

ESTONIA

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Foreword

- [1]. The study was compiled by Ms Merle Haruoja, Ms Marianne Meiorg and Mr Kari Käsper, experts of Estonian human rights law. Ms Haruoja is Head of the Estonian Institute of Human Rights and Ms Meiorg and Mr Käsper work for the Human Rights Centre at Tallinn University of Technology.
- [2]. The research team took into account all information available from publicly accessible sources. In addition, formal Letters of Inquiry were sent to public authorities including *justiitsministeerium* [Ministry of Justice], *Õiguskantsler* [Chancellor of Justice], *sotsiaalministeerium* [Ministry of Social Affairs], *Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik* [Gender Equality and Equal Treatment Commissioner] and *Riigikohus* [Supreme Court]. In general, it can be said that the public authorities were forthcoming in providing information. The Ministry of Justice and Ministry of Social Affairs prepared a detailed joint reply for the Letter of Inquiry, whereas others replied in a shorter manner.
- [3]. The team used comparative and analytical approaches to the research subject. Where necessary, EU and national law were compared, contrasted, and deficiencies in national law were highlighted. Relevant Estonian laws, regulations, case law and practices were analysed.

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I. Executive summary

Definitions

- [4]. In Estonian law two terms are widely used: ‘persons with disability’, which also covers intellectual disability; and ‘mental disorder’. The definitions are accurate and correspond to international standards. In few older laws and the Constitution, the terminology “mentally ill” is also used.

Anti-discrimination

- [5]. Although the UN Convention on the Rights of Persons with Disabilities has not yet been ratified by Estonia, it can be said that persons with intellectual disability and persons with mental disorder have comprehensive legal protection at least of the same level as other vulnerable groups. The recently adopted equal treatment rules, for example, only apply for discrimination in the employment area. Due to the extremely limited number of practical cases submitted to the Chancellor of Justice and Gender Equality and Equal Treatment Commissioner no specific conclusions can be drawn regarding the effectiveness of the existing system.

Specific Fundamental Rights

- [6]. The Estonian fundamental rights protection system affords equal protection to persons with intellectual disability and persons with mental disorder in the areas of the right to life, right to freedom from torture, right to freedom from exploitation. For other rights, such as the right to liberty, right to fair trial, right to privacy, right to marry, right to maintain parental rights, right to vote and right to property, certain limitations are set for persons with restricted active legal capacity, which include persons with intellectual disability and persons with mental disorder in cases where the court has appointed a guardian to them. Those limitations are in line with international human rights standards and in some cases are more favourable than international standards.

Involuntary Placement and Involuntary Treatment

- [7]. International monitoring bodies have found in their visits that the living conditions and treatment in psychiatric institutions were inadequate. Other forms of treatment should be developed, as well as more frequent visits of independent monitoring bodies (such as the Chancellor of Justice) are necessary. Involuntary placement and treatment are regulated by several legal acts and there are specific conditions that have to be satisfied. Placement requires a psychiatric evaluation and court order for periods of more than 48 hours. Involuntary placement must be reviewed within a year and the decision can be appealed.

Competence, Capacity and Guardianship

- [8]. The Estonian legal framework foresees a single option of restricted active legal capacity, which is presumed when a guardian has been appointed for an adult due to a person’s

mental illness, mental disability or other mental disorder. The degree to which legal capacity is restricted, is defined within the court decision and may or may not include, for example, limiting the exercise of parental rights or voting rights. The guardian is appointed for the protection of the personal and property rights and interests of the person with intellectual disability or person with mental disorder. The guardian becomes legal representative of the person to the extent that this is provided for by the guardianship decision.

Miscellaneous

- [9]. Nothing to report, except to note inconsistencies between legal acts and older implementing regulations.

2. Definitions

[10]. Persons with mental disorder and persons with intellectual disability are not specifically defined in Estonian legislation. The terms used differ depending on the legal act.

- The *puuetega inimeste sotsiaaltoetuste seadus* [Social Benefits for Disabled Persons Act]¹ defines disability (*puue*) as the loss or deviation of a person's anatomic, physiological or mental structure or function, which in conjunction with societal and environmental barriers obstructs the participation in public life on equal basis with others.
- The *võrdse kohtlemise seadus* [Equal Treatment Act]² defines disability (*puue*) as the loss or deviation of a person's anatomic, physiological or mental structure or function, which has an important and long-term unfavourable impact on the performance of daily activities.
- *Psühhiaatrilise abi seadus* [Mental Health Act]³ defines mental disorder (*psüühikahäire*) as a mental state or behavioural disorder according to the current international classification of mental and behavioural disorders.

Although some legal acts refer to the specific terms *vaimupuue* (intellectual disability, mostly referred to in education-related legal acts) and *vaimuhaige* (mentally ill person, referred to in the Constitution), they are not specifically defined. Therefore it can be said that the main terms used are disability (the definition of which also includes mental disability) and mental disorder. There is no case law available, which contributes to the definition of the national terminology used.

¹ Estonia/Riigikantselei (18.02.1999) Riigi Teataja I, 16, 273, unofficial and incomplete translation available at: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30031K8&keel=en&pg=1&ptyyp=RT&tyyp=X&query=PUUETEGA+INIMESTE+SOTSIAALTOETUSTE+SEADUS> (last accessed on 17.10.2009).

² Estonia/Riigikantselei (23.12.2008) Riigi Teataja I, 56, 315, unofficial and incomplete translation available at: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXX006&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F5rdse+kohtlemise+seadus> (last accessed on 17.10.2009).

³ Estonia/Riigikantselei (06.03.1997) Riigi Teataja I, 16, 260, unofficial and incomplete translation available at: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X1050K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=ps%FChiaatrilise+abi+seadus+> (last accessed on 17.10.2009).

