepting the bribe and the possibilities available for prevention both through legal education as well as the appointment of judges.

Conclusions and Recommendations

Generally, access to justice is ensured in Estonia; though there is still room for improvement in guaranteeing this right. One way to improve the situation of right to appeal is to work out conditions, that judges would be able to rely on depending on specific circumstances, instead of a closed list prescribed by law.

In order to ensure better access to justice in areas, where there are fewer sworn advocates, application of certain measures should be considered (for example, increasing the compensatory allowances for state legal aid outside larger municipal centres). Further, with regard to promotion of diversity in Estonian legal community, a more proportional distribution of state-commissioned education between different academic institutions that teach law could be considered, as well as founding measures to

[33] European Court of Human Rights, 24 April 2008.
[34] European Court of Human Rights (reference 33), paras 55-59.

support education in foreign states.

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

Data Protection

The legal regulation of data protection in Estonia is in accordance with relevant European Union and international law. EU legislation has been implemented in full and there are no apparent deficiencies in the Estonian law covering this sphere. The area is primarily governed by the Personal Data Protection Act (PDPA),[35] though the right is likewise upheld by the Constitution of the Republic of Estonia.[36] The PDPA implements Directive 95/46/EC[37] in full since its amendment in 2008.

The Estonian Data Protection Inspectorate

The Estonian Data Protection Inspectorate (EDPI) was created by the PDPA as an independent institution working within the scope of governance of the Ministry of Justice. On a general note the EDPI has been seen to be relatively proactive in initiating complaints on its own accord and in trying to increase awareness among the public about the institution itself and data protection rights in general. The latter point is particularly important in light of the fact that public awareness of the rights and principles is notably low. The only survey that was conducted on this topic was in 2006 and it showed a lack of awareness of data protection regulation amongst both the general population and data processors themselves.[38]

Despite the fact that data protection law is of a good standard and that there are no blatant deficiencies some issues still ought to be considered in greater detail. The actual structure and administration of the EDPI raise several concerns. First, the fact that the budget of this institution is approved, amended and the execution assessed by the Minister of Justice. Second, the Director General is appointed to the position for a

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[35] *Isikuandmete kaitse seadus* [Personal Data Protection Act] (RT [State Gazette] I 2007, 24, 127; RT I 2007, 68, 421).

[36] *Eesti Vabariigi Põhiseadus* [The Constitution of Republic of Estonia] (RT I 1992, 26, 349; RT I 2007, 33, 210), §42 and 44.

[37] European Parliament and the Council Directive 95/46/EC 24 October 1995, on protection of private individuals on processing of personal data and free movement of such data.

[38] Turu-uuringute AS, *Elanikkonna ja asutuste teadlikkus isikuandmete kaitsmise*st [Citizen and Consumer Awareness of Protection of Personal data], December 2006, available at: http://www.aki.ee/document.php?id=115 (04.03.2010).

term of 5 years, appointment is done by the Government based on the recommendation of the Minister of Justice. Third, the EDPI field of competence is not limited to data protection, it is also the supervising authority for the Public Information Act that guarantees access to public information.[39]

The fact that the budget is under the control of the Ministry of Justice is a matter of concern in so far as it is possible that this influence could be used as an instrument of control over the EDPI. If the government were to use this to administer indirect control over the EDPI it could seriously impede its ability to act as an independent institution.

As to the manner in which the Director General is appointed, the selection process is purely in the hands of the Ministry of Justice and Government, which raises two issues. First, the transparency of the process is questionable, as it is dealt with in a purely internal manner. Second, the fact that selection lies in the hands of the government without supervision could lead to further compromise of the independence and impartiality of the institution. An example that demonstrates the fact that such concerns are well founded is the appointment of the new Head of the Estonian Data Protection Agency in 2008, where one of the many requirements for candidates iterated in the public competition was for them to be 'oriented to the interests of the state'.[40]

Finally, what may be called the dual functionality of the EDPI, namely, the fact that it deals with both data protection and access to public information. Essentially this means that one institution is dealing with two inherently different rights, the interests of which are somewhat opposed. There is a significant danger when one institution with a singular budget, body of staff and limited resources is dealing with two such opposing rights. It is questionable whether one of the rights will be favoured and the extent to which its data protection functions may suffer if it is not treated as being equally important as the other function. This danger is enhanced by the previous two issues regarding government influence over the EDPI.

As previously mentioned, the EDPI has been trying to deal with the lack of public awareness regarding data protection rights and principles. It must however be noted that there have not been any widespread campaigns that would necessarily catch the eye of the general public. The primary activity of the EDPI to this end has been the yearly conferences held on

[39] *Avaliku teabe seadus* [Public Information Act] (RT I 2000, 92, 597; RT I 2009, 63, 408), §44.

[40] State Chancellery, Open competition: Director General of Data Protection Inspectorate, 29.01.2008, available at: http://www.riigikantselei.ee/tan?id=73200 (04.03.2010).

data protection day.[41] Though such conferences are most certainly a step in the right direction, events of this nature are in practice more likely to attract persons already concerned with data protection than the general public. To conclude, in the future as this area of law becomes less of a novelty to Estonia, more serious and widespread measures should be taken to ensure the increase of public awareness.

Sanctions, Compensation and Legal Consequences

There are both criminal and administrative sanctions for the breach of data protection under Estonian Law (within the Penal Code[42] and PDPA respectively). The maximum fines, under the PDPA, for breach of personal data processing rules by legal persons has been increased tenfold from 2007. This ought to act as a rather effective deterrent to companies who consider the breach of data protection rules.

In practice the EDPI has proven to be quite reluctant to make use of sanctions, this is demonstrated in part by the extremely small amount of fines issued.[43] It would seem that they have favoured an approach of ensuring that the data processor comprehends and abides by the rules. Submitting a complaint to EDPI is free of charge: this should encourage individuals to come forward. The only apparent downside of this is the fact that after the complaint has been made the claimant has no influence over the actual proceedings as the EDPI takes the matter entirely into their own hands.

As to criminal sanctions for data protection related breaches there is reason for concern from two aspects. One, the level of expertise in this area within the police force is questionable and this puts the likelihood of effective application of the law under threat. Two, the provision itself is quite broad and without prior court practice there is plenty of room for interpretation, which increases the possibility of unintentional breaches of obligations. The lack of case-law in general in the area of data protection makes it hard to predict how willing the courts are going to be to provide compensation fore-coming cases, in particular compensation for non-material damage. As Estonian courts have proven to be reluctant to provide compensation for non-material damages for all types of claims, this a matter of concern.

[41] More information on conferences available at: http://www.aki.ee/est/?part=html&id=25 (04.03.2010).
[42] *Karistusseadustik* [Penal Code] (RT I 2001, 61, 364; RT I 2010, 8, 34).
[43] Statistics available at: http://www.aki.ee/est/?part=html&id=23 (04.03.2010).

FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Military Services and Alternative Service

Particular attention needs to be paid to protection of human rights in areas where human rights are curtailed more than in regular situations. One of such areas is the area of national defence, especially the compulsory service in Defence Forces.

The need for improved observance of human rights in the Defence Forces has been emphasised by the Chancellor of Justice, who made inspection visits to the Single Guard Battalion of the Infantry Training Centre as well as the Kuperjanov Infantry Battalion in 2008 and discovered several deficiencies in the guarantee of basic rights and freedoms to conscripts.[44] The Chancellor of Justice has made a total of four inspection visits to various institutions of the Defence Forces in 2009 (Signal Battalion, Tapa Artillery Battalion, Marine Base and the Logistics Battalion), but at the time of release of this report the findings of these visits bear the marking AK ("*ametkondlikuks kasutuseks*" – for departmental use), and are therefore unavailable to the public. During the course of the inspection visit in 2008 the Chancellor of Justice found fault with:

- Medical attendance to the conscripts: in order to see a doctor the conscripts had to divulge delicate personal data during a health check-up or to persons who lacked the legal right as well as legitimate need to handle this personal data;
- Living conditions: the conscripts could not use the lecture halls outside of study hours and had to study standing up in the hallway for lack of room, the conscripts were not allowed to use washing machines for doing their laundry, and since the commissary only accepted cash, the conscripts did not have the opportunity to use their subsidies;

[44] Chancellor of Justice, *Õiguskantsleri kontrollkäik JVÕK Kuperjanovi Üksik-jalaväepataljoni* [Chancellor of Justice's inspection visit to Kuperjanov Single Guard Battalion of the Infantry Training Centre], 15.10.2008, available at: http://www.oiguskantsler.ee/public/resources/editor/File/01_Kontrollk_ik_JV_K_Kuperjanovi__ksik-jalav_epataljoni__oktoober_2008.pdf (04.03.2010); and Chancellor of Justice, *Õiguskantsleri kontrollkäik JVÕK Üksik-vahipataljoni* [Chancellor of Justice's inspection visit to Kuperjanov Single Guard Battalion of the Infantry Training Centre], 08.02.2008, available at: http://www.oiguskantsler.ee/public/resources/editor/File/02_Kontrollk_ik_..._____ksik_vahipataljoni__veebruar_2008.pdf (04.03.2010).

- Use of physical exhaustion as a form of punishment (including collective punishment) and arbitrary refusal to issue town passes.

It is clear from the above that in order to ensure protection of human rights in Defence Forces control over this needs to be increased. The lawfulness of limitations to human rights, their proportionality and the legitimacy of the purpose of limitations must be checked and ensured.

Acts regulating service in the Defence Forces lack provisions which would prohibit LGBT persons[45] from entering into the service. There have been no known cases in the Estonian Defence Forces, at least no cases that have been made public, in which a person has not been recruited for service in the Defence Forces or has been released before due time because of their sexual orientation. Then again there is no statistics available as to how many LGBT persons serve in the Defence Forces.

Alternative service as an alternative to service in the Defence Forces

At the outset, it ought to be mentioned that unlike many other European states Estonia has decided to opt for compulsory service in the Defence Forces, for male citizens, and apparently does not have any plans to switch to professional Defence Forces. Even though compulsory service aimed at men breaches the principle of equal treatment of men and women, the area of planning of state defence is one where discrimination is allowed according to the norms of international human rights.[46] Then again, in a situation, where most European states have replaced the obligatory service in Defence Forces by professional Defence Forces, this standpoint may change.

The compulsory nature of the service in the Defence Forces stems from §124 of the Constitution of Republic of Estonia, according to which taking part in national defence is obligatory for Estonian citizens.[47] The Defence Forces Service Act specifies the conscript service obligation in §3 and states that the conscript service obligation lies on Estonian male citizens

[45] LGBT - Lesbians, Gays, Bisexuals and Transsexuals.

[46] A similar opinion is also shared by the Chancellor of Justice and the and the Gender Equality and Equal Treatment Officer. - see *Inimõiguste keskus* [Human Rights Centre], *Inimõigused Eestis 2007* [Human Rights in Estonia 2007], Tallinn 2008, p 19.

[47] *Eesti Vabariigi Põhiseadus* [The Constitution of Republic of Estonia] (RT [State Gazette] I 1992, 26, 349; RT I 2007, 33, 210), §42 and 44. Also see Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 1950, entry into force 1953, entry into force for Estonia 1996, art 9.

from ages of 16 to 60.[48] Since this obligation temporarily restricts anyone's right to freely choose an area of activity and employment (Constitution §29),[49] this exception to that specific right has been written into the constitution as well as Article 4 of the European Convention on Human Rights (ECHR), that prohibits forced labour.

