Estonia

Chancellor of Justice

Independence and effectiveness of the NHRI

International accreditation status and changes in the national regulatory framework

The Chancellor for Justice of Estonia is a non-accredited associate member of ENNHRI. In January 2019, new legislation on the institution came into force, which broadened its mandate to allow it to act as the NHRI in Estonia. The Chancellor of Justice has a broad and strong mandate, including as the National Preventive Mechanism (NPM) under UN CAT, the National Monitoring Mechanism (NMM) under the UN CRPD, and it also performs the functions as the Ombudsperson for Children.

The Chancellor of Justice recently applied for accreditation and was up for undergoing the process in March 2020. However, the accreditation session was postponed due to the outbreak of COVID-19.

Checks and balances

Political parties and the Political Parties Act

In 2018/2019 the Chancellor had to assess several shortcomings in the Political Parties Act that the Political Parties Financing Surveillance Committee has had to deal with in its work. One of the shortcomings in the Act concerns **sanctions laid down for political parties for accepting a prohibited donation**, which in the Chancellor's assessment are not clear, implementable or effective. This is contrary to the principle of legal clarity. The Chancellor contacted the Minister of Justice with a request to initiate amendment of the Political Parties Act.

The Political Parties Financing Surveillance Committee asked for the Chancellor's opinion as to **restrictions on office and activities by members of the Committee**. The Chancellor found that the Political Parties Act does not prohibit appointing a person connected with a political party, including a member of the board or of the audit committee of a political party, to be a member of the PPFSC. Persons otherwise connected with a political party, for

example an attorney providing services to a political party, may also serve as members of the PPFSC. In the interests of independence of the Committee, such restrictions should be considered, but the decision can be made by the Riigikogu.

Elections

Since elections in 2019 took place for the Riigikogu as well as for the European Parliament, many election-related issues were raised. The Chancellor was asked to check whether the **Estonian electronic voting system meets the requirements for democratic voting**. The Estonian Constitution stipulates that elections must be free, uniform, general, direct, and secret (§ 60). These principles must also be respected in the case of electronic voting. For this, electronic voting must comply with the following conditions: a voter's identity and eligibility to vote is established, each voter has one vote, a voter is able to vote freely, secrecy of the vote is ensured, the vote cast is counted, and the results of voting and elections are correctly established. In brief: the system must ensure an honest result and, in the interests of credibility, monitoring and verifying it must be possible. The Chancellor explained that the system of electronic voting in Estonia complies with the constitutional principles set for elections. Individual verifiability of a vote is not an end in itself. This is also not possible when voting by paper ballot. In order to reduce the risk of selling votes, Estonia uses a system of combined control in electronic voting. Certainly, the technical solution (including verifiability) for electronic voting needs continuous critical assessment and development. Also important are maximum transparency and clear explanation of the system for the public.

Several people asked the Chancellor whether **secrecy of voting is indeed ensured in Estonia**. The Chancellor explained that the procedure for electronic voting (§ 484 Riigikogu Election Act) meets the principle of secrecy of elections (§ 60(1) Constitution). Secrecy of voting is intended to ensure freedom of election. On the one hand, secrecy of voting means anonymity of the vote and, on the other hand, privacy of voting. In the case of electronic voting, the anonymity of a vote is ensured through encryption of the e-vote. To ensure privacy of voting, a so-called virtual polling booth has been created, meaning that a voter may also change their vote when voting electronically.

One individual contacted the Chancellor doubting whether it was lawful that during advance voting outside the polling division of the voter's residence a person is given two envelopes, one of which has the voter's personal identification code written on it. The Chancellor affirmed that a voter's identity is not linked to their choice through that envelope. The outer envelopes with the personal identification code and the inner

envelopes with the ballot paper are not opened at the same time. Noting a voter's data on the outer envelope is necessary because that way the polling division committee of the voter's residence can verify that the voter has not voted several times.