III Anti-discrimination

A. Incorporation of United Nations standards

[11]. The UN Convention on the Rights of Persons with Disabilities was signed by the Government of Estonia on 25 September 2007 but is yet to be ratified.⁴ The Ministry of Justice stated that the analysis of the current legislation is underway to determine the full impact the ratification may have on the current legislation.⁵ The Ministry of Social Affairs pointed out that Estonia has taken the Convention into account in the development of the legislation and state policy, e.g. the definition of disabled persons in the *puuetega inimeste sotsiaaltoetuste seadus* [Social Benefits for Disabled Persons Act]⁶ was amended.⁷ The delay in ratification process has no connection with the rights of persons with mental disorder and persons with intellectual disability. The Convention is planned to be ratified after it is determined that Estonian legislation fully complies with it. Estonia did not participate in the consultation which took place on 24 October 2008.

B. The Anti-Discrimination National Framework

[12]. The *Eesti Vabariigi Põhiseadus* [Constitution of the Republic of Estonia]⁸ includes a general prohibition of discrimination (§12). The list of possible grounds for discrimination does not include disability of any kind but it is non-exhaustive and could, in principle, fit under the term 'other grounds'. The *võrdse kohtlemise seadus* [Equal Treatment Act],⁹ following closely the Employment Equality Directive (Directive 2000/78/EC of 27 November 2000), includes disability as one of the possible grounds for discrimination that is prohibited. The Act protects persons with disability, however, only in the employment area (§2(2)). There is no case law on this subject.

[13]. The Constitution does stipulate however, that persons with disabilities are under the special care of the state and local governments (§28). There are different types of preferential treatment arrangements provided at the legislative level:

- Social benefits to support the disabled persons – disabled child allowance, disability allowance for a person of working age, disability allowance for a person of retirement age, caregiver's allowance, disabled parent's allowance, education allowance, work allowance, rehabilitation allowance and in-service training allowance.¹⁰ Specifically for persons with mental disorder or with intellectual disability, the state has established the special welfare service, which includes everyday life support, support for work, accommodation support,

⁴ See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (15.10.2009).

⁵ Estonia/Justiitsministeerium (15.10.2009) *Vastuskiri*, p 1.

⁶ Estonia/Riigikantselei (18.02.1999) Riigi Teataja I, 16, 273, unofficial and incomplete translation available at: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30031K8&keel=en&pg=1&ptyyp=RT&tyyp=X&query=PUUETEGA+INIMESTE+SOTSIAALTOETUSTE+SEADUS> (last accessed on 17.10.2009).

⁷ Estonia/Sotsiaalministeerium (16.10.2009) RE: üks kiire küsimus.

⁸ Estonia/Riigikantselei (28.06.2007) *Riigi Teataja* [State Gazette] I, 43, 311, unofficial and incomplete translation available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0000K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F5hiseadus> (last accessed on 17.10.2009).

⁹ Estonia/Riigikantselei (23.12.2008) Riigi Teataja I, 56, 315, unofficial and incomplete translation available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXX006&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F5rdse+kohtlemise+seadus> (last accessed on 17.10.2009).

¹⁰ Social Benefits for Disabled Persons Act, §4.

living in a community support and 24-hour-special support.¹¹ In addition, such persons could also receive full or partial pension for incapacity to work.¹²

- Employment service – disabled persons will get certain preferential treatment also in regard to employment services, such as expediting advice in job seeking, support in job interviews, and working with a support person.¹³
- Preferential treatment in public transport – disabled persons can use the public transport free of charge and their escorts for half price.¹⁴
- Additionally, preferential treatment from local governments, which varies from local government to local government. For example, in the capital city of Estonia, Tallinn, disabled persons are able to make use of the following preferential treatment: caregiver support,¹⁵ personal supporter service, consultations for disabled persons, daily activity and care service,¹⁶ and support services and trainings for family members.¹⁷

[14]. Services and social benefits available for disabled persons and more specifically to persons with mental disability and intellectual disability are wide-ranging and cover all the important areas in their lives. They also have a relatively well-developed network of non-governmental organisations.¹⁸ However, since disabled persons are a vulnerable group and heavily dependent on support from state and local governments, then any problems occurring in the system have a considerable impact on them. For example, in the autumn of 2008, the state was unable to pay the social benefits for about three months due to a technical error and thousands of people dependent on the benefits were left without any support. As a result, the Minister of Social Affairs was forced to step down and several officials were punished.¹⁹

¹¹ Estonia/Riigikantslei (06.03.1995) *sotsiaalhoolekande seadus* [Social Welfare Act] Riigi Teataja I, 21, 323, unofficial and incomplete translation available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X1043K9&keel=en&pg=1&ptyyp=RT&tyyp=X&query=sotsiaalhoolekande+seadus> (last accessed on 17.10.2009), §11¹⁵-11⁵³.

¹² Estonia/Riigikantslei (27.12.2001) *riikliku pensionikindlustuse seadus* [State Pension Insurance Act]. Riigi Teataja I, 100, 648, unofficial and incomplete translation available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X60008K8&keel=en&pg=1&ptyyp=RT&tyyp=X&query=riikliku+pensionikindlustuse+seadus> (last accessed on 17.10.2009).

¹³ Estonia/Riigikantslei (18.10.2005) *tööturuteenuste ja -toetuste seadus* [Employment Service and Subsidy Act] Riigi Teataja I, 54, 430.

¹⁴ Estonia/Riigikantslei (15.02.2000) *ühistranspordiseadus* [Public Transport Act] Riigi Teataja I, 10, 58, unofficial and incomplete translation available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30060K5&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%FChistranspordiseadus+> (last accessed on 17.10.2009), §27 and 29.

¹⁵ Estonia/Tallinna Linnavolikogu (19.02.2009) *hooldajatoetuse määramise ja maksmise kord* [Procedure for determining and paying caregiver's allowance], available at: <http://tallinn.andmevara.ee/oa/page.Tavakasutaja?c=1.1.1.1&id=113556> (last accessed on 15.10.2009).