In addition to prohibition of forced labour the conscript service obligation may also potentially restrict a person's right to freedom of thought, conscience and religion (ECHR, Art 9, Estonian Constitution §40). The Estonian Constitution entails an exclusion clause in the conscript service obligation and allows persons to go through alternative service in lieu of the conscript service on religious or moral grounds (§124 section 2). It is, however, unclear whether a state is obliged to have an alternative service to the conscript service according to international human rights norms or not. The European Court of Human Rights has only recently stated that it is not a duty of the state, whereas the UN Human Rights Committee has opted for the opposite position.[50] The Constitution of the Republic of Estonia prescribes in §124 the possibility of alternative service for those who refuse to undergo conscript service on religious or moral grounds.

Several important changes were made to the Defence Forces Service Act in 2008 and 2009: those changes were to do with alternative service. According to the explanatory memorandum to the draft legislation those changes stemmed from the need to update its regulation.[51]

Overview of the alternative service

Alternative service is, according to the Defence Forces Service Act, an alternative to persons eligible to be drafted who "have refused to serve in the Defense Forces for religious or moral reasons" (§4). Stemming from that the person performing an alternative service may not be forced to "handle weapons or other means of warfare…, or handle other means and substances which are intended for the extermination or injury of persons (§76(1)). Questions pertaining to alternative service are within the competence of the Ministry of Defence institution Defence Resources

[48] Kaitseväeteenistuse seadus [Defence Forces Service Act], RT I 2000, 28, 167; RT I RT I 2010, 7, 29.
[49] European Convention of Human Rights, art 9.
[50] Respectively, Bayatyan v Armenia (27 October 2009), para 63; and UN Human Rights Committee, General Comment no 22: The right to freedom of thought, conscience and religion (Art 18), UN doc. no. CCPR/C/21/Rev.1/Add.4 (30 July 1993), para 11; and UN Human Rights Committee, *C*oncluding observations of the Human Rights Committee: Estonia, UN doc. no CCPR/CO/77/EST (15 April 2003), para 15.
[51] Government of the Republic, Explanatory memorandum to the draft Amending Conscript Service Act , Health Insurance Act and Social Tax Act (Draft Act 289 III), p 1.

Department, where the person eligible to be drafted needs to file an application justifying his wish to perform alternative service instead of conscription service in the Defence Forces (§72).

According to the change that came to effect in 2009 the person will be notified about the alternative service at least one month before the commencement of the service (§39 section 9). Previously, the period of notification was one year, as is the case with conscription service. The change also introduced a trilateral alternative service contract, which is concluded between the person serving, the institution where the service takes place and the Defence Resources Department (§75^{2}). The list of places where alternative service may be served has also been extended and now the person serving the alternative service can serve with either a rescue institution within the governance of the Ministry of Internal Affairs, a social services institution of the state or the local government, or in a special needs study institution (§73). An important change is also that the person in alternative service will be paid a monthly grant, the amount of which has been set by the government, whereas the remuneration of the person used to depend on the wage level of the particular institution (§76(2^{1})).

The duration of alternative service is 16 months, whereas the conscript service lasts 9 months (11 months in some cases).[52]

Alternative service in the light of human rights

The regulation of alternative service in Estonia is problematic from several aspects in the human rights standpoint. These problems stem partly from an earlier time, but some problems arose due to recent changes. The main problems are the duty to prove one's convictions, unreasonably short notice of the commencement of alternative service and the longer duration of alternative service in comparison to conscription service. There are extremely few persons performing the alternative service in comparison to other states, which makes it likely that many people are serving in the conscription service instead of an alternative service against their religious or moral convictions for one reason or another. We shall now analyse the specific problem areas.

It is still required by law to prove one's religious or moral convictions and insufficient evidence may result in the person's application to perform an alternative service being denied. In addition to the obligation to justify

[52] Government Regulation no 241 of 25 July 2000 *"Ajateenistuse ja asendusteenistuse kestuse määramine"* [Determining duration of the conscript and the alternative service], according to §3 and §-s 1 and 2.

one's wish to opt for the alternative service, the Defence Resources Department will also question the person himself as well as persons close to him, his peers and his religious organisation (§72). The fact itself that the person needs to prove deeply personal beliefs may contradict the principles of freedom of conscience and religion.[53] It is also possible that the person's personal beliefs may not be confirmed. According to the Act, the Department has to make enquiries with the religious organisation, which makes the deduction possible that pacifistic convictions may only stem from a religion, which in term contradicts the wording of the constitution. These facts and dangers were pointed out even before the changes were made.[54] The research of State Chancellery from 2008 confirms that several European states that still have obligatory conscription service and alternative service (for example Finland, Denmark, Germany) have waived the justification obligation.[55]

The second problem of regulating alternative service has to do with the shortening the notification of commencement of the alternative service from one year (equal to the case with conscription service) to just one month (Defence Forces Service Act, §39 section 9). It is necessary, according to the explanatory memorandum to the draft legislation, since the nature of the alternative service requires the places to be filled immediately and "the possible service institutions have neither the interest nor the ability to wait one year until the person starts the alternative service".[56] However, such regulation does not take into account the interests of the person eligible for service. He needs to make arrangements in his life in order to go through the alternative service that lasts a year and a half and one month is a disproportionally short time for that. In order for the restriction to human rights to be lawful the person's

[53] For example, Human Rights Special Officer for Council of Europe has decided that the system, which requires the detainee to prove that their need for a special diet stems from their religion, is problematic from the point of view of religious freedom. – Human Rights Special Officer for Council of Europe, Memorandum to the Estonian Government - Assessment of the progress made in implementing the 2004 recommendations of the Commissioner for Human rights of the Council of Europe, CommDH(2007)12 (11 July 2007), para 29, available a: https://wcd.coe.int/ViewDoc.jsp?id=1163131&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679 (04.03.2010).

[54] Rain Liivoja, Annika Talmar, Varro Vooglaid and Martens Society, *Essee: Teenistus riigi hüvanguks: kuidas ja kellele?* [Essay: Service for the good of state: how and for whom?], Eesti Ekspress, 26.10.2006.

[55] Riho Kangur, *Asendusteenistus Eestis, Leedus, Saksamaal, Soomes ja Taanis. Riigikogu kantselei majandus- ja sotsiaalinfoosakond* [Alternative service in Estonia, Lithuania, Germany, Finland and Denmark. Economic and Social Council of Chancellery of the Parliament], no 15-3/044 (10 March 2008).

[56] Explanatory memorandum to the draft Act (reference 51), p 2.

and state's interests need to be balanced. It is important that the specific restricting measure fulfils the purpose stemming from the state's interest but also burdens human rights as little as possible. In this case Estonian law does not meet these conditions.

The biggest problem with the alternative service in Estonia is its length in comparison to the conscription service. The excessive length of the alternative service has been pointed out by the UN High Commissioner for Human Rights in his report about alternative service all over the world, as well as by the Human Rights Committee in its closing comments about Estonia.

The practice of the European Court of Human Rights has so far been somewhat different. The former Human Rights Commission has stated in their cases, that considering the less burdening nature of the alternative service and the danger that people may take advantage of the option given to them, it is reasonable that it is compensated by a longer duration in comparison to conscription service.[57] Releasing the person from the duty of proving their convictions, they are placed under another duty, which must guarantee that the alternative service is not taken advantage of. In Estonia the person goes through a stage that proves his convictions, and then goes through the considerably lengthier alternative service, which in other states fulfils the objective that in Estonia has already been achieved during the application stage. The length of the alternative service has been criticised not only outside of Estonia but also in Estonia.[58] Alternative service should not have a punitive effect,[59] but this, in fact, is the case in Estonia at the moment.

Alternative service is relatively unheard of in Estonia. An extremely small portion of persons eligible to be drafted have opted for this opportunity: as of December 31, 2009 only 20 men had gone through the alternative service.[60] This figure has gone up during the last year: 28 men started alternative service in 2009 and applications for conscript service to be replaced by alternative service were made on 20 occasions in 2009. That is still a very small number in comparison to, for example the statistics from Germany, where the number of people in alternative service is twice

[57] European Commission of Human Rights, N.C. van Buiten v the Netherlands (2 March 1987) and European Commission of Human Rights, Autio v Finland (6 December 1991).
[58] Liivoja *et al* (reference 52); Kaidi Toomsalu, *Asendusteenistus kui Eesti kaitseväeteenistuse alternatiiv: olulisus ja rakendatavus, bakalaureusetöö* [Alternative service as alternative to Estonian conscription service: necessity and applicability. Bachelor's thesis], Tallinn University 2008.
[59] Human Rights Committee (reference 50), para 15.
[60] Lilian Tukk (Adviser to Alternative Service,Defence Resources Agency), Letter 11.02.2010 no 9-5/1776.

that of men in conscript service.[61] The small number of people in the alternative service is particularly surprising in the face of the statistics from the Ministry of Defence regarding the attitude of the Estonian population towards alternative service. According to that nearly 80% of the people favour alternative service and that percentage has steadily continued to rise.[62]

There is some room for improvement in bringing alternative service into conformity with the requirements of human rights. The requirement for proving one's convictions should be abolished, the period of notice of commencement of alternative service should be prolonged and its duration should be made shorter so that it loses its punitive effect. Persons eligible to be drafted should also be notified of the option of going through an alternative service on religious and/or moral grounds and the cause of small number of persons opting for alternative service should be investigated.

[61] Aivar Engel, *Ajateenistuskohustus või kutseline kaitsevägi?* [Conscript service or a professional army?], Kaitse Kodu no 6, 2005, available at: http://www.mod.gov.ee/static/sisu/files/Kaitsemin_artiklid.pdf (04.03.2010).

[62] Ministry of Defence, Avalik arvamus ja riigikaitse [Public opinion and state defence] (compiled by Turu-uuringute AS), January 2010, p 54.

FREEDOM OF ASSEMBLY

Public Assemblies Act

Freedom of assembly is one of the most essential human rights that form the basis of a democratic society. It is closely tied in with several other human rights such as freedom of expression, which is considered to be the cornerstone of a democratic society along with freedom of thought, conscience and religion.[63] Freedom of assembly, along with freedom of expression is essential for providing or the protection of other human rights, as it allows people to stand up for their rights and demand that the state respects their rights through the use of these freedoms.

Constitution of the Republic of Estonia establishes freedom of assembly in §47: "Everyone has the right, without prior permission, to assemble peacefully and to conduct meetings."[64] A similar provision can be found in European Convention of Human Rights (Article 11)[65] and the UN International Covenant on Civil and Political Rights (Article 21).[66] It is, however, not an absolute right – it can be limited, and on certain occasions it has to be limited. The constitution, as well as the European Convention and UN Covenant, albeit worded slightly differently, allow restriction of the freedom of assembly in certain cases and pursuant to procedure provided for by law to "ensure national security, public order, morals, traffic safety, and the safety of participants in a meeting, or to prevent the spread of an infectious disease."