During the last election, confusion arose from the **new Population Register Act**. This resulted in a situation where some people could not vote due to absence of their residence data. That is, at the beginning of 2019 earlier residence data changed at the request of the owner of a dwelling and recorded in the register to a level of accuracy stating the city, city district or rural municipality or settlement unit became invalid. As voter lists are drawn up on the basis of the population register data, people who had not renewed their data were excluded from the list of voters. The Chancellor explained that during an election a person's residence can be registered through a simplified procedure; based on a notice of residence submitted during the election a person's address is entered in the population register immediately, and if necessary also to the level of accuracy of a city, city district or rural municipality. After that the person is also entered on the list of voters.

The **prohibition on political outdoor advertising** during the active campaign stage caused confusion because of the very close temporal proximity of elections for the Riigikogu and for the European Parliament. The Chancellor was asked to assess the opinion of the Police and Border Guard Board according to which outdoor advertising of the European Parliament election was also banned during the Riigikogu election. The Chancellor found that the opinion was not contrary to the law. Those running in the Riigikogu election cannot circumvent the prohibition on outdoor advertising that way. If an advertisement presents an independent candidate, a political party or a person standing as a candidate on a political party list running in the Riigikogu election, or their logo or distinctive mark and programme, this cannot be substantively distinguished from advertising in the Riigikogu election.

Therefore, it should be regarded as advertising for the Riigikogu election even if the advertising has an additional purpose. Since the restriction on outdoor political advertising does not fulfil aims set beforehand and restricts the rights of candidates to introduce themselves, the Chancellor repeated the proposal to abolish the restriction in her written report to the Riigikogu. The Chancellor also asked the Riigikogu to abolish the prohibition on active campaigning on election day (except in or close to polling divisions), as this no longer corresponds to the current situation. Ever more people use the opportunity to vote before election day and it is also very difficult if not impossible to control dissemination of advertising in social media on election day. By the time of drawing up the annual report,

the Government had approved the proposals prepared by the Ministry of Justice to abolish the restriction on outdoor political advertising and the prohibition on campaigning on election day.

Prior to the 2019 Riigikogu election, the Richness of Life Party contested a provision in the arrangement established by the Board of the Estonian Public Broadcasting (ERR), on the basis of which the ERR gives **preference for participation in election debates on its main channel** (i.e. ETV) to political parties submitting a full list, i.e. including 125 candidates. The Richness of Life Party claimed in its complaint that since the election legislation in force in Estonia does not recognise the concept of a "full list" the ERR has also no right to distinguish between political parties based on such a parameter or discriminate against any of the political parties. The Chancellor replied to the Richness of Life Party that the ERR has the right and under the Estonian Public Broadcasting Act also the obligation to establish rules for covering election campaigns on its channels. In doing so, all political parties and independent candidates should be ensured an opportunity to present their views on ERR channels before the election.

The ERR also has the obligation to ensure the journalistic content and wide audience appeal of campaign programmes (including debates). Thus, in the specific case, the ERR violated neither the Constitution nor the law. However, the Chancellor conceded that the ERR should be consistent and predictable in its rules on covering campaigns and should not change the rules. By establishing the requirement of a "full list" for participation in some election debates, the ERR indirectly directs political parties to expand their lists. Since a deposit is payable for every candidate, which, in the event of failure to exceed the election threshold is non-refundable to political parties (or to independent candidates), this entails a considerable financial risk for political parties not represented in the Riigikogu (and not receiving support from the state budget) as well as smaller political parties.

The Chancellor recommended that the Riigikogu should consider whether **the requirement of a deposit** imposed on political parties participating in the Riigikogu election is justified. Establishing the requirement of a deposit was motivated by the wish to avoid fragmenting the political landscape while seeing strong, stable and economically well-off political parties as participants in the political process. It was also considered important that votes are not dispersed between the candidates of too many political parties in elections and that an excessive proportion of votes not remain below the election threshold. The election threshold functions effectively as a measure to avoid fragmentation of the Riigikogu and the consequent risk of internal political instability. However, a uniform

amount of deposit is financially more burdensome on new and smaller political parties which, inter alia, do not receive support from the state budget. This results in an unequal situation before elections and may therefore diminish the desire of smaller and new political parties to run in elections.