¹⁶ Estonia/Tallinna Linnavolikogu (31.01.2007) *Sotsiaalteenuste nõuete kinnitamine* [Approval of the Requirements of Social Services], available at: <http://tallinn.andmevara.ee/oa/page.Tavakasutaja?c=1.1.1.1&id=106991> (last accessed on 15.10.2009).

¹⁷ Estonia/Tallinna Linnavolikogu (22.12.2004) *Tallinna Vaimse Tervise Keskuse põhimääruse kinnitamine* [Approval of the Statutes of Tallinn Mental Health Centre], available at: <http://tallinn.andmevara.ee/oa/page.Tavakasutaja?c=1.1.1.1&id=98991> (last accessed on 15.10.2009).

¹⁸ E.g. the *Eesti Puuetega Inimeste Koda* [Estonian Chamber of Disabled People], which is an umbrella organisation for about 50 organisations – see: <http://www.epikoda.ee/index.php?op=2&path=IN+ENGLISH> (last accessed on 15.10.2009); or *Eesti Patsientide Esindusühing* [Estonian Patient Advocacy Association], dealing also with patients of psychiatric hospitals – see: <http://www.epey.ee/index.php?page=3> (last accessed on 15.10.2009).

¹⁹ Selection of newspaper articles: Kai Kalamees (2008) 'Maripuu palus puuetega inimestelt vabandust', in: *Postimees* (13.12.2008); Merike Tamm (2008) 'IT-juht lahkus ametist puuetega inimeste toetuste hilinemise tõttu', in: *Postimees* (23.12.2008); Marina Lohk (2009) 'Sotsiaalministeeriumi kantslerit ja asekanterit karistati noomitusega', in: *Postimees* (05.01.2009). Official press releases from the Ministry of Social Affairs:

<http://www.sm.ee/aktuaalne/uudised/b/a/pressibriif-puudega-inimeste-sotsiaaltoetused.html> (last accessed on 15.10.2007), <http://www.sm.ee/aktuaalne/uudised/b/a/maripuu-astub-tagasi-23-veebruari.html> (last accessed on 15.10.2009).

- [15]. The Employment Equality Directive (Directive 2000/78/EC of 27 November 2000) is transposed into Estonian law by the Equal Treatment Act, which provides for a definition of disability including also ‘abnormality in ... mental structure or function of a person’ (§5). No case-law on this has been developed yet.
- [16]. The Equal Treatment Act, however, is limited to prohibition of discrimination on grounds of disability in the field of employment. Other areas, such as health care, social protection, education and housing, are not covered. Yet, as mentioned above in paragraph 0, the Ministry of Social Affairs has stated that Estonia follows the definition of the UN Convention on the Rights of Persons with Disabilities, which does include mental and intellectual disability. The definitions used in other Acts dealing with benefits and services to disabled persons also indicate that mental and intellectual disability is covered by the general term ‘disability’.²⁰ There is however no case law to confirm that.
- [17]. In order to facilitate the equality of persons with disability, the Equal Treatment Act requires employees to ‘take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer’ (§11).
- [18]. Directive 2000/78/EC and the Draft Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (See Doc. COM(2008) 426 final) recognise the obligation to provide “reasonable accommodation” to meet the needs of persons with a disability. There are no other provisions in any law concerning employment where this would be regulated. The state has foreseen a certain support system for disabled persons to facilitate their equal treatment in the employment market. In this regard, the benefits and support summarised above in paragraph [13] are relevant, such as the payment of allowance for in-service training and working, if the disability causes additional expenses, and support for work for mentally and intellectually disabled persons. Also relevant are employment services from the state and different consultations and support services at the local level. No case law has been developed on the question of “reasonable accommodation” by employers.
- [19]. Discrimination based on disability is within the competence of the Gender Equality and Equal Treatment Commissioner since 1 January 2009 after the entry into force of the Equal Treatment Act. Within the few months since the the Commissioner has been able to accept such complaints she has received only three. She rejected one because it concerned the supply of goods and services, which does not fall within the Commissioner’s competence. In regard to one of the complaints it has not yet been decided whether it should be accepted and the Commissioner is currently writing her opinion with respect to the third complaint.²¹
- [20]. Additionally, the Chancellor of Justice is competent to accept complaints against public authorities in regard to discrimination on grounds of disability.²² He has had several applications. For example, in 2008 he checked the possibility of a disabled child to attend a kindergarten close to home.²³ The Chancellor is also competent to conduct mediation proceedings between private persons but no applications specifically related to discrimination based of disability have reached the Chancellor.

²⁰ Social Benefits for Disabled Persons Act, §2; Social Welfare Act.

²¹ Estonia/Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik (15.10.2009) RE: küsimus puuetega inimeste kohta.

²² Estonia/Riigikantslelei (18.03.1999) *Õiguskantsleri seadus* [Chancellor of Justice Act] Riigi Teataja I, 29, 406, unofficial and incomplete translation available at: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30041K7&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%D5IGUSKANTSLERI+SEADUS> (last accessed on 15.10.2009).

²³ Estonia/Õiguskantsler (2009) *Õiguskantsleri 2008. aasta tegevuse ülevaade*, p 79.