The main act that regulates freedom of assembly in Estonia is the Public Assemblies Act, which states that a public meeting as regulated by law is "a demonstration, meeting, picket, a religious event, procession or any other protest taking place on a square, in a park, on a road, in the street or any other public place in the open air" (§2).[67] This law came to force in 1997 but was in desperate need of updating and modernisation to bring it into accordance with current standards.[68] Ken-Marti Vaher, the chairman

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[63] European Court of Human Rights, Handyside v United Kingdom (7 December 1976), para 49.
[64] The Constitution of the Republic of Estonia (RT [State Gazette] I 1992, 26, 349; RT I 2007, 33, 210).
[65] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 1950, entry into force for Estonia 1996.
[66] International Covenant on Civil and Political Rights, adopted 1966, entry into force 1976, entry into force for Estonia 1992.
[67] *Avaliku koosoleku seadus* [Public Assemblies Act] (RT I 1997, 30, 472; RT I 2009, 62, 405).
[68] Ken-Marti Vaher, Records of the XI Parliament, III session, 4.06.2008 at 14:50.

of the Legal Affairs Committee of the Parliament considered the outdated act even unconstitutional when he spoke at the discussion of its amendment in 2008.[69]

Modernisation of the Public Assemblies Act

The constitutionality of the regulation of public assemblies came under doubt primarily in regards to the notification requirements of such assemblies. Thus far, the notification period had been seven days in most cases, which poses a problem considering that most protests are to do with topical decisions, which need to be reacted to immediately. "Certain assemblies and protests lose their actuality as time passes and from point of view of democracy it is essential to be able to show one's opinion faster".[70]

The amendments that came to force on July 13th, 2008 state that there are two deadlines for notifying of public assemblies, depending on the scope and nature of the assembly:

- A public assembly must be notified of to the local municipality government, the county government or the government of the Republic of Estonia (depending on the territory where the event will take place) at least four days but not earlier than three months in advance if it requires (§7 section 1):
  - Diversion of traffic;
  - Setting up a marquee, a stage, a tribune or some other construction of a large scale, or
  - Use of sound or lighting equipment;
- On other occasions the police must be notified of the assembly at least two hours in advance (§7 sections 2).

In specific cases public assemblies are not allowed (Public Assemblies Act §3, 5 and 8 section 6 and Emergency Act,[71] §27 section 1). Amendments of 2008 brought in new wording of Public Assemblies Act §3 section 3. Now a public assembly is prohibited if it "incites hatred, violence

[69] Ken-Marti Vaher, Records of the XI Parliament, III session, 4.06.2008 at 14:50. Also Silver Meikar's explanation for changing §4 p 2 of the draft. – the second readon, Draft Act 222 II, *Muudatusettepanekute loetelu politseiseaduse ja sellega seonduvate seaduste muutmise seaduse eelnõule* [Motion to amend the Police Act and acts connected to it] (04.06.2008), p 11.

[70] Silver Meikar, Records of the XI Parliament, III session, 4.06.2008 at 14:50.

[71] *Hädaolukorra seadus* [Emergency Act] (RT I 2009, 39, 262; RT I 2009, 62, 405).

or discrimination based on nationality, race, colour, gender, language, origin, creed, sexual orientation, political opinions or proprietary or social situations". In addition to Minister of Internal Affairs and the prefect who were stated in the previous act it is now also within the power of the Director-General of Police and Border Guard Administration to prohibit a public assembly (Public Assemblies Act, §8 section 7).

Regulation of the prohibition of public assemblies has been remarkably more flexible since the amendments to the act were made. The officials no longer have the duty to prohibit a meeting if it contradicts provisions of Public Assemblies Act, but they are given a certain amount of discretion to decide and even make proposals to the organisers of the meeting in order to bring the assembly into conformity with the law (§8).

Therefore, the changes made in the Public Assemblies act in 2008 constitute change in the right direction. The notification period for public meetings has been made shorter and it now enables the public to react to topical issues operatively. It is also a positive development that there is now more flexibility in a situation, where the public assembly or its notice does not comply with provisions of the law. The officials have the opportunity to decide, taking certain issues into consideration, whether to prohibit the public meeting from taking place or to make proposals to the organisers on how to bring the assembly or its notice into conformity with the law.

Application of Public Assemblies Act

Despite the generally positive changes in the Public Assemblies Act, the practice so far has demonstrated some shortcomings. In 2008 and 2009 the attempts of animal rights' activists to protest against using animals in a circus received media attention. The Circus Tour that travelled around Estonia was joined on both summers by animal rights' activists, who arranged protests at most stops of the tour.[72] The persons involved with the Circus Tour, who were tired of the protests, registered a protest of their own at the place where the tour stopped, thereby impeding the

[72] Merilin Kruuse, "*Loomakaitsjad korraldavad tsirkusevastaseid meeleavaldusi*" [Animal rights' activists hold anti-circus protests], epl.ee, 03.07.08, available at: http://www.epl.ee/artikkel/434428 (05.03.2010); Kerttu Kaldoja, "*Loomaõiguslased jätkavad tsirkusevastaste meeleavaldustega"* [Animal rights' activists continue with anti-circus protests], epl.ee, 05.07.08, available at: http://maja.epl.ee/artikkel/434602 (05.03.2010); Ott Heinapuu, *"Loomaõiguslased avaldavad Tallinnas meelt metsloomade kasutamise vastu tsirkuses"* [Animal rights' activists protest against use of wild animals in circus], epl.ee, 16.05.09, available at: http://www.epl.ee/artikkel/468722 (05.03.2010).

animal rights' activists from registering a protest.[73] This happened in 2008 as well as in 2009. Having registered their demonstration, they did not hide their true motives, giving comments on their plan in the press on several occasions.

Human rights and freedoms are not unrestricted and the freedom of assembly is no exception in this regards. Most of these rights can and should be restricted. The Constitution of the Republic of Estonia demands the honouring and the taking into account of human rights and freedoms of others (§19 section 2).

The international human rights treaties that are binding on Estonia have approached this subject from a slightly different angle – they prohibit people from using their rights and freedoms in a way that contradicts their meaning.[74] This rule has thus far been used in extreme situations concerning freedom of expression, assembly or association for the purpose of inciting racial hatred or in activity contradicting democratic public order.[75] The duty stated in the Constitution of Republic of Estonia has, at first glance, a wider application. The purpose of §19 section 2 of the constitution is to require persons to use their rights in a manner that respects the rights and freedoms of others.[76] If this requirement is ignored the state has the right and duty to react to it.

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[73] Kertu Kalmus, *"Politsei sekkus Hiiumaal toimunud loomaõiguslaste meeleavaldusse"* [Police interfered with animal rights' activists' protests in Hiiumaa], epl.ee, 25.07.08, available at: http://www.epl.ee/artikkel/436509 (05.03.2010); Kerttu Kaldoja, *"Tsirkuse Tuur blokeerib loomakaitsjate meeleavaldusi"* [Circus Tour blocks animal rights' activists' protests], epl.ee, 19.09.09, available at: http://www.epl.ee/artikkel/478301 (05.03.2010); Martti Kass, *"Loomakaitsjaid tõrjuv Viikna hakkas taimekaitsjaks"* [Viikna become plant rights' activist to repel animal rights' activists], Postimees.ee, 21.09.09, available at: http://www.postimees.ee/?id=166165 (05.03.2010); also see: http://www.suvetuurid.ee/taimedenimel/ (05.03.2010).

[74] Tarlach McGonagle, The Potential for Practice of an Intangible Idea, 13 Media Law and Policy 28, p 38. For example, European Convention of Human Rights (Art 17), Charter of fundamental rights of the European Union, Official Journal of the European Union 303, 14/12/2007, pp 1-16 (art 54), Covenant on Civil and Political Rights (art 5(1)).

[75] See for example European Court of Human Rights, Norwood v United Kingdom (16 November 2004); European Court of Human Rights, W.P. and Others v Poland (2 September 2004); European Court of Human Rights, Gustafsson v Sweden (25 April 1996).

[76] This provision has also been discussed by the Supreme Court: "Any use of basic rights is limited by §19 section 2 of the Constitution, which states that everyone has the obligation to honour and respect others' human rights and freedoms and follow the law in the course of enjoying their rights and freedoms" - Special Panel of the Supreme Court, 3-2-1-99-97 (1.12.1997).

The duty of the state stems from paragraphs 13 and 14 of the constitution, which affords everyone the right to the protection of the state; and thereby requires the state and local government to guarantee the rights and freedoms of persons. These provisions require the state (and the local government) to actively "protect anyone from interfering with activity of other people".[77] The state must actively apply the requirements stemming from law, but it also has to interpret the norms of law "in the light of the constitution".[78] Therefore, the law should not be applied automatically; it must also be ensured that the application of a specific norm is in accordance with human rights and freedoms guaranteed in the constitution under the relevant circumstances.

If a situation arises where the application of a norm of law brings about a restriction of a person's human right or freedom, the state has the duty to find a balance between the opposing interests.[79] The purpose of this is to find a solution that restricts the rights of everyone involved as little as possible and fulfils the purpose of the specific basic right or freedom as much as possible.

The conflict between the Circus Tour and animal rights' activists took place because of a distortion of the principle of freedom of assembly for personal gain. The persons involved with the Circus Tour, who were behind the pseudo-demonstration, clearly abused their freedom of assembly. This is clearly demonstrated by their statements in various media outlets.[80] They registered a public assembly in the name of protection of plants, not to hold a public meeting, but to restrict the animal rights' activists from holding a meeting of their own. Thereby these people violated their duty stemming from the constitution to honour and take into account other people's rights (§19 section 2).

Did this course of action create obligations for the state? According to the constitution, this created the obligation to protect the freedom of assembly of the animal rights' activists for the state (§13 and 14). Upon finding out the plan of people associated with the Circus Tour, the state should have taken action. The animal rights' activists could have sped up the process by notifying the local government of a public assembly that contradicts

[77] Taavi Annus, *Riigiõigus* [Constitutional law], Juura 2006, p 223; Rait Maruste, *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* [Constitutionalism and protection of basic rights and freedoms], Juura 2004, p 295.
[78] Annus (reference 77), p 223.
[79] Annus (reference 77), p 235-236; also *Eesti Vabariigi põhiseadus, kommenteeritud väljaanne* [Constitution of Republic of Estonia, commented] (second, improved edition), Juura 2008, p 129.
[80] Kaldoja (reference 73); Kass (reference 73).

with the constitution. The local government should have made a balanced decision between the interests of people involved and acted accordingly. A possible solution could have been to hold negotiations between organisers of two opposing public assemblies.

According to changes that came to force in the summer of 2008, the local government no longer has the absolute obligation to prohibit an assembly from taking place if it contradicts the provisions of Public Assemblies Act. The statement of grounds for the changes made emphasised relaxing of rules, which would allow officials a certain amount of room for consideration and the opportunity to make proposals to organisers (§8) that would remedy the situation. In this case the local government came to a conclusion that disregarded its scope of consideration and made an automatic decision not to register the assembly that was notified of later. According to the constitution the local government needs to depart from a persons' basic rights upon interpreting the law and in the case of collision try to balance opposing interests in a way that facilitates the realisation of everyone's rights to as great an extent as possible.

The local government failed to fulfil its duty stemming from the constitution. As a result, the persons wishing to use their human rights and freedoms purposefully were deprived of this opportunity. Yet persons who never intended to hold a public meeting were given that right. The local government should have known of the assembly's unconstitutionality (at least on the second occurrence in 2009 when persons associated with the Circus Tour repeated the 2008 incident, having notified the public of it through media previously). Therefore the local government was in breach of its constitutional duty and the animal rights' activists, who did not manage to register their meeting, had the right to demand the local government to protect their rights.

Conclusion

Organizing public assemblies has become a great deal simpler with the latest amendments and there are no great reproaches to the wording of the Act. However, there are still some matters of concern regarding the application of the act, as demonstrated by the Circus Tour incident. An important aspect is raising awareness amongst officials on the nuances of regulation of public assemblies.