The Chancellor also drew attention in her report to the difference in the number of mandates distributed in electoral districts and recommended that the Riigikogu should consider changing electoral districts so as to equalise their size based on the number of voters. The Riigikogu could also consider the possibility to rephrase § 6 of the Riigikogu Election Act and, as of the 2023 Riigikogu election, assign the duty of forming electoral districts to an independent institution, such as the National Electoral Committee. Such a decision would curb the effect of current politics and political party preferences on the organisation of elections and would facilitate implementing changes.

Public information

The Chancellor's Office analysed information provided by cities and rural municipalities on their websites about social services which local authorities are required by law to organise for their residents. Information must be sufficient, accessible and understandable, and diverse modes of providing information should be used. An individual who is not aware of their rights cannot exercise them (memorandums to Tartu City Government, Maardu Town Government, Tartu Rural Municipality Government).

Public access to municipal council sessions means that everyone may, on the spot, observe voting on agenda items of interest to them. A decision by a municipal council chair to remove from a council session people observing a debate on a public agenda item is not compatible with the principle of public access to local government activities and municipal council sessions. That decision also fails to respect the requirements for exercise of the margin of appreciation and contravenes the Constitution (§ 34 – freedom of movement, including the right of stay; § 44(1) – right to free access to information disseminated for public use).

The Chancellor drew the attention of the chair of Saarde Rural Municipality Council and municipal councillors to the need to duly respect the rights of visitors at a municipal council session.

Participation of rights-holders: accessibility

Access to elections

In 2019, two elections were held in Estonia: elections for the Riigikogu and for the European Parliament. In this connection, the Chancellor addressed rural municipal and city council chairs and rural municipal and city government mayors with a request to designate as polling stations only those buildings which are accessible to all voters. In cooperation with the national election service and the Estonian Chamber of Disabled People, information needed by voters with special needs was made more accessible and is now easier to find. Information needed by voters with special needs was added to the elections website at www.valimised.ee. Voters with special mobility needs could use the map application of polling divisions which enables a person to easily find the location of their polling station and obtain information about access to it. The map application showed whether the polling station was accessible independently in a wheelchair and, for example, also with a baby carriage. Since not all polling stations were accessible, during the Riigikogu election the Chancellor repeated her call before the European Parliament election. On the European Parliament election day, the Chancellor's advisers visited polling stations. It was found that alongside easily accessible polling stations there were still stations which voters with special mobility needs could not access independently. Although in the case of elections persons with special mobility needs may decide to vote online or request a ballot box to be delivered to their home, those solutions should not be forced on them. Everyone is entitled to vote at a polling station. In order to ensure that persons with disabilities can independently access all polling stations during the next election, the Chancellor made a proposal to the Riigikogu to lay down the requirement of accessibility of polling stations in election legislation.

Access to e-services

At the beginning of 2019 the Estonian Information System Authority introduced new ID card software Digidoc4, but it turned out that the new version failed to function with screen readers used by visually impaired persons. However, when working with a computer and IT tools visually impaired persons use screen readers that read out the text to them. These people lost the opportunity to safely give digital signatures and verify their validity. Visually impaired people contacted the Chancellor for assistance. For many people with disabilities, e-government means a convenient opportunity to independently communicate with the state and fulfil their duties. With the help of the ID card, they can carry out banking transactions, order food, books and commodities from an e-shop for delivery to their

home, enter into contracts, operate as members of the board of an association, etc. However, if something happens with the electronic identity of these people (forgetting the password, the card getting locked, software renewal that is no longer interoperable with the screen reader, etc.), they also lose independent access to the state and the services offered by it. The Chancellor resolved problems related to Digidoc4 in cooperation with the Information System Authority and the Estonian Chamber of Disabled People. The Chancellor's Office asked the Minister of Information about resolving the problems of Digidoc4 as well as more generally about all IT developments and new e-services.