IV. Specific Fundamental Rights

- [21]. The Estonian constitutional framework guarantees fully civil and political rights for persons with mental disorder and persons with intellectual disability. The rights are guaranteed as universal and no differences regarding persons with mental disorder or persons with intellectual disability exist. It should be noted that Estonian law considers the European Convention of Human Rights and Fundamental Freedoms as directly applicable, which means that courts in Estonia can directly rely on the provisions and case law of the European Court of Human Rights. Specific rights are analysed separately.
- [22]. The right to life is a constitutionally protected right (§ 16 of the Constitution). Attempted suicide is not punishable, although it is possible to limit the freedom of a mentally ill in case he or she poses a threat to himself or herself (§ 20 (2) p 5 of the Constitution). There is no case law regarding persons with mental disorder and persons with intellectual disability.
- [23]. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment is guaranteed by § 18 of the Constitution. The protection is afforded to everyone, including persons who are unable to understand or direct their actions due to a mental condition. There is no case law regarding persons with mental disorder and persons with intellectual disability.
- [24]. The right to freedom from exploitation is guaranteed by § 29 (2) of the Constitution. The protection is afforded to everyone. There is no case law regarding persons with mental disorder and persons with intellectual disability.
- [25]. The right to liberty and security is guaranteed by § 20 - 21 of the Constitution. The exception provided in § 20 of the Constitution is framed more restrictively than in the ECHR: according to the clause, it is allowed “to detain a person suffering from an infectious disease, a person of unsound mind, an alcoholic or a drug addict, if such person is dangerous to himself or herself or to others.” The *Psühhiaatrilise abi seadus* [Mental Health Act]²⁴ (hereinafter as MHA) in conjunction with other legal acts regulates more specifically the area of involuntary placement (see Section **Error! Reference source not found.**). Even in cases when it is allowed by law taking of freedom cannot be arbitrary (§ 11 of the Constitution). There is no case law regarding persons with mental disorder and persons with intellectual disability.
- [26]. The right to fair trial is regulated by § 15 of the Constitution. The right to access to justice is connected with the legal capacity of the person, as analysed in Section **Error! Reference source not found.** Whereas persons with restricted active legal capacity do not have active civil procedural capacity, they do have administrative procedural capacity (see more in paragraph [62]). There is no substantive case law regarding persons with mental disorder and persons with intellectual disability.
- [27]. The right to privacy is guaranteed by § 26 of the Constitution. The primary data protection legislative act is the *Isikuandmete kaitse seadus* [Personal Data Protection Act] (PDPA),²⁵ the purpose of which is according to §1 “the protection of the fundamental rights and freedoms of a natural person with regard to the processing of personal data, specifically the right for the inviolability of private life.” The protection is afforded to everyone, including persons who are unable to understand or direct their actions due to a mental condition.

²⁴ Estonia/Riigikantselei (06.03.1997) Riigi Teataja I, 16, 260, unofficial and incomplete translation available at: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X1050K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=ps%FChiaatrilise+abi+seadus+> (last accessed on 17.10.2009).

²⁵ Estonia/Riigikantselei (16.03.2007) Riigi Teataja I, 24, 127.

According to the PDPA, data on the state of health or disability is sensitive personal data (§ 4(2)). *Tervishoiuteenuste korralduse seadus* [Health Services Organisation Act]²⁶ states that health care providers who are required by law to maintain confidentiality have the right to process the personal data, including sensitive personal data, necessary for the provision of a health service, without the consent of the data subject. Data relating to the state of health of a data subject who is in hospital may be transmitted or the data may be accessed by those closest to him or her, except if the data subject has prohibited access to the data or transmission of the data. There is no case law regarding persons with mental disorder and persons with intellectual disability.

- [28]. The right to marry, to found a family and respect of family life is guaranteed by § 26 and 27 of the Constitution. § 26 protects from state interference with family life, whereas § 27 is a more positive right to state activity to support the family as a unit. Family is not defined in Estonian law, however, the *perekonnaseadus* [Family Law Act]²⁷ bans marriages in which at least one spouse has been appointed a guardian due to restricted active legal capacity. A guardian can be appointed also to persons with intellectual disability or persons with mental disorder (see more in paragraph [65] and further), which in effect means that those persons are prohibited from marriage. There is no case law regarding persons with mental disorder and persons with intellectual disability.
- [29]. The right to have children and maintain parental rights is guaranteed by § 27 of the Constitution, with the main specific legal Act being the Family Law Act. There are specific differences as regards these rights in relation to persons with restricted active legal capacity. Firstly, when ascertaining the child's filiation to a father not married to the mother of the child (§ 41 (4) p 2), only the father's application is necessary in those cases where, due to restricted active legal capacity, a guardian has been appointed to the mother of the child. Usually a joint application of both father and mother is required. Secondly, a person with restricted active legal capacity cannot adopt children (§ 75 (2) p 3). Thirdly, the minor child of a person with restricted active legal capacity is represented by a guardian. It should be emphasised, however, that guardianship can be restricted to specific areas if the court finds that the parent is capable of exercising certain parental rights. (see paragraph [64]). Thus, the aforementioned parental rights of persons with intellectual disability and mental disorder are not automatically limited, but depend on the discretion of the judge when determining the extent of the guardianship.
- [30]. The right to property is guaranteed in § 32 of the Constitution. The specific regulation of property rights for persons under guardianship due to restricted active legal capacity are regulated in the Family Act. The guardian must obtain approval of the guardianship authority in order to:
- transfer an immovable or encumber it with restricted real rights;
 - transfer a movable which is of special value to the ward;
 - give away a movable of a ward except for customary gifts;
 - pledge a movable of a ward;
 - take a loan in the name of a ward or waive collection of a debt;
 - decline to accept a succession in the name of a ward.

²⁶ Estonia/Riigikantselei (28.05.2001) *Riigi Teataja* I, 50, 284.

²⁷ Estonia/Riigikantselei (09.11.1994) *Riigi Teataja* I 1994, 75, 1326

There is no significant case law regarding persons with mental disorder and persons with intellectual disability in the area of property rights.

- [31]. The right to vote is regulated constitutionally in § 57-58 of the constitution. It is only applicable for Estonian citizens. Citizens who have been divested of their legal capacity by a court do not have the right to vote (§ 57 (2)) according to the text of the Constitution. It is further specified in the Code of Civil Procedure that if the court establishes guardianship for managing all the affairs of the person or if the guardian's sphere of duties is extended in such manner, the person is additionally deemed to be without active legal capacity within the meaning of the right to vote, and he or she loses his or her right to vote (§ 526(5)). Therefore loss of voting rights is not automatic, but depends on the extent to which active legal capacity is restricted. There is no case law regarding persons with mental disorder and persons with intellectual disability.