RIGHT TO MARRY

Same-sex Partnerships

The issue of same-sex partnership came into the centre of public attention once again in the year 2008. The suggestion of Minister of Justice Rein Lang to regulate the relations of same-sex partners through a contract of partnership (in Estonian: *seltsingu leping* – not to be confused with civil partnership) received a mixed reaction.[81] However, as a result the question of a partnership act was raised and the Minister promised to begin work on it in 2009.[82] Marriage of same-sex couples is still beyond discussion – Prime Minister Andrus Ansip confirmed, that the government's position on it has been confirmed with the new Family Law Act. According to which, a marriage can take place only between a man and a woman, and marriages between persons of the same sex are invalid.[83]

The promise of the Minister of Justice was fulfilled in 2009 as Andra Olm's research on non-marital cohabitation and its legal regulation was published.[84] The research focuses on non-marital cohabitation in general, analyses related problems and various possible solutions, including the option of making a contract of partnership, as suggested by the Minister of Justice. At the moment, it is more likely that a partnership act will in fact be drawn up. However, work on an actual draft has yet to be started on.

In comparison to the average of European Union the public opinion on same-sex marriages in Estonia is conservative. If the average opinion poll in the European Union according to Eurobarometer is 44% for and 49%

[81] P.Luts, Lang: *samasoolised saavad ka praegu oma kooselu seadustada* [Samesex partners can legalise their cohabitation even now], ERR, 03.07.2008, available at: http://uudised.err.ee/index.php?06126808 (12.05.2009).
[82] Luts (reference 78). According to another source, the Minister of Justice promised to finish the draft legislation itself in 2009. – Kadri Ibrus, *Homopaarid saavad peagi kooselu seadustada* [Gay couples will soon be able to legalise their cohabitation], Eesti Päevaleht, 3.07.2008, available at: http://www.epl.ee/artikkel/434315 (7.08.2009).
[83] *Perekonnaseadus* [Family Law Act] (RT [State Gazette] I, 14.12.2009, 60, 395), §1(1) and 10.
[84] A.Olm, *Mitteabieluline kooselu ja selle õigusliku regulatsioon* [Non-marital co-habitation and its legal regulation], Ministry of Justice, 2009, available at: http://www.just.ee/orb.aw/class=file/action=preview/id=44568/Partnerlussuhted_anal%FC%FCs_09.07.2009.pdf (25.01.2010).

against, the figures in Estonia are 21% and 71% respectively.[85] Then again, according to European Social Survey of 2008, the public opinion was divided between 18% for and 60% against.[86] As the institutions carrying out the surveys are different, the results are not, strictly speaking, comparable. However, during the few years between the surveys, the amount of people, who have not reached a conclusion, does seem to have grown. That number has grown due to people who were previously against same-sex marriage changing their opinion. It could be said that the public opinion has become somewhat more positive.

According to the research of Ministry of Social Affairs 61,000 freely cohabitating couples were registered in the course of the year 2000 census (21.5% of all cohabitating couples). Ten of them were marked as same-sex couples. The LGBT community[87] itself offers the estimate of 300-400 couples.[88] All cohabitating couples (hetero- and homosexual) are plagued by the same insecurities – they lack the rights and obligations, which in Estonia usually accompany a marriage in Estonia.[89] Whereas, if heterosexual cohabitating couples in Estonia have the option of getting married and thereby eliminating these insecurities, the same-sex couples do not have access to this option or an option that would enable a similar outcome.

Human right to marriage

The right to marriage has internationally been recognised as a human right since the passing of the Universal Declaration of Human Rights.[90] Even though the Constitution of the Republic of Estonia does not include

[85] European Commission, Eurobarometer 66. Public Opinion in the European Union, December 2006, available at: http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.pdf (13.08.2009), p 36.
[86] L.Järviste, K.Kasearu, ja A.Reinomägi, *Abielu ja vaba kooselu: trendid, regulatsioonid, hoiakud, Poliitikaanalüüs* [Marriage and co-habitation: trends, regulations, stands, Political analyses], Proceedings of Ministry of Social Affairs no 4/2008, p 17.
[87] LGBT – lesbians, gays, bisexuals and transsexuals.
[88] Järviste *et al.* (reference 86), p 4.
[89] For example: social security and welfare services, ownership rights of residence, alimony to the partner that is on a less favourable position, assets (loans etc), questions of inheritance and questions arising with crossing borders (residence permit etc.), protection from domestic violence, partner's rights in case of a medical emergency (hospital visits, right to decide etc.). - Järviste *et al.* (reference 86), p 8-9.
[90] United Nations General Assembly, Resolution A/RES/217 (10 December 1948), available at: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/est.pdf (13.08.2009), Art 16(1).

this as a basic right,[91] Estonia still recognises this human right as it has signed the European Convention on Human Rights (Article 12)[92] as well as the UN International Covenant on Civil and Political Rights (Article 23)[93]. The right to marriage is regulated in Estonia by the Family Law Act and several other regulations that stipulate the formats of documents etc.[94] The meaning of this right, from the point of view of human rights, is constantly changing. What was meant by the drafters of the Universal Declaration of Human Rights or by the drafters of the European Convention on Human Rights is not necessarily how this right is understood now.

At least one thing, which is especially important for same-sex couples, has not changed since the drafting of the human right to marriage – the right to marriage is still reserved only for couples of opposite sex. All the core international documents word this right in a way that would allow the interpretation that same-sex couples also have the right to marriage. In spite of this the international organisations have found that at this stage the human right to marry can be relied upon only by couples of opposite sex.[95]

However, the fact that only couples of opposite sex can marry constitutes unequal treatment. European Court of Human Rights as well as UN Human Rights Committee have confirmed that this is direct discrimination

[91] *Eesti Vabariigi Põhiseadus* [Constitution of the Republic of Estonia] (RT I 1992, 26, 349; RT I 2007, 33, 210).

[92] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 1950, entry into force for Estonia 1996.

[93] International Covenant on Civil and Political Rights, adopted 1966, entry into force for Estonia 1992.

[94] Regulation no 159 of the Republic of Estonia in 19.08.1997 *"Perekonnaseisuaktide koostamise, muutmise, parandamise, taastamise ja tühistamise ning perekonnaseisutunnistuste väljaandmise korra kinnitamine"* [Drawing up, changing, amending, reinstating and nullifying of vital registration records and issuing of vitals statistics certificates] (RT I 1997, 62, 1067; RT I 2007, 67, 418); Regulation no 48 of the Minister of Internal Affairs in 07.07.2004 *"Perekonnaseisuasutusele esitatavate avalduste ja nende poolt väljaantavate tõendite vormide kehtestamine"* [Establishing formats of applications to the vital statistics office and to certificates issued by the office] (RT Appendix 2005, 33, 473; RT Appendix 2005, 51, 720).

[95] Joslin v New-Zealand, application no 902/1999, UN Human Rights Committee 17 July 2002 opinion, UN doc. no. CCPR/C/75/D/902 /1999; Christine Goodwin v United Kingdom, European Court of Human Rights 11 July 2002 decision, Reports of Judgments and Decisions 2002-VI; Karner v Austria, European Court of Human Rights 24 July 2003 decision.

based on sexual orientation.[96] Thus far these international institutions have accepted as justification for this unequal treatment the need to protect the concept of "traditional marriage and family". What this concept means exactly and what (and to what extent) needs to be done to protect it, is subject to change over the course of time.

The European Court of Human rights stated in its pivotal case of Christine Goodwin that marriage is not necessarily reserved solely for couples of biologically opposite sexes.[97] The case was about a transsexual, who applied for her right to marriage, after the operation she and her partner were of opposite sex (though conceiving in a traditional manner was impossible). Referring to Article 12 of the Convention, which guarantees the right to marriage and family, the court confirmed that the second part of the right is not necessarily dependent on the first. The couple's inability, according to the court, to conceive or have children cannot *per se* be the basis for denying them the right to marry. If one were to bring this conclusion to a more general level, one might say that the concept of "a traditional marriage or family" has by now achieved a far broader application in European human rights law. The traditional premise that marriage means the ability to have children together should no longer be a deciding factor against same-sex couples' right to marry.

Yet this was the argument that the Chancellor of Justice of Estonia relied on when asked for a statement on legalisation of family relations of same-sex couples in 2006.[98] As expected, he came to the conclusion that even though the preclusion of marriage for same-sex couples constitutes unequal treatment, this treatment is justified. The Chancellor found that "marriage is a sustainable unit, consisting of a man and a woman, who are capable of having offspring of their own and who are therefore guarantors of sustainable society." With that statement the Chancellor blatantly contradicted the practice of the European Court of Human Rights.[99] Even though there is no provision, which demands the extension the right to marriage to same-sex couples, the state can no longer rely on the argument of their inability to conceive children. This would preclude marriage for a rather large number of opposite sex couples, who, for

[96] UN Human Rights Committee, X v Columbia, application no 1361/2005, Committee decision of 27 May 2007, UN doc. no CCPR/C/89/D/1361/2005; Karner case (reference 95).
[97] Christine Goodwin case (reference 95).
[98] Chancellor of Justice, *Seisukoht samasooliste peresuhete seadustamise kohta* [Opinion on legalization of same-sex family relations], 01.2006 no 6-1/060166/0600782.
[99] Whereas, the opinion of the Chancellor of Justice does not even contain a reference to the Christine Goodwin case, which is considered the most notable and pivotal in ECtHR's practice in the last decade.

reasons not depending on themselves cannot have children or couples who do not want to have children. But the statement of the Chancellor of Justice seems to claim just that.

International law does not demand that same-sex couples be allowed to marry, nor does it rule out extending to them this institution on equal grounds with opposite sex couples. This possibility has been used by many states in the world – Belgium, Spain, the Netherlands, Canada, Republic of South Africa, Norway, Portugal, Sweden and some states in the USA (District of Columbia, Iowa, Vermont, Connecticut, Massachusetts, New Hampshire).[100] States that have taken this road must treat hetero- and homosexual marriages in an equal manner.[101] As they have waived the concept of "traditional marriage or family" having allowed same-sex couples to get married as such they have waived this justification and have the obligation to treat these couples equally to opposite sex marriage.

Recognition of same-sex marriage in Estonia

Estonia has made the choice of not extending the marriage institution to same-sex couples. The important question here is the status of marriages that have been concluded abroad. According to Private International Law Act, a marriage concluded in a foreign state is deemed to be valid in Estonia "if it is contracted pursuant to the procedure for contraction of marriage provided by the law of the state where marriage is contracted and the material prerequisites of the marriage are in compliance with the laws of the states of residence of both spouses".[102] So according to this provision a same-sex couple who have relocated to Estonia from a foreign state should retain their married status in Estonia. In the European Union, where freedom of movement is ensured in order to achieve a free common market, such a course of action is crucial.

EU Directive 2004/38, which was implemented in Estonia with Citizen of European Union Act,[103] grants "the spouse" automatic and unconditional

[100] ILGA, Lesbian and gay rights in the world, March 2010, http://ilga.org/Statehomophobia/ (13.03.2010).
[101] De Schutter, Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States, Part I - Legal Analysis, FRA 2008, p 59.
[102] *Rahvusvahelise eraõiguse seadus* [Private International Law Act] (RT I 2002, 35, 217; RT I 2004, 37, 255).
[103] *Euroopa Liidu kodaniku seadus* [Citizen of European Union Act] (RT I 2006, 26, 191; RT I 2009, 62, 405).

entry into the destination state (Art 2(2a)).[104] A Research paper of the EU Agency for Fundamental Rights came to the conclusion (and this was confirmed by European Parliament) that according to this Directive "a spouse" is a person married to the immigrant according to the law of the state where the marriage was concluded.[105] This may mean same-sex marriages, regardless of whether it is possible to conclude such unions in the destination state or not. The Ministry of Internal Affairs has stated it can see no reason why same-sex spouses could not be considered "spouses" within the meaning of Citizen of European Union Act.[106] The practice of this statement has not yet accumulated.