Transparency, data collection

On 12 November 2018, the Draft Implementing Act of the Personal Data Protection Act failed at the final vote in the Riigikogu. The Chancellor had previously drawn the attention of the Riigikogu Constitutional Committee to the fact that between parliamentary readings amendments concerning the Imprisonment Act had been added to the draft without substantive debate and approval (see pages 74–82 of the Draft Act) that would have granted the prison service an unlimited right to collect and retain personal data. Opposition to that intention was also expressed by the Minister of Education and Research in her letter to the Minister of Justice. According to the Draft Act, the prison service would have obtained an unlimited and unsupervised right to collect and retain data on all people (and, in turn, on people connected with them) who either directly or indirectly provide services to prisons or have to apply for authorisation to enter a prison zone. This would have entailed unjustified and uncontrolled interference with the privacy of an unidentified number of people. Persons concerned would have included, for example, teachers, medical staff, ministers of religion, lawyers and consular workers visiting a prison for work-related duties, as well as their next of kin.

In the Chancellor's opinion, the intended legislative amendments contravened several constitutional principles, including the duty to ensure protection of people's private and family life (§ 26). Certainly, those fulfilling the functions of a public authority in prison should be reliable. This ensures attainment of the aims of imprisonment and security in prison. However, this does not mean that the prison could begin to arbitrarily collect and retain personal data in cases and to an extent not clearly defined, under the mere pretext of ensuring prison security. The prison service can employ other and even more effective measures (e.g. a search) to ensure security in prison.

The Chancellor also criticised the manner whereby an extensive package of amendments is submitted to the responsible Riigikogu committee immediately before the second reading

of the Draft Act. That way, members of the committee and factions are deprived of the opportunity to thoroughly consider the legality and necessity of the added rules. Government representatives who brought the amendments to the Riigikogu committee thus also circumvented all the rules of procedure agreed by the Government for dealing with draft legislation (e.g. approvals, constitutionality check, impact analysis). Such aberrant law-making is not compatible with the nature of a democratic state governed by the rule of law. The Draft Implementing Act of the Personal Data Protection Act was passed by the Riigikogu on 20 February 2019 without amendments to the Imprisonment Act.

The Chancellor was contacted by an individual who had served a sentence imposed for a crime committed in the past and whose punishment data in the criminal records database had been expunged. Despite this, the person's criminal past was displayed on the homepage of the Internal Security Service, thus also making it available through search engines. The Chancellor asked the Internal Security Service to assess whether publication of personalised court judgments on its website was compatible with the general principles arising from Article 5 of the General Data Protection Regulation (including lawfulness, intended purpose) and to decide whether and to what extent disclosure of someone's punishment data is justified after punishment has expired. The Internal Security Service removed the person's full name from its homepage.

Good administrative practice

The Chancellor has had to reprimand the Ministry of Justice and the Ministry of Social Affairs, which had failed to reply to several memorandums and requests for explanation by the deadline.

Põhja-Sakala Rural Municipal Government failed to register a request for an explanation and sought to justify its refusal to reply on the basis that the request lacked a digital signature. However, no legal act stipulates that only documents signed digitally or manually are to be registered. In this case, the rural municipal government was requested to provide information on the draft development plan drawn up by the municipal government, so that no legal basis existed to demand a signature.

The Chancellor has received letters about problems with information exchange between information systems as well as glitches in using information systems. In the European Union, Estonia stands at the forefront in terms of electronic public procurement in all tender procedures. Approximately 10 000 public tenders a year are organised in Estonia with a total value of 2.3 billion euros. In 2018, an amendment to the Public Procurement

Act entered into force establishing the requirement that all information exchange in relation to a public tender between the contracting entity and the economic operator (including submission of tenders) must take place electronically, unless otherwise laid down by law. The amendment was based on a presumption that the electronic public procurement register is sufficiently functional, user-friendly and convenient. The Chancellor was contacted by an architect's office which had failed to submit a tender because due to a technical glitch they did not manage to send their competition project to the public procurement register. When trying to upload their work to the public procurement register, the architect's office encountered a technical malfunction related to a temporal restriction on performing operations. The restriction resulted in a situation that if the file could not be uploaded within 60 seconds the operation was discontinued. Unfortunately, this meant that users of a slower internet connection could not submit their tender.