V. Involuntary placement and Involuntary Treatment

- [32]. Involuntary placement and treatment in Estonia has been subject to discussion before the United Nations Committee Against Torture (CAT) only once. Main findings of CAT are the following:²⁸
- CAT was concerned about the living conditions and inadequate forms of treatment in psychiatric institutions and recommended that alternative forms of treatment, such as community based treatment, be developed (paragraph 24);
 - CAT recommended that places where mental health patients are held for involuntary treatment are regularly visited by independent monitoring bodies (paragraph 24)
- [33]. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has visited Estonia four times. The report on the last visit in 2007 has not been published yet. The issue of involuntary placement and involuntary treatment was not an issue in the report on 1999 but was extensively discussed in the reports of 1997 and 2003. The main findings of CPT in its 2003 report on Estonia concerned mostly one welfare home and one psychiatric hospital and are the following:²⁹
- Constant informing of patients in regard to their treatment, while ensuring the confidentiality of their medical data from others not concerned (this was also a concern in the 1997 report³⁰);
 - Written policies on the use of means of restraint (this was also a concern in the 1997 report³¹ in regard to isolation for children);
 - Review of procedures for involuntary placement to offer guarantees of independence and impartiality, to guarantee that the person concerned is heard in person by the court, that the person concerned is informed of the court ruling, the reasoning behind it and deadlines of appeal procedure and has unlimited access to legal representative, that the persons in need have access to free legal representation, that the persons concerned are able to request at reasonable intervals that the necessity for their placement is reviewed;

²⁸ CAT (22.12.2007) *Conclusions and recommendations of the Committee against Torture: Estonia, UN Doc. CAT/C/EST/CO/4.*

²⁹ CPT (27.04.2005), *Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 to 30 September 2003*, pp 62-65.

³⁰ CPT (30.10.2002) *Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 21 December 1999*, p 91.

³¹ CPT (30.10.2002) *Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 23 July 1997*, p 91.

- Regular visits to these establishments by a body, which is independent of the health/social welfare authorities.

A. Legal Framework

[34]. Involuntary placement and involuntary treatment in Estonia are regulated by the following Acts:

- Constitution (adopted on 28.06.1992), §20-21 – providing the general right to personal liberty and security;
- *Tsiviilkohtumenetluse seadustik* [Code of Civil Procedure]³² (hereinafter CCP) (adopted on 20.04.2005), §533-543 – covering the placement of a mentally ill person in a psychiatric hospital or a social welfare institution against his/her will together with deprivation of the liberty of the person;
- Mental Health Act (adopted on 12.02.1997), §10-17 – covering involuntary placement for psychiatric health purposes to a psychiatric hospital where the person has severe mental disorder, which restricts his/her capability to understand and control his/her behaviour, the person would endanger his/her and others' life, health or security, and other psychiatric treatment is not enough (§11(1));
- *Sotsiaalhoolekande seadus* [Social Welfare Act]³³ (hereinafter SWA) (adopted on 8.02.1995), §19-20² – covering involuntary placement in a social welfare institution where the person has a severe mental disorder which restricts his /her ability to understand or control his/her behaviour, the person would endanger himself/herself or others, and the application of earlier measures have not been sufficient or the use of other measures is not possible (§19(1));
- *Alaealiste mõjutusvahendite seadus* [Juvenile Sanctions Act]³⁴ (adopted on 28.01.1998) – regulates sanctions applicable to minors and the competence of juvenile committees applying the sanctions, including the placement of minors into schools for students with special needs. The Act is applied to minors who commit unlawful acts constituting the necessary elements of a criminal offence or misdemeanour prescribed by the *Karistusseadustik* [Penal Code].³⁵

³² Estonia/Riigikantselei (19.05.2005) Riigi Teataja I, 26, 197, unofficial and incomplete translation available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=Tsiviilkohtumenetluse+seadus> (last accessed on 17.10.2009).

³³ Estonia/Riigikantselei (06.03.1995) Riigi Teataja I, 21, 323, unofficial and incomplete translation available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X1043K9&keel=en&pg=1&ptyyp=RT&tyyp=X&query=sotsiaalhoolekande+seadus> (last accessed on 17.10.2009).

³⁴ Estonia/Riigikantselei (26.02.1998) Riigi Teataja I, 17, 264, unofficial and incomplete translation available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X40090K5&keel=en&pg=1&ptyyp=RT&tyyp=X&query=ALAEALISE+M%D5JUTUSVAHENDITE+SEADUS> (last accessed on 17.10.2009).

³⁵ Estonia/Riigikantselei (06.07.2001) Riigi Teataja I, 61, 364, unofficial and incomplete translation available at:

When the person is over 14 years of age, in addition to committing such act, there must be a belief by prosecutor, court or body conducting extra-judicial proceedings that the person can be influenced without the imposition of a criminal punishment;

- Penal Code (adopted on 6.06.2001), §86 – covers situations where the person was mentally ill, feeble-minded or suffered from any other severe mental disorder at the time of commission of an unlawful act, during preliminary investigation, the court hearing, or after the making of the court judgment but before the service of the full sentence, and he/she poses danger to himself/herself and to society due to his or her unlawful act and mental state and is in need of treatment.
- *Kriminaalmenetluse seadustik* [Code of Criminal Procedure]³⁶ (adopted on 12.02.2003), §102 and 393-403 – covers the criminal procedure for implementation of involuntary psychiatric treatment based on §86 of the Penal Code.