The absence of practice causes confusion, which would need to be clarified one way or another. Freedom of movement, one of the basic freedoms of European Union, is clearly impaired if moving from one state to another means lack of legal clarity for same-sex couples. In such an instance the couple would prefer to stay in the state where their rights are recognised. This may impede commercial activities, as well as hinder Estonia's diplomatic relations with states that have legalised same-sex marriage. This may also put Estonia in an awkward position if there are persons in the diplomatic corps who are in a same-sex marriage.[107] Even though they should be subjected to equal treatment to that afforded to opposite sex spouses in the face of law, it is unlikely Estonia is ready to do so. This is further exemplified by the new Family Law Act, which renders marriage concluded between same sex persons void (§10 p 1).[108]

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[104] European Parliament and the Council Directive 2004/38/EC, 29 April 2004, which deals with the right of citizens and their family members of European Union to move and live feely on the territories of Member States and which changes the Regulation (EMU) no 1612/68 and declares invalid the Directives 64/221/EMU, 68/360/EMU, 72/194/EMU, 73/148/EMU, 75/34/EMU, 75/35/EMU 90/364/EMU, 90/365/EMU and 93/96/EMU, Official Journal of the European Union L 158, 30.04.2004, pp 77-123.

[105] De Schutter (reference 98), pp 62-63; European Parliament's Resolution of 2 April 2009 on application of Directive 2004/38/EC (which deals with the right of citizens and their family members of European Union to move and live freely on the territories of Member States), point 2.

[106] FRA, Thematic Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation (Estonia), February 2008, pp 14-15.

[107] L.Kampus, *RE: Küsimus*, email reply to Marianne Meiorg, 13.02.2008.

[108] In addition to the problem of same-sex marriage, it is probable that Estonia's legislation does not fully comply with the requirements of EU Directive 2004/38. The Directive requires the entering into and living in a Member State of an immigrant partner in "a durable relationship, duly attested" to be "facilitated" (Art 3(2b)). For example, a registered partnership is essentially a relationship of that nature (proved by required documentation). Citizen of European Union Act] does not recognize the term "durable relationship, duly attested" and only recognizes relationships that can be classified either as marriage or household. Proof of belonging in a household requires different

The new Family Law Act affects mainly Estonian citizens who wish to marry a same-sex partner in a foreign state. This requires a document from the Vital Statistics Office certifying the absence of circumstances impeding marriage. This document not only states that the person is single, but it should also certify that the person does not have any other impediments by Estonian law that would prohibit the person getting married.[109] The rationale for such document is the need to guarantee legal certainty. According to the Chancellor of Justice: "Marriage, which is valid in one legal order and not in another, makes the consequences of this legal relationship unpredictable for the people who are married, as well as for other people. This contradicts the principle of legal certainty."[110] As it means that the certificate will not be issued to persons wishing to marry a same-sex partner, as this would not be possible under Estonian legislation, not even if it were legal in the person's state of residence.

The Chancellor of Justice has conceded that in practice this document may not serve the set purpose of legal certainty. The document does not state anything other than what has been communicated to the Vital Statistics Office at the time of issuing this document. For example, the person does not need to inform the Office whether the marriage was concluded in a foreign country after all. Moreover, the gender may not be clear from the name of the future spouse, and the document does not require that the sex is stated. Since the document is issued based on incomplete information, the foreign state may still conclude a marriage, which could not be concluded in Estonia under normal conditions.[111] Therefore, the principle of legal certainty is not achieved, which effectively means that the rule at hand is deficient, does not serve its purpose and needs to be reviewed.

Rights of same-sex couples

Even though the state does not enable same-sex couples to get married, this does not necessarily mean that they do not have the right to similar

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and much more thorough evidence. Moreover, the state has substantially wider discretion in deciding the nature of the relationship or their economic or physical dependency

[109] Minister of Internal Affairs 07.07.2004 Regulation no 46 *"Perekonnaseisuasutusele esitatavate avalduste ja nende poolt väljaantavate tõendite vormide kehtestamine"* [Establishing formats of applications to the vital statistics office and to certificates issued by the office] (RT Appendix, 98, 1559).

[110] Chancellor of Justice, case no 9-4/1012, *Õiguskantsleri 2005. aasta tegevuse ülevaade* [Overview of activities of Chancellor of Justice in 2005], 2006, p 270.

[111] Chancellor of Justice (reference 110), p 269; also Chancellor of Justice (reference 98), p 5.

rights and privileges as those which marriage would bring on. As a general rule, unmarried couples are not in a comparable situation with married couples and may therefore be treated differently, but the presumption here is that marriage is a possibility for the couple. The couples make a conscious decision to either benefit from marital rights and remissions or to forgo them.[112] Such free choice may only be relevant to opposite sex couples, as same-sex couples have this option only in a few select states. Therefore, in order to detect unequal treatment, comparing marriages of opposite and same-sex couples does not suffice. The trend in international law is to lean towards the opinion that curtailing marital rights for same-sex couples (if they are of permanent nature) constitutes indirect discrimination, if the institute of marriage is denied them in the state.[113] The UN Human Rights Committee has criticised the practice of states that prohibit same-sex couples from benefiting from certain marital concessions, for example a particular pension, which a spouse is eligible to.[114]

The European Court of Justice has compared marriage and a registered same-sex partnership in its Tadao Maruko case in 2008.[115] In that case Germany refused to pay a survivor's pension to Tadao Maruko after his partner died, because such pension was provided only to spouses. The court found that since the state had created an institution of partnership, which was comparable to marriage in all of its major features, then it may not treat it differently from a marriage.[116] Since Estonia is also planning on creating such an institution, this EU case should be considered in the drafting stages of this act.

At the moment, an issue of greater importance for Estonia is the comparability of marriage and cohabitation of same-sex couples. This question was deliberated on by two members of the UN Human Rights Committee in their joint opinion in 2002. Mr Lallah and Mr Scheinin generally agreed with the opinion of the Committee, which stated that according to international law the institution of marriage was still a heterosexuals' prerogative. But Lallah and Sheinin went further into this

[112] UN Human Rights Committee, Danning v the Netherlands, application no 180/1984, Committee decision of 9 April 1987 UN doc no CCPR/C/44/D/395/1990; European Court of Human Rights, Shackell v United Kingdom (decision of 27 April 2000).
[113] De Schutter (reference 101), p 56.
[114] UN Human Rights Committee, Young v Australia, application no 41/2000, Committee decision of 18 September 2003, UN doc. no CCPR/C/78/D/941/2000; and X v Columbia (reference 96).
[115] European Court of Justice, case C-267/06 (1 April 2008), Tadao Maruko v Versorgungsanstalt der deutschen Bühnen.
[116] Tadao Maruko case (reference 115), para 73.

question and analysed the rights of homosexual partners in a situation where they have not been given the right to marry.[117] They found that in such an instance, in order to identify unequal treatment (opposite sex) married couples and not married same-sex couples can be compared. They came to the conclusion that denial of certain marital rights for same-sex couples may, in certain circumstances, constitute unjustified discrimination. A research paper conducted by EU Agency for Fundamental Rights in 2008 reached the same conclusion.[118]

The situation in Estonia needs to be reformed in order to catch up with developments at the international level. The Ministry of Justice has confirmed that, in principle, there is no obstacle in recognising proprietary rights and obligations of couples who have come from a foreign state "stemming from a registered partnership, similarly to rights and obligations stemming from any contract."[119] It should be pointed out that this refers to rights/obligations in private law. Couples in non-marital cohabitation do not even have that option unless they conclude a contract to that effect. According to research conducted by the Ministry of Internal Affairs: "non-marital cohabitation is recognised by our law in the matters of family law on relatively unimportant questions".[120] The most important questions of family life such as property, children, alimony, issues pertaining to taxes or housing are entirely unregulated for couples in non-marital cohabitation. It is possible to regulate certain relations in civil law (for example property, housing or inheritance matters), but other questions are entirely beyond the remit of the couples themselves. This is also confirmed by the research conducted by the Ministry of Justice in 2009.

Worldwide trends

Estonia has a long way to go in terms of marriage and partnership. Although, at the moment Estonian legislation is in accordance with international law, an eye must be kept on the developments in the rest of the world. The European Court of Human Rights as well as the UN Human Rights Committee monitors the so called consensus of states in their practice. As a result of this principle, progress in other states brings about change in the interpretation of human rights. At the moment same-sex marriage is allowed in eight states and in six of the states of the

[117] Joslin case (reference 95), paras 15-16.
[118] De Schutter (reference 101).
[119] Chancellor of Justice (reference 110), p 266.
[120] Järviste *et al* (reference 86), p 12.

USA.[121] Even more states have taken the first step of allowing same-sex couples to register their partnership.

In many states, the road to same-sex marriage has been opened by the courts. Courts have been the ones to separate the right to marriage from the ability to conceive and to state that the ability to have children cannot be the only feature to define marital relationships.[122] The need to protect the concept of "traditional marriage or family" has also been dismissed, because it has been found that enabling same-sex couples to get married does not in any way hinder opposite-sex couples from marrying and forming a family in the traditional sense.[123] However, these arguments were still used by the Estonian Chancellor of Justice as the grounds for his opinion in regards to marriage of same-sex couples.

It is getting increasingly difficult for states to justify discrimination of same-sex couples in comparison to opposite sex couples. Arguments, which have been accepted thus far, are becoming less reliable. For example, the Constitutional Court of South Africa explained that the state has the obligation to promote equality on every level.[124] Precluding the possibility of marriage to same-sex couples or giving them the option of concluding a separate registered partnership does not fulfil this obligation, but rather creates a situation where same-sex partnerships are "separate but equal" – a concept that has been categorically abolished from inter-racial relations a long time ago. Such developments in the world increase the chance that if one were to lodge a complaint with a court based on the impossibility of same-sex marriage and go through all of the instances at the national level and then lodge a complaint with the European Court of Human Rights then by the time the Court reaches a decision the situation will have changed and the Human Rights Court may very well state that the right to marry belongs to same-sex couples as well.

[121] ILGA, Lesbian and gay rights in the world, May 1009, http://www.ilga.org/Statehomophobia/ILGA_map_2009_A4.pdf (7.08.2009)
[122] Halpern v Canada (A.G.), [2002] O.J. No. 2714 (Ont. Div. Ct.), paras 122, 130; Minister of Home Affairs and another v Fourie and another, South African Constitutional Court, case CCT 60/04, 1 December 2005, para 86.
[123] Halpern case (reference 122), para 121; Fourie case (reference 119), para 111.
[124] Fourie case (reference 122), paras 149-150; see also Halpern case (reference 119), para 107. Constitution of Republic of Estonia confirms the same if to view §12 with §14.