The Chancellor analysed the incident and ascertained that the public procurement register could indeed not accept files forwarded through a slow data communication channel. Regrettably, this information did not reach the tenderer, so that the architect's office did not succeed in submitting a competition project completed as a result of several months of work. Since the automatic error message did not contain a possible reason for the upload failure and the help desk did not explain this as a possible problem, the principles of good administrative practice were violated. The manager of the public procurement register must ensure that a tenderer is informed of all technical requirements, including those related to submission of documents, and in the event of a technical failure would also receive information about the reasons for failure and possibilities to rectify it.

References

- https://www.oiguskantsler.ee/annual-report-2019/index.php

Corruption

Regulatory framework

The Chancellor submitted a Memorandum to the Riigikogu Constitutional Committee with a proposal to amend the laws so as to be better able to combat and prevent corruption in local government bodies. On 23 January 2019, the Riigikogu adopted Act (574 SE) amending the Local Government Organisation Act and other related Acts. This legalised

some of the proposals by the Chancellor of Justice, the most important of these being the idea to empower the prosecutor's office to claim pecuniary damage caused by a criminal offence from a person convicted of corruption if the local authority itself does not file a claim to that effect against the criminal.

Consequences for political parties accepting a prohibited donation

The Political Parties Financing Surveillance Committee (PPFSC) asked the Chancellor whether default interest applicable (at the daily rate of 0.85% of the overdue amount) for delay in transferring a prohibited donation to the state budget was compatible with the Constitution.

The Chancellor found that this rate of default interest was not unconstitutional. In order to prevent political corruption and ensure fair and democratic competition, it is particularly important that the financing of political parties should be transparent and the rules intended for ensuring this be respected. Consequences of violations should be sufficiently harsh as to make political parties resist the temptation of a prohibited donation. Measures applicable to a violation may only be established and changed by the Riigikogu. When analysing the issue of default interest, the Chancellor found that the sanctions laid down under the Political Parties Act for making a prohibited donation cannot be unequivocally understood and cannot be effectively implemented. Compliance with the rules has, to a large extent, been left to the conscience of political parties. On that basis, the Chancellor sent a memorandum to the Ministry of Justice recommending that precepts issued by the PPFSC for return – or transfer to the state budget – of a prohibited donation should be compulsorily enforceable. The Chancellor also recommended harmonisation of coercive measures, including considering transfer of a prohibited donation to the state budget instead of returning it; specifying the conditions and procedure for reducing a state budget allocation in the event of violation of the rules, and expanding the rights of the PPFSC to request information from third persons. The Minister of Justice found that the initiative for resolving these problems should come from the Riigikogu.

In-focus section on COVID-19 measures

Most significant impacts of measures taken in response to the COVID-19 outbreak on the rule of law in the country

The Estonian Government declared an emergency state on March 12, 2020.

Quick legislative processes have not followed the usual good practices (e.g involving all interest groups, doing full impact analysis etc), but the Chancellor did not find evidence of unconstitutional practices.

Potentially unconstitutional provisions included in some draft bills have been fortunately taken out after consultations. The Chancellor has been participating in consultations and providing opinions in this respect. The Chancellor's head attends the government's cabinet meetings.

Cooperation and consultations with NGOs and human rights advisory bodies is more difficult due to confinement measures, but flow of communications is ensured in particular to report issues on the ground.

There is no evidence that access to justice has been restricted or derogations imposed to fair trial guarantees and court proceeding regulations. Indeed, if possible and lawful the courts are using more written proceedings and online solutions. If possible, the judge postpones a hearing. Those court proceedings that require physical contact are being done following the hygiene rules (e.g in the biggest court rooms to allow distance between people, court rooms are regularly being disinfected etc).

Most important challenges due to COVID-19 for the NHRI's functioning

The emergency situation has not impacted the independence or the effective fulfilment of the mandate of the Chancellor of Justice (while some impact on consultation and cooperation, as mentioned above), also thanks to e-government tools and digitalisation of many services which allow effective remote work.

The Chancellor of Justice has however been facing an increase of individual submissions and **workload**.

References

- https://www.riigiteataja.ee/en/eli/517032020002/consolide

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