- [35]. In 2008, extensive amendments were made to both the Mental Health Act and the Social Welfare Act. No significant amendments regarding involuntary placement or treatment are debated or on the agenda currently.
- [36]. Most of the Acts use involuntary placement and involuntary treatment in conjunction while still on occasion the distinction is explicitly brought out. CCP applies mainly to involuntary placement and the administering of involuntary treatment is a consequence to that. MHA on the other hand distinctly applies to involuntary treatment and involuntary placement is the means to achieve it. Interestingly, the Code of Criminal Procedure also emphasises the treatment and only then refers to involuntary placement. A similar approach is taken in the Juvenile Sanctions Act where the influencing of the minor has priority and involuntary placement might be used as a means for it (§7(1)). Perhaps the clearest distinction is made by the SWA, which allows involuntary placement in a closed institution, i.e. social welfare institution, without treatment.
- [37]. The purposes of the relevant regulation are psychiatric treatment (MHA, CCP and Code of Criminal Procedure), special care (SWA), social rehabilitation (Juvenile Sanctions Act) and the prevention of harm to himself/herself and others (all the Acts).
- [38]. The relevant regulations do not stipulate aftercare following involuntary treatment.
- [39]. There is no special regulation for involuntary placement of minors in a psychiatric hospital but as noted above in paragraph 0 there is the

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30068K8&keel=en&pg=1&ptyyp=RT&tyyp=X&query=karistusseadustik> (last accessed on 17.10.2009).

³⁶ Estonia/Riigikantselei (13.03.2003) Riigi Teataja I, 27, 166, unofficial and incomplete translation available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X60027K5&keel=en&pg=1&ptyyp=RT&tyyp=X&query=Kriminaalmenetluse+seadustik> (last accessed on 17.10.2009).

Juvenile Sanctions Act regulating the means of influencing and re-socialising minors who have committed criminal acts or misdemeanours. The Code of Criminal Procedure also regulates the application of means of influencing minors under a separate paragraph (§87).

- [40]. Involuntary placement and the procedure for its application differs in regard to offenders with mental disorder. This type of placement is regulated by §86 of the Penal Code, Code of Criminal Procedure, §15 and 17 of the MHA and by the regulation of the Minister of Social Affairs 'Requirements of psychiatric treatment and organisation of work of psychiatric hospital upon involuntary psychiatric treatment applied by court'.³⁷ Paragraph 86(1) stipulates:

'If at the time of commission of an unlawful act the person lacks capacity or if he or she, after the making of the court judgment but before the service of the full sentence, becomes mentally ill or feeble-minded or suffers from any other severe mental disorder, or if it is established during preliminary investigation or the court hearing of the matter that the person suffers from one of the aforementioned conditions and therefore his or her mental state at the time of commission of the unlawful act cannot be ascertained and he or she poses danger to himself or herself and to society due to his or her unlawful act and mental state and is in need of treatment, the court shall order coercive psychiatric treatment of the person.'

B. Criteria and Definitions

- [41]. To order an involuntary treatment or placement under ordinary circumstances the following conditions in combination must be fulfilled by law (SWA, §19(1)):

- the person has a severe mental disorder which restricts his/her ability to understand or control his/her behaviour;
- if upon failure to place the person in a social welfare institution the person poses a danger to himself/herself or to others;
- the application of earlier measures has not been sufficient or the use of other measures is not possible.

- [42]. Emergency involuntary placement according to the decision of a psychiatrist requires that the danger under the second point above must be specifically either to his/her or others' life, health or security (MHA, §11(1)). Involuntary placement as an interim measure by court requires additionally adequate documentation concerning the state of health of the person (CCP, §534(1)). Conditions for involuntary placement under the Penal Code are referred to above in paragraph [40].

³⁷ Estonia/Sotsiaalminister (04.09.2002) Regulation no 105 of 26 August 2002, Riigi Teataja L, 96, 1494.

- [43]. It is clear from the above that less intrusive alternatives must be adopted before deciding an involuntary placement or involuntary treatment.
- [44]. The person subject to possible involuntary placement must be heard before the decision is made by the court (CCP §536(1) and Code of Criminal Procedure, §395). This is an obligation that the court must fulfil before ordering involuntary placement. This is not the case in interim measures proceedings if the necessity for such interim measure can be determined based on documents but also when it would endanger the person's health or he/she refuses to be heard (CCP, §534(3)). In this case the court may hear the person after the application of the interim measure but the wording of the provision suggests that this is not the obligation (CCP, §534(4)).
- [45]. The 'danger' referred to as one of the conditions for involuntary placement is not further explained under the ordinary course of involuntary placement. However, as mentioned above in paragraph [42], in case of emergency involuntary placement the danger must be specifically either to his/her or others' life, health or security (MHA, §11(1)). No other guidelines are offered by the law.

C. Assessment, Decision Procedures and Duration

- [46]. In general the procedure of involuntary placement and treatment of the person is the same, whether it is to psychiatric hospital under the MHA or to social welfare institution under the SWA. If differences occur, the authors will point that out. The need for a person's involuntary placement in a psychiatric hospital or social welfare institution is decided with the involvement of a psychiatrist.³⁸ Only the opinion of one psychiatrist is needed. No psychiatrist is consulted in the course of applying involuntary placement to a psychiatric hospital as an interim measure under the CCP, however, it does presuppose the existence of adequate documents on the person's state of health (§534(1) and (3)). There are no statutory time limits between psychiatric assessment and the beginning of compulsory placement.
- [47]. Involuntary placement of a person in a hospital as an emergency measure can be decided by a psychiatrist of that hospital. Such measure may not exceed 48 hours. Every involuntary placement that exceeds 48 hours must be effected by a court order.³⁹ The termination of the involuntary placement is decided upon by a court (CCP, §539, 540).
- [48]. The same procedure applies also to the involuntary placement that follows directly from voluntary placement.
- [49]. Emergency involuntary placement in a psychiatric hospital without a court order may not exceed 48 hours (MHA, §11(4)). Involuntary

³⁸ CCP, §537(1); MHA, §11(3); and SWA, §19(1).

³⁹ CCP, §533 and 534; and MHA, §11(3) and (4).

placement as an interim measure following a court order can last up to four days, which can be extended to two weeks after the person concerned and an expert are heard (CCP, §534(5)).