PROHIBITION OF DISCRIMINATION

Equal Treatment Act

The year 2008 was an important year for Estonia as it brought about changes in the application of the principles of equal treatment. The equal treatment principle is stated in §12 of the Constitution of the Republic of Estonia:

"Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds. The incitement of national, racial, religious or political hatred, violence or discrimination shall, by law, be prohibited and punishable. The incitement of hatred, violence or discrimination between social strata shall, by law, also be prohibited and punishable." [125]

However, a more concrete protection from discrimination is necessary to specify the implementation of this principle. Such protection is provided by the Equal Treatment Act (ETA) that was passed on December 11th, 2008 and came into force January 1st, 2009.[126]

Passing the Equal Treatment Act

The passing of ETA at the *Riigikogu* [the Parliament] did not go quickly and smoothly and is characterised by the procedure preceding the passing of the act. The draft of ETA had been in proceedings in the Parliament several times before it was passed. The first time the ETA draft was presented was to the session of September 24th, 2002 of the Parliament, but proceedings of the draft stopped with suspension of the second reading.[127] The proceedings of the next ETA draft (67 Draft Act) were not initiated again until 5 years later – on May 30th, 2007. Memorandum of the initiator to the ETA draft stated the following:

"In June 28th, 2006 the European Commission sent Estonia an official letter which concerned the implementation of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. In

[125] *Eesti Vabariigi põhiseadus* [Constitution of Republic of Estonia] (RT [State Gazette] I 1992, 26, 349; RT I 2007, 33, 210).
[126] *Võrdse kohtlemise seadus* [Equal Treatment Act] (RT I 2008, 56, 315; RT I 2009, 48, 323).
[127] Government of Republic of Estonia, explanatory memorandum to Equal Treatment Act (Draft Act 67 III).

January 3rd, 2007 the Commission sent Estonia an official letter which concerned the implementation of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The Commission was of the opinion in their official letters that Estonia is not fulfilling its duties under Directives 2000/43/EC and 2000/78/EC. The official letter signifies the first formal step in the infringement proceedings of Article 226 of Treaty establishing the European Community. Since European Commission has initiated infringement proceedings, the draft needs to be processed as quickly as possible."

Therefore, it can be deducted from the memorandum to the draft legislation that the main reason for processing the ETA was the infringement proceeding of the Commission.

The proceedings of the ETA draft initiated in 2007 (Draft Act 67) lasted for nearly a year and the third reading took place in May of 2008, but it was rejected from proceedings for lack of necessary support from the plenary assembly of the Parliament in May 7th, 2008.[128]

the Estonian Reform Party faction, Estonian Socialdemocratic Party faction, Isamaa and Res Publica Party faction decided to initiate the ETA draft again in the same form (Draft Act 262 III) on May 8th, 2008. The third reading by plenary assembly of the Parliament took place on October 23rd, 2008 and the Parliament decided to reject it.

On November 6th, 2008 the same factions initiated the ETA again in the same form. At the first reading of ETA on November 11th, 2008 the Parliament sitting was chaired by member of Estonian Reform Party Väino Linde, whose speech reaffirmed the claim that ETA is most of all needed because of the requirements of the European Commission:

"At this stage we cannot say that Estonia does not fight against discrimination, because we do not have provisions for it. Quite the opposite, it is written in our Constitution. the Estonian Constitution provides protection from discrimination … But as I said, it is not enough from the point of view of European Commission, they require a special Act. Because of that this Act is before you as a draft now."

Väino Linde repeated this statement once more in his speech:

"When we look back on the proceedings before the previous of a similar draft in the Parliament, our good colleague Urmas Reinsalu, performing in the name of IRL fraction stated that IRL does not really need this Act. I am

[128] Explanatory memorandum (reference 127).

sorry, but that was essentially his position and he explained that this Act was most of all necessary for the European Commission and precisely for Estonia's relations in the European Union. I am of this position today as well."

Such emphasis of the legislators on the necessity of the law makes it doubtful whether the legislators realise that the principle of equal treatment would not receive necessary attention by just being based on other Acts. All of the memorandums to the draft act make it rather clear that ETA is needed to present to the European Commission and for the reputation of state of Estonia and not for Estonian society. The necessity of ETA for Estonia's reputation was affirmed by Väino Linde in his speech on November 11th, 2008 having phrased it as follows:

"if we make this draft into an Act in the near future, one good thing will happen – namely the infringement procedure against Republic of Estonia initiated by the European Commission will not progress to the next stage. This is what we should be worried about. It does not leave a good impression of our state."

The purpose of the draft of ETA was supported by the Chancellor of Justice, but he found that the draft was in accordance with the subject-matter of European law rather than the Constitution of Republic of Estonia. The Parliament dismissed the opinion of Chancellor of Justice on the draft of ETA. The Chancellor also pointed out several deficiencies in the draft of ETA, like the list of grounds of discrimination, which is problematic in the light of the Constitution and international treaties. The Chancellor proposed opening up the processing area of the draft to ETA, providing protection in all aspects of social life and providing exceptions of non-application of the Act. The Chancellor of Justice found it a problem that provisions regulating a specific legal area are fractioned and divided between various legal acts.[129]

In order to leave a good impression of our state (if to quote the speech of Väino Linde), the Parliament passed the draft to Equal Treatment Act on December 11th, 2008 as an act of law with 55 (out of 101) votes in favour.

Changes stemming from the entering into force of the Equal Treatment Act

The ETA that entered into force on January 1st, 2009 brought about several changes in other Acts as well – such as the Estonian Employment

[129] Chancellor of Justice, *Õiguskantsleri 2008. aasta tegevuse ülevaade* [Overview of activities of Chancellor of Justice in 2008], Tallinn 2009, available at: http://www.oiguskantsler.ee/index.php?weeklyID=153&menuID=38 (05.03.2010).

Contract Act, Salary Act, Public Service Act, Government of the Republic of Estonia Act, Individual Labour Dispute Resolution Act, State Public Servants Official Titles and Salary Scale Act, Gender Equality Act.

Passing ETA had the most direct effect on the Gender Equality Act (GEA) and the institution of the Gender Equality Commissioner. Chapter 4 of ETA is dedicated to Gender Equality and the Equal Treatment Commissioner, including the appointment of the Commissioner, financing, administration, competence and providing of opinion. Until the entering into force of ETA there was one Gender Equality Commissioner in Estonia, but as ETA entered into force she became "Gender Equality and Equal Treatment Commissioner." This means that after the entering into force of ETA one Commissioner supervises both GEA and ETA (ETA § 15 section 1).[130] The memorandum to draft of ETA (Draft Act 384) provides

"Considering that there are not numerous breaches of human rights in Estonia, it is not reasonable to create separate institutions for different equality rights. The best solution would be creation of one Commissioner, whose tasks include protection of equality in general (irrespective of grounds of discrimination)."[131]

Thereby, now there is one Gender Equality and Equal Treatment Commissioner (from hereon Commissioner in this text) in Estonia, who deals with unequal treatment based on gender, nationality, race, colour, creed or opinion, disability or sexual orientation. Before January 1st, 2009 the gender equality Commissioner dealt with one area – gender discrimination, but now five more areas have been added.

The memorandum to the ETA draft (Draft Act 384) foresaw additional costs upon the entering into force of ETA, such as creating the Office of the Commissioner, creating additional posts and increasing operatiing costs (the prognosis of the Commissioner's budget was 4.4 million). The budget of the Ministry of Social Affairs for 2009 did not include additional resources allocated to the Commissioner, although it was promised.[132] According to the opinion of Minister of Finance, it is not expedient to allocate additional resources of state budget to a department, which has duties that have already been covered by other institutions or officials financed by state budget.[133]

[130] ETA (reference 130), §15 section 1.
[131] Explanatory memorandum (reference 127). Chancellor of Justice is of a similar opinion (reference 129).
[132] Ministry of Finance, Budget of Ministry of Social Affairs for 2009, available at: http://www.fin.ee/?id=366 (19 May 2009).
[133] Explanatory memorandum (reference 127).

At the Parliament's sitting of May 5th, 2009 Evelyn Sepp had the floor and explained Estonia's situation in the area of gender equality and equal treatment:

"…When we [in the Parliament] merged the areas of equal treatment and gender equality the previous year, it was supposed to bring about substantial increase in financial support of the activity of the independent Commissioner, so that she would be able to hire help. Despite this concrete promise, the situation is precisely the opposite: instead of adding one and one, she has lost quite a large fraction of her budget. We have, essentially, done something meaningless. In this form the institution is certainly not efficient."[134]

Contradictory positions exist on the necessity of funding the activity of the Commissioner and this brings about doubts as to the capacity of the Commissioner. Thereby the actual purpose – protection from discrimination – has not been achieved, because Estonia cannot provide sufficient funds and that severely impacts the institution promoting equality (the Commissioner), and the Commissioner's ability to carry out her role in promoting equality as well as helping the victims of discrimination. The events that took place in 2009 characterise the situation in Estonia regarding the prioritisation of the Commissioner's work and its funding. The efficiency of the Commissioner's activity was limited in 2009 by the cutting back of resources. Despite the need described in the draft to ETA for increase of the Commissioner's resources due to additional duties, her resources were decreased. In 2008 the Commissioner's budget was 950,000 kroons (60,716 euros), in 2009 the budget was 923,254 kroons (59,007 euros). There are only two people working at the office of the Commissioner: the Commissioner and an advisor, therefore the promise of additional human resources in the draft to ETA has not come to fruition. On the contrary, the budget deficit forced the Commissioner to work on a partial workload basis (75%) since May of 2009.

The decrease in funding of the Commissioner's activity and simultaneous addition of new areas of work indicate that the Commissioner's work does not belong among the priorities of the government.

The society, on the other hand, has shown more trust in the Commissioner, as confirmed by the number of inquiries made with the Commissioner. In fact, the number of inquiries nearly doubled in comparison to 2008 – a total of 161 inquiries were made in 2009. Most of them had to do with gender equality (77 inquiries). There were

[134] Records of the XI Parliament, III session, 5.05.2009 at 10:00.

substantially fewer inquiries on other grounds (nationality, disability, sexual orientation and other) – 47 inquiries. A third of these had to do with issues of equal treatment regarding employment. Many of the inquiries had to do with the principle of equal treatment in general without specifying an area of life or the ground of discrimination.[135]

Amendments to the Equal Treatment Act

ETA has come into force, but the Parliament has already held proceedings on the amendments to the Equal Treatment Act. Motions to amend the ETA covered a shared burden of proof and the opinion of Commissioner. The Draft Act 317 came to third reading on February 19th, 2009, was passed and forwarded to the President of Republic of Estonia. The President of Republic of Estonia refused to proclaim it stating that passing an act breaches the rules set in the Rules of Procedure of the Parliament Act to such an extent that it amounts to a significant distortion of the Parliament's resolution process and breach of the Constitution.[136] A new discussion of the said draft took place on March 11th, 2009 and decision was made to pass it in an unaltered form. The proceedings of Draft Act 317 began again, it was passed and it came into force on October 23rd, 2009.[137]

Legal protection guaranteed by the Equal Treatment Act

From point of view of the principle of equal treatment the passing and entering into force of ETA was a positive step towards protection of right to equality. It allows people to rely on a specific act that is in force in Estonia for protection of their rights, if they have been discriminated against based on nationality, race, colour, creed or opinion, disability or sexual orientation. Commissioner Margit Sarv has confirmed the need for a special act: "It is good to have equal treatment as a separate basic right and also protection from discrimination, which is based on a special act,

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[135] Information from the Gender Equality and Equal Treatment Commissioner.

[136] Resolution of the President of the Republic from 3 March 2009 no 440 *"Soolise võrdõiguslikkuse seaduse, võrdse kohtlemise seaduse, Eesti Vabariigi töölepingu seaduse, kohaliku omavalitsuse korralduse seaduse ja kohaliku omavalitsuse volikogu valimise seaduse muutmise seaduse" väljakuulutamata jätmine"* [Refusal to proclaim the Act that amends the Gender Equality Act, the Equal Treatment Act, the Employment Contracts Act, Local Government Organisation Act and the Local Government Council Election Act] (RT Appendix, 10.03.2009, 22, 284).