- [50]. The person may not be placed in a closed institution for more than one year from the court ruling (CCP, §538(2)). At the same time, involuntary placement must be terminated by court immediately after the prerequisites for such placement (CCP, § 533, 534) have lapsed, even if the period initially ordered has not lapsed yet (CCP, §539). The hospital is required to inform the court immediately if the person should not be in the closed institution anymore. The person concerned, his/her guardian, the local government or the court itself can initiate the proceedings at any time for termination of involuntary placement.
- [51]. Medical interventions allowed to be used must be scientifically justified and internationally acknowledged methods of treatment.⁴⁰ Specific treatments are not regulated by law.
- [52]. According to MHA, § 14, means of restraint are implemented only where there is a direct threat of bodily harm to the person himself/herself or of violence against other people and where other methods have not given results. Means that can be resorted to are isolation (placement of the person in an isolation room) and fixation (usage of straps or special clothing to restrict the person's freedom of movement). Means of restraint are implemented on the order of the doctor, who must document it with reasoning in the patient's medical file. The implementation must be terminated as soon as the threat has lapsed.
- [53]. In social welfare institution, the only means of restraint that can be used is isolation.⁴¹ The decision is taken by the provider of 24-hour special care service. As a rule, the provider of such service must inform the emergency medical staff or police before implementing the isolation. If this is not possible, he/she may implement isolation already before but not for longer than 3 hours. The service provider must prepare a written explanation and inform the legal representative of the person concerned of the isolation.
- [54]. According to MHA, the patient has the right to receive information on his/her disorder and treatment and to have access to his/her medical documents, unless it is harmful for his/her psychological health or to the security of others (§4). The person subject to possible involuntary placement must be heard before the decision is made by the court (CCP §536(1)). Additionally, the court must hear his/her spouse and other family members living with him/her, the guardian, the trustee appointed by the person, members of the rehabilitation team, the head of the closed institution in which the person stays, or an official appointed thereby (CCP, §536(2)). In interim measures proceedings these persons do not have to be heard if the necessity for such interim

⁴⁰ Estonia/Sotsiaalminister (04.09.2002) Regulation no 105 of 26 August 2002 'Requirements of psychiatric treatment and organisation of work of psychiatric hospital upon involuntary psychiatric treatment applied by court', Riigi Teataja L, 96, 1494.

⁴¹ SAW, §20².

measure can be determined based on documents but also when it would endanger the persons health or he/she refuses to be heard (CCP, §534(3)).

- [55]. To ensure that the rights of the person are fully respected and he/she understands the procedure and its consequences, the court is under an obligation to appoint a representative if this is in his/her interest and he/she is not already represented by a competent representative (CCP, §535). The court may decide on its own initiative whether the existent representative is competent enough to guard the interests of the person concerned. A representative must not be appointed for the interim measure proceedings unless the extension of such measures is considered. The judge must explain the person about the appeal procedures and must appoint the representative if the person wants to appeal the court ruling.
- [56]. The Supreme Court has on numerous occasions stated that courts must do everything possible to ensure that the interested person is present at the court hearing. The court must be active in determining the ability of the person to participate in court hearings and in guaranteeing the person's participation in court proceedings the object of which is to determine restrictions on his or her rights. The courts should 'achieve the maximum possible level of certainty' in deciding whether the person concerned should personally attend the hearing or not.⁴² Moreover, the court must provide objective and documented reasons for not hearing the person concerned in person.
- [57]. The ruling of the court placing the person into the closed institution must be delivered to the person himself/herself, his/her representative as well as guardian (CCP§541). In addition, the ruling must be delivered to the trustee appointed by the person and to the local government. The ruling must be made known also to the spouse and other family members living with him/her.
- [58]. The person who has been placed in the closed institution has the right to appeal the court ruling ordering involuntary placement or refusing the termination of the placement (CCP, §543). The person can appeal the ruling to determine the lawfulness of the placement even if the placement has already terminated. Such an appeal can be submitted also to all of the persons that the court was obliged to hear when the decision over the placement was made (CCP, §543). The patient, his/her guardian or the local government may require the termination of involuntary placement (CCP, §539).
- [59]. Legal support on state's expenses can be arranged under the general rules of state legal aid. This is regulated by the State Legal Aid Act, which is discussed in detail in the Thematic Legal Study on assessment of Access to Justice in Civil Cases in European Union (Estonia) under chapter 2.2.5.

⁴² E.g. Estonia/Riigikohus/3-2-3-14-05 (19.12.2005), para 10; Estonia/Riigikohus/3-2-3-10-05 (26.09.2005), para 12; Estonia/Riigikohus/3-2-3-11-05 (12.09.2005), para 8; Estonia/Riigikohus/3-2-3-8-05 (08.06.2005), para 9.

VI. Competence, Capacity and Guardianship

- [60]. Estonian legal framework includes provisions for the management of affairs of persons with mental disorders and persons with intellectual disability. The Family Law Act provides for guardianship for persons with restricted active legal capacity for the protection of their personal and property rights and interests (§ 92 (4)) as well as curatorship for persons with active legal capacity who due to mental disability need assistance in the exercise of their rights and duties (§ 105 (1)).
- [61]. In Estonian law, the terminology of active and passive legal capacity is defined in § 7 and 8 of *Tsiviilseadustiku üldosa seadus* [General Part of Civil Code]⁴³ (hereinafter GPCC). Passive legal capacity means the capacity to have rights and obligations under civil law; this is uniform and unlimited for everyone, it cannot be restricted. Active legal capacity means the ability to make valid transactions, and it can be either full or restricted. Starting from 2002, it is no longer possible in Estonian law to declare a person permanently incapable. Additionally, § 13 refers to incapacity to exercise will, which is defined as a condition which precludes a person's ability to accurately assess the impact of the transaction on his or her interests due to a temporary mental disorder or other circumstances.
- [62]. There are also specific terms used in the CCP: passive civil procedural capacity (§ 201) and active civil procedural capacity (§ 202). Persons with restricted active legal capacity do not have active civil procedural capacity, except in cases when the restriction does not impact the procedural rights and obligations of the party. This is not expanded to procedures in administrative courts, where the Supreme Court has held that the person himself or herself has to be able to protect his or her rights in the administrative proceedings.⁴⁴
- [63]. The GPCC states that persons, who due to mental illness, mental disability or other mental disorder are permanently unable to understand or direct their actions, have restricted active legal capacity (§ 8(2)). Therefore three conditions have to be present at the same time in order to restrict active legal capacity of a person:
- the person is adult;
 - the person has mental illness, mental disability or other mental disorder;

⁴³ Estonia/Riigikantselei (24.04.2002) Riigi Teataja I, 35, 216, unofficial and incomplete translation available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30082K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilseadustiku+%FClldosa+seadus> (15.09.2009).

⁴⁴ Estonia/Riigikohus/3-3-1-42-06 (30.11.2006), p 21

- the person is permanently not capable of understanding or directing his or her actions.
- [64]. It is further stated in the GPCC that in case a guardian is appointed by a court to a person who due to mental illness, mental disability or other mental disorder is permanently unable to understand or direct his or her actions, the person is presumed to have restricted active legal capacity to the extent the guardianship is determined for (§ 8(3)). Therefore the court can specify within the guardianship decision, to what extent the passive legal capacity is restricted. The GPCC further states that restricted active legal capacity impacts the validity of transactions only to the extent that the person is unable to understand or direct his or her actions.
- [65]. The system protecting adults with restricted active legal capacity is guardianship. Curatorship can be established for persons with active legal capacity.
- [66]. Guardianship is established for persons with restricted active legal capacity for the protection of their personal and property rights and interests (§ 92 (4) of the Family Law Act), it involves the appointment of the guardian, who is the legal representative of the person. The guardian must care for and maintain the person under guardianship and act in the interests of that person (§ 98 of the Family Law Act). According to § 105 of the Family Law Act, curatorship on the other hand is established in order to assist the person who has active legal capacity in the exercise of his or her rights or duties. The curator is appointed with the consent of the person under curatorship and it is established for the performance of a certain act or certain acts. The curator is not a legal representative of the person under curatorship.
- [67]. According to the CCP, if the court has information or doubt that a person has a mental illness or mental disability, the court shall order a forensic psychiatric examination in order to determine the need for appointment of a guardian for such person. Before an expert opinion is prepared, the person must be personally examined or questioned by an expert (§ 522). The person whose guardianship is in question has generally the right to be heard, except when it could have serious consequences for his or her health or when the court is convinced that a person is not capable of expressing his or her will (§ 524). Curatorship requires the consent of the person who is placed under curatorship, according to § 105 of the Family Law Act.
- [68]. According to the CCP the Court determines in the ruling appointing the guardian the period at the latest by the end of which the court must decide on the termination or extension of the guardianship. This period cannot be longer than 5 years (§ 526). There are no minimum time limits. There are no minimum or maximum limits for curatorship; it can be terminated by the person under curatorship at any time (§ 106 of the Family Law Act).
- [69]. According to the Family Law Act, the spouse, relatives and relatives by marriage of a person in need of guardianship, judges, police

officers, heads of medical institutions, officials of vital statistics offices, prosecutors and any other officials who have information concerning a person in need of guardianship are required to notify the guardianship authority according to the residence of the person in need of guardianship (§ 92(5)). The application requesting placement of the person under guardianship can be made to the court by the guardianship authority or the person himself or herself (§ 93).

- [70]. The court cannot declare that a person has restricted active legal capacity, in case the court appoints a guardian, restricted active legal capacity is presumed (§ 8 of the GPCC). The protection of the person and his or her property can only be done by the court through the appointment of the guardian. The guardian is responsible to report to the guardianship authority and present a yearly report on the management of the property of the person under guardianship (§ 101 of Family Law Act).
- [71]. The court decides to restrict active legal capacity by appointing a guardian. It is not possible under Estonian law to make a separate decision restricting active legal capacity, therefore the appeals process is the same as with appointment of a guardian.
- [72]. The guardian can be any natural person, except minors, persons with restricted active legal capacity; persons who have been deprived of parental rights or from whom a child has been removed without deprivation of parental rights; persons who have been relieved of the performance of duties of a guardian or curator; or persons who for some other reason are not capable of performing the duties of a guardian (§ 96 of Family Law Act).
- [73]. The guardian is required to care for and maintain the ward and to act in the ward's interests (§ 98 of the Family Law Act). The guardian cannot without prior approval of a guardianship authority according to § 99 make certain transactions that impact the property rights of the person (see paragraph [30])
- [74]. A guardian shall also not enter into a transaction with the person under guardianship except in cases where no civil obligations arise from the transaction for the ward. A guardian shall not enter into a transaction in the name of the person under guardianship with the guardian's spouse, descendants, ascendants, brothers or sisters or represent the person in disputes with them (§ 100 of Family Law Act).
- [75]. A ruling on appointment of a guardian can be appealed by the ward, the person who was appointed as guardian, or by the spouse, relative, relative by marriage, close person named by the person (person of trust) or rural municipality or city government of the residence of the person to whom the guardian was appointed (§ 532 of CCP). The appeal cannot be submitted later than five months from informing the guardian of the decision.
- [76]. The need for the guardian is reviewed by the court at the end of the time for which the guardianship was established. This takes place at

least every five years (§ 526 of CCP). If prerequisites for the establishment of guardianship cease to exist, a guardian is required to submit an application to a court for termination of guardianship. The application may also be submitted by a guardianship authority (§ 103 of the Family Law Act).

VII. Miscellaneous

- [77]. Nothing to report, except it can be noted that legal acts analysed in the scope of the study are not always coherent, specifically certain government regulations are sometimes outdated and do not take into account recent changes in laws