[137] *Soolise võrdõiguslikkuse seaduse ja võrdse kohtlemise seaduse muutmise seadus* [Act amending the Gender Equality Act and the Equal Treatment Act] (RT I 2009, 48, 323).

because the principle of equal treatment may remain in the background in the context of other acts, or the connection may not be seen."[138]

The ETA allows people to turn to courts or labour dispute committees in solving disputes of discrimination and demand compensation for damage. People can also turn to the Commissioner, who advises and helps people with lodging complaints regarding discrimination and gives opinions on possible cases of discrimination. People also have the right to turn to the Chancellor of Justice, who solves disputes of discrimination in the course of conciliation procedure, since the principles of equal treatment and equality are stated within the field of activity of the Chancellor of Justice.[139] The activity of Chancellor of Justice in promoting the principles of equality and equal treatment is regulated by the Chancellor of Justice Act, which specifies the duties of the Chancellor of Justice.140 Everyone has the right to turn to the Chancellor of Justice if he finds that he has been discriminated against on the basis of gender, race, ethnicity, colour, language, origin, creed or religious belief, political or other opinion, property, social status, age, disability, sexual orientation or other indication of discrimination by a natural or a legal person governed by private law (Chancellor of Justice Act §19).

52 inquiries were made with Chancellor of Justice pertaining to the principle of equal treatment in 2008.[141]

Principles of equal treatment in the Employment Contract Act

Year 2009 brought about radical changes in Estonian labour legislation. A new Employment Contract Act (ECA) was passed by the Parliament on December 17th, 2008 and entered into force on July 1st, 2009.[142] Upon the drawing up of this act, obligations stemming from EU law and international treaties and their incorporation into Estonian law were analysed. The area regulating relations between employers and employees includes the principle of equal treatment. The ECA §3 states the principle of equal treatment as follows:

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[138] Gender Equality and Equal Treatment Commissioner, "Võrdse kohtlemise põhimõtte rakendamine Eestis" [Application of principles of equal treatment in Estonia], speech on "Sotsiaalfoorumil - õigus võrdsele kohtlemisele Eestis" ["Social forum – right to equal treatment in Estonia] 30.11.2007, available at: http://www.svv.ee/index.php?id=478 (5.03.2010).

[139] ETA (reference 130).

[140] Õiguskantsleri seadus [Chancellor of Justice Act] (RT I 1999, 29, 406; RT I 2009, 15, 94).

[141] Overview of activities of Chancellor of Justice (reference 129).

[142] Töölepingu seadus [Employment Contracts Act] (RT I, 2009, 5, 35; RT I 2009, 36, 234).

"The employer must ensure the protection of employees from discrimination, follow the principle of equal treatment and promote equality according to the Equal Treatment Act as well as the Gender Equality Act."

Thereby the employer has an obligation stemming from law to follow the principle of equal treatment. The principle of equal treatment and non-discrimination has been stated in several areas regulating relationships between employers and employees. The employer is obliged to avoid discrimination even during the precontractual negotiations. ECA §11 states the order of precontractual negotiations in a way that prohibits employer from asking the applicant for information that he has no legitimate interest in. The explanatory memorandum to the draft ECA set out areas, where employer's interest may result in discrimination. Such areas are, for example, private data of the employee, their political and religious views, questions about employee's family planning, hobbies, opinions etc. Principles of equal treatment have also been stated in other contexts of the act, such as non-discrimination between a part-time and a full-time employee, discrimination between employers with employment contracts with a time limit and those with contracts without time limits.

The ETA has been passed and entered into force but it does not automatically result in better protection from discrimination. If people do not know what their right to equal treatment entails they are not able to stand up for this right, and in addition the representatives of vulnerable groups refrain from relying on legal protection because of the attitude of the enforcers of social and legal norms.[143]

As a conclusion, it can be said that equal treatment in Estonia is guaranteed by the Constitution as well as the Equal Treatment Act and Estonia has finally fulfilled its legal duty to implement Directives 2000/43/EC and 2000/78/EC. The adoption of the ETA filled a very important gap in the Estonian legal order, which was confirmed by the Chancellor of Justice.[144] Then again, it is not yet clear how effective this act will turn out to be in practice, especially in a situation where the resources assigned to the Gender Equality and Equal Treatment Commissioner are extremely limited.

[143] Explanatory memorandum (reference 127).
[144] Overview of activities of Chancellor of Justice (reference 129).

RIGHTS OF A CHILD

An important issue in the protection of children's rights in Estonia is the absence of legislation to suit modern needs. Even though work on the new Child Protection Act began in 2005, it had yet to be formed into a legal act by the end of 2009. The requirement of laying down implementing provisions stemming from paragraph 68 of the existing Act has not been fulfilled yet either.[145]

In 2008 and 2009 the majority attention was paid to custodial institutions for minors. Viljandi juvenile penitentiary was closed on May 1st, 2008 and the inmates were transferred to Viru and Tartu prisons. The Chancellor of Justice spotted deficiencies in the prison's work during his inspection visit in December: the juveniles were not given enough opportunities to communicate with their inspector-contact person and some of the children who were subject to compulsory school attendance were not attending school.[146]

Upon their unannounced check-up visit in May 2008 to the Puiatu Specialised School that operates under the governance of the Ministry of Education and Research, the advisers to the Chancellor of Justice found that use of the seclusion room, was in violation of the requirements stated by law for the treatment of minors and that subjecting children to such conditions constitutes inhumane and demeaning treatment.147 The Chancellor of Justice also reproached the school for frequent use of violence, incompetence of the management and the fact that students with mental disorders are not guaranteed special conditions. In addition to the aforementioned issues the Chancellor of Justice also found that the students are not guaranteed the basic right of protection of health and the students in composite classes are not guaranteed the right to education.

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[145] *Eesti Vabariigi lastekaitse seadus* [Estonian Child Protection Act] (RT [State Gazette] I 1992, 28, 370; RT I 2009, 62, 405).

[146] Chancellor of Justice, Viru Penitentiary inspection visit 02.12.-03.12.2008, December 2008, available at: http://www.oiguskantsler.ee/public/resources/editor/File/02_Kontrollk_ik_Viru_Vanglasse__detsember_2008.pdf (05.03.2010).

[147] Chancellor of Justice, *Kokkuvõte õiguskantsleri nõunike ja erialaasjatundjate etteteatamata kontrollkäigust Puiaty Erikooli* 12.05.2008 [Summary of an unannounced visit of advisors of Chancellor of Justice's and experts to Puiaty Specialised School 12.05.2008], May 2008, available at: http://www.oiguskantsler.ee/public/resources/editor/File/04_Kontrollk_ik_*Puiatu_Erikooli*__mai_2008.pdf (05.03.2010).

The Ministry of Education and Research closed Puiatu Specialised School on August 31st, 2009.[148]

An important step forward in protection of children's rights was the opening of the national 24-hour children's consultation helpline 116 111 in the beginning of 2009.[149] The helpline is there for the notification of children who need help and also to provide counselling. The Estonian Union for Child Welfare initiated a discussion in 2009 as to the need of creating children's obmudsman.[150]

Two investigations can be pointed out as steps made by the state towards dealing with juvenile crime. One investigation was carried out in 2008 on the effectiveness of the punishment of juveniles that analysed the nature and sources of background information, which is used for pre-trial reports and for basing judgments on, the practice of applying so-called alternative punishing measures and experts' opinion on whether the available measure of punishment are sufficient and the effectiveness of punishment aimed at juveniles.[151] There is also an analysis available on violent crimes committed in 2008, which were carried out by minors.[152] The analysis states that the practices in proceedings cases of juvenile violence may be inconsistent and advises the Ministry of Education and Research to ensure equal treatment of cases across Estonia and to establish a code of practice for schools for dealing with cases of violence.

[148] Ministry of Education, *Puiatu Erikool lõpetab tegevuse* [Puiatu Specialised School to close down], available at: http://www.hm.ee/index.php?0510500 (05.03.2010).
[149] See: www.lasteabi.ee (05.03.2010).
[150] Estonian Union for Child Welfare, *Lastekaitse Liidu noortekogu pöördumine Riigikogu poole. Seisukoht: Laste ombudsman* [EUCW Juvenile Assembly's inquiry with Riigikogu. Opinion: Children's Ombudsman], 7 December 2009, available at: http://www.lastekaitseliit.ee/?id=15764 (05.03.2010).
[151] Anna Markina and Maarja Märtson, *Alaealiste karistuste tulemuslikkus* [Effectiveness of punishment of juveniles], Institute of Public Law, Law department of Tartu University, Tallinn 2008, available at: http://www.just.ee/orb.aw/class=file/action=preview/id=37875/Alaealiste+karistuste+tulemuslikkus.+Tartu+%DClikooli+%D5igusinstituut%2C+A.+Markina%2C+M.+M%E4rtson+%282008%29.pdf (05.03.2010).
[152] Jako Salla, *Alaealiste vägivallakuritegevus* [Violent crimes carried out by minors], Department of Criminal Policy, Ministry of Justice, 2010, available at: http://www.just.ee/orb.aw/class=file/action=preview/id=49166/Alaealiste+v%E4givallakuritegevuse+anal%FC%FCs%2C+Justiitsministeerium.pdf (05.03.2010).

CIVIL SOCIETY

Development and Current Situation of Civil Society in Estonia 2008-2009

An essential aspect of securing human rights is the strength of the civil society. Attention needs to be paid to the right to organise and to the freedom of activity – that are the minimum standard for ensuring an environment for civil initiative. It is necessary to investigate what has been done and the progress made in the facilitation of such an environment for activity in states that have long-standing experience in promoting civil society in a more liberal manner. In addition to having the possibilities, it is important to spread the values that promote citizens' activity – public awareness of the essence of civil initiative, the various roles, potential and desire to take part in or support such initiatives are crucial. It is equally important that the initiators operate skilfully. Values, opportunities and skills have equal effect on the strength of civil society. Moreover, they are closely interlinked and failure in one department affects the success of the others. A closer look at the developments of all three parts during 2008 and 2009 follows.

The citizens' associations referred to in the context of Estonia are non-profit organizations and foundations that have been created on private initiative (the public sector also has the right to create them). The third, unofficial form is civil law contract of partnership, which traditionally marks smaller club-like undertakings but they also include various movements or frameworks (including virtual ones), which are not deemed necessary to be officially registered. Sometimes the contract of partnership is the first step in founding an official organization; sometimes it marks an impermanent form of cooperation that is dissolved when the objective has been achieved or when the participants lose interest, some civil law partnerships operate for years.

Any citizens' initiative is legally regulated by Acts of Non-profit Associations and Foundations, which were last amended in 2009 to give the members of such associations' greater control over the management boards of the organisations, and also to make annual statements public.[153] Generally the acts are supportive of the associations' liberty to operate and do not include any undemocratic limitations of operations, management or the freedom of expression of the organisations. It is easy

[153] *Mittetulundusühingute seadus* [Non-profit Associations Act] (RT [State Gazette] I 1996, 42, 811; RT I 2009, 54, 363); *Sihtasutuste seadus* [Foundations Act] (RT I 1995, 92, 1604; RT I 2009, 54, 363).

to found an organisation; it can be done on the Internet in a few days.[154] However, the issue of income tax incentive has become a problem in the last few years for organizations operating in the interest of the public. Making it onto this government-approved list[155] gives the organizations the right to income tax incentive on certain expenses and also makes donations in their name tax free for the donators. The condition for making the list is operating for charity and in public interest. But the Estonian Tax and Customs Board is strict in interpreting the first criterion and that makes it difficult for organizations, that make any profit through their activity.[156] The government, as well as various donors, have repeatedly expressed their want for citizens' associations to become more financially independent, as this would decrease the need for state funding. The limitation upon receiving income tax incentive hinders such development.

The essential principles for the development of associations' operations environment and for the cooperation between the public and the third sector were laid down in the Estonian Civil Society Development Concept that was drawn up on the initiative of Estonian civil society and passed by the *Riigikogu* [the Parliament] in 2002.[157] It stated the principles of equal partnership between the public sector and citizens' initiative and its independence, as well as setting more specific objectives for the following years. Relying on these provisions the Network of Estonian Non-profit Organizations has worked in areas of inclusion, funding of associations, delegation of public services, citizens' education, voluntary activity and other similar areas.

The principles of inclusion of citizens and their associations in the development of public policies were set with the Code of Good Practices on Involvement in 2005.[158] Some provisions demanding inclusion can be found in various legal acts, but the Code of Good Practices provides guiding material that cannot be set out in acts, such as who and how to

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[154] Website for registration: https://ettevotjaportaal.rik.ee/ (05.03.2010).

[155] Government Regulation no 279 of 22 December 2006 *"Tulumaksusoodustusega mittetulundusühingute ja sihtasutuste nimekirja koostamise kord ning asjatundjate komisjoni moodustamise kord ja töökorraldus"* [Order of compilation of Non-profit Associations and Funds eligible for tax incentives and creation and working order of committee of experts] (RT I, 61, 464). From 1 January 2010 the list confirmed by Government Order no 94 of 8.02.2000 (RT Appendix 2000, 21, 298) is applicable.

[156] Network of Estonian Non-profit Organizations has made such an observation on consultation of organizations.

[157] *Eesti kodanikuühiskonna arengu kontseptsioon* [Estonian Civil society Development Concept], Resolution of the Parliament of 12 December 2002, available at: http://www.ngo.ee/7337 (05.03.2010).

[158] *"Kaasamise hea tava"* ["Code of Good Practices on Involvement"] is available at: http://www.ngo.ee/11583 (05.03.2010).

include. This document can be considered one to promote and facilitate the culture of inclusion. One of the more important developments in recent years has been the creation and development of government's website for inclusion www.osale.ee, where the participants can comment on drafts drawn up by ministries as well as put forth ideas of their own and give support to the ideas of others. Training for hundreds of state and local government officials has also taken place and various study materials have been published.[159] Inclusion or lack of inclusion in shaping public policies is also one of the issues constantly discussed in media.

Even though inclusion by the government improves each year, two major problems can be identified. First, issues that governing parties have a clear political preference for and where public discussion is not desired. Second, inclusion in Estonia is usually limited to the consultation stage, where a draft previously put together by officials is presented for public discussion. These texts are difficult to understand for people without a legal background, moreover the discussion is forced to take the shape presented by the draft. Citizens and their associations would be more able to participate in the discussion if their opinion were asked before the draft is put together and if easier forms of participation were used, such as roundtable discussions, polls, open forum, citizens' forums etc. The same problems exist on a local level, though the situation there varies depending more on the people in charge – some local governments cooperate well with citizens, some do not.

The most remarkable changes in funding in the previous years is the establishment of two new funds in the beginning of 2008 – The Civil Society Foundation is funded from the state budget[160], Norway-and the European Economic Area Non-governmental Organizations Fund (which will cease to exist in 2010 and its possible continuation is uncertain).[161] These funds have distributed about 70 million kroons (4.5 million euros) to benefit the development of civil society within two years. It is important to point out that this money has not been distributed just for carrying out projects in the area, but also to activities that should facilitate the organisational ability of associations' environment. One of the basic hindrances in the development of associations is the dominance of project-based funding. Even though it is justified as a method of funding for several activities, it means that in the case of scarcity of support for

[159] For example: *"Poliitikaanalüüsi ja huvirühmade ning avalikkuse kaasamise meetodid"* [Methods of political analysis, interest groups and involvement of public], Praxis, 29-30 October 2010, available at: http://www.praxis.ee/index.php?id=138 (05.03.2010).
[160] Website of Civil Society Foundation: www.kysk.ee (05.03.2010).
[161] Information on Non-governmental Organizations Fund is available at: http://www.oef.org.ee/programmid/norra.html (05.03.2010).

activity opportunities (applied to few areas and relatively few organisations at the moment), the majority of citizens' associations plan their activities around project competitions and therefore do not evolve enough as organisations. The problem with several of the funding opportunities (most of all from EU sources, but also from several national ones) is the time spent on administration – it is likely that this is the reason some organisations refrain from applying, which in turn weakens the competition or they spend an inordinate amount of time on bureaucracy, which means the work itself suffers.

The government itself lacks a clear overview of figures and the outcomes of funding – since various ministries have different practices, the whole picture can only be seen as a result of research conducted every now and again. The government is preparing a conception of state funding for associations, which is expected to solve this problem; however, it is evolving very slowly.[162]

The same could be said, to a large extent, about the most essential point of cooperation between the public sector and citizens' associations – delegation of public services. Like funding, delegation of services is not a rare or a new occurrence – according to a survey presented in 2009 the services are delegated by 60% of local governments that comprise of 87% of Estonian citizens.[163] The problem is the lack of a common system and the different understandings of potential that goes along with delegation between the parties. The public sector sees it as a favour to citizens' associations and an opportunity to cut costs. The third sector emphasises its role as providing a better quality service. For various reasons the service contracts are often project based – short term and meant to cover direct costs, which give the service provider no certainty or opportunity for development. The result here, as with funding, is that a great deal of potential is not being put to use.

There is a rather good framework of umbrella organizations for various areas and the associations work together to achieve common goals. There is a development centre in every county, that provides free

[162] More information on state funding of citizens' associations is available at: http://www.siseministeerium.ee/rahastamine/ (05.03.2010).

[163] Ministry of Internal Affairs, *Analüüsi lõpparuanne: Kohaliku omavalitsuse üksuste avalike teenuste lepinguline delegeerimine kodanikeühendustele* [Final report of the analysis: contractual delegation of public services to citizens' associations by units of local government], July 2009, available at: http://www.praxis.ee/fileadmin/tarmo/Projektid/Valitsemine_ja_kodanikeühiskond/Avalike_teenuste_delegeerimine_KY/SIMDEL_aruanne_SIM_le_korrektuuriga_finalver2.pdf (05.03.2010), p 7.

consultation and training, but many associations are not aware of this.[164] A large portion of the activity of development centres is aimed at the needs of associations that are starting out, leaving the tackling of problems at further stages to the associations.

Opportunities to act are closely tied in with values, or the desire to act as active citizens as well as the skills to do it. The spread of values is mostly connected to increase in standard of living and good existing examples. The great citizens' activity of the end of 1980s was followed by a low, which has been replaced by a clear increase in the last decade. The economic recession of the last two years has not had a negative impact. The survey presented in 2009 showed that most citizens' associations' sources of income originating from other organisations such as the state, local governments and enterprises had decreased, but not that from private persons.[165] The number of volunteers had decreased in just 4% of the associations, but increased in a third of associations. The *"Teeme ära"* (Let's do it) initiatives probably had a significant effect: a rubbish clearing initiative with 50,000 participants in 2008 and the ideas' initiative with 12,000 participants in 2009. In addition to a firsthand positive experience for the participants, the initiatives also received wide media coverage, being probably the most talked about citizens' initiatives over those years. Increase in professionalism of the organisations brings about increased ability in "public visibility" and public inclusion.

Yet, it is the organisation's operative ability and most of all the level of professionalism of the management that is probably the most crucial point that needs to be improved on in Estonia's third sector. It is partially caused by the environment described, yet the ability of citizens' associations to participate in developing public policies, providing services, developing independent financial modes and including people in their activities also leaves for a lot to desire within the limits of this environment. Even though there are more well-managed and operative citizens' associations each year, whose activities are influential, who find media coverage and who are held as examples, most associations are still operating in a rather haphazard fashion, setting out from existing possibilities, not considering their needs and actively working on creating the possibilities for carrying them out.

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[164] More information on development centres in counties is available at: http://mak.eas.ee/ (05.03.2010).

[165] Network of Estonian Non-profit Organizations, *Uuringu aruanne: suutlik sektor* [Report of research: capable sector], Tallinn 2009, available at: http://www.ngo.ee/orb.aw/class=file/action=preview/id=28056/Suutlik+sektor+raport.pdf (05.03.2010), p 10-11.

Therefore, the development of citizens' education in Estonia is also crucial, in addition to solving the aforementioned practical questions: in contributing to people's desire to act as good, active and caring citizens irrespective of their place of work and in making talented and capable people see self-realisation in the third sector as a viable possibility.

CONCLUSION

2008 and 2009 brought about change in several areas connected to human rights, which were discussed in this report on various levels of specificity.

The positive developments that strengthened the protection of human rights in Estonia were:

- Considerable simplification in organising public assemblies in 2008: most public assemblies may be held upon just two hours' oral notice. The refusal to register a meeting is no longer absolute and the emphasis has been placed on negotiations, which would bring the meeting in line with the law.
- Discussion on regulation of same-sex couples' relationships has been initiated: The Ministry of Justice concluded an analysis on non-marital cohabitation, which looked at various methods of regulating such relationships. It was proposed in the course of discussion that a partnership act be created; however, work on preparation of a draft has not begun yet.
- A great step forward in non-discrimination area was made by the adoption of the Equal Treatment Act, even though the law was passed due to the pressure from the European Commission. It contains somewhat problematic provisions and the implementation is not effective enough, it is still a step forward, now that the principles of equal treatment are stated in detail in Estonian law. This affords victims of discrimination better legal protection than before.
- Positive changes in the domain of civil society in 2008 and 2009 came with increased financing opportunities from the Civil Society Foundation and Norway-EEA Non-governmental Organizations Fund. These measures are primarily aimed at increasing the ability of citizens' associations to function.

There are also several ongoing shortcomings and new problem areas:

- The option of detaining repeat offenders post sentence has been created. Even though work on the problem of repeat offenders constitutes as progress in ensuring public order, the specific measures chosen potentially contradict human rights in several aspects. For example, it may contradict the practice of the European Court of Human Rights to apply post-sentence

preventive detention in a situation, where specific issues of rehabilitation have not been addressed.

- In the area of administration of justice there is an ongoing problem concerning legal aid, which may not provide everyone with an equal opportunity to turn to court and be represented (especially outside larger towns). The small number of lawyers in Estonia and corporate nature of the bar mean that possible conflicts of interests should be closely supervised. Access to justice would also improve if the limitations on *locus standi* of third parties were not as restrictive.
- There is room for improvement in protection of human rights in Defence Forces, which has also been pointed out by the Chancellor of Justice. The problem is primarily the length of alternative service in comparison to the standard service in Defence Forces, which is also indicated by the small number of people who have opted for the alternative service. There are also other problems with alternative service: personal moral and religious beliefs must be proved and upon insufficient proof the state may refuse the option of alternative service.
- There is still no option available for same-sex couples to regulate their relationship in a manner that is equal to marriage. A new Family Law Act has been adopted, which precludes same-sex marriage and thereby contradicts general trends in the world.
- Despite the adoption of the Equal Treatment Act there is no general political will to deal with issues of non-discrimination. This is indicated by the decrease in resources allocated to the Gender Equality and Equal Treatment Commissioner.