

Control over the Restriction of Basic Rights and Freedoms in the Field of Social Welfare

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Introduction and Background

During recent years, instances of violations of basic civil rights and freedoms in social welfare facilities, as discovered by various monitoring institutions, have reached the public eye. Already in an annual report of his activities in 2007, the Chancellor of Justice drew attention to the matter: “the supervisory organs often fail to guarantee the kind of treatment of subjects in need of social care that would respect the human dignity of said subjects. Among various forms of malpractice, there have been cases of illegal restriction of freedom of movement.”¹

The Chancellor of Justice has also had to handle various complaints pertaining to the mistreatment of subjects in welfare facilities in the following years. It has been alleged that on average, the Chancellor of Justice has to deal with 100 complaints annually, including ones that ask the Chancellor to investigate the legality of the facilities’ actions in restraining the movement of their subjects, as well as instances of their involuntary placement in high security wards.²

Other European countries also experience these problems. In July 2009, the chairwoman of The United Kingdom’s Care Quality Commission drew attention to the requirement for the protection of the fundamental civil rights of subjects residing in social welfare facilities in light of a report on the application of legislation of mental health. In said report, the need to guarantee the safety as well as an acceptable quality of welfare is addressed in reference to three instances of death that occurred in 2008, which are partly attributed to an insufficient level of training of the personnel in charge of the security in the welfare facilities in question.³

In addition to the aforementioned problems, some welfare services in Estonia remain insufficiently regulated by legislation. In autumn 2009, the Chancellor of Justice of the Republic of Estonia presented a report in which he found, among other

- 1 Annual Report of the Chancellor of Justice 2007. Tallinn 2008, p 246.
http://oiguskantsler.ee/sites/default/files/annual_report_of_the_chancellor_of_justice_2007.pdf
- 2 The Chancellor of Justice annually receives 100 complaints from nursing homes. Interview with the senior counsellor of the Chancellor of Justice Igor Alyoshin. Postimees.ee 03.11.2010 <http://www.postimees.ee/?id=335781>
- 3 Regulator emphasises need for improvement in care provided to people detained under the Mental Health Act http://www.cqc.org.uk/newsandevents/pressreleases.cfm?cid=35230&FAArea1=customWidgets.content_view_1&usecache=false

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issues, that due to the lack of action by the legislative power, most Estonian local authorities lack specialized rehabilitation centres for underage persons with addiction disorders and effective treatment for said disorders is not available. In the meantime, in those few local authorities in which such a service is available, the rehabilitation centres – among other things, restrict people’s civil rights – without a proper legislative basis & guidance.⁴ In the autumn of 2010, the Chancellor of Justice organized a visit to the Children’s Shelter of Tallinn, in the aftermath of which an overview was issued, in which attention is again drawn to the lack of aforementioned legislative guidance and regulations in the country as a whole.⁵

The purpose of the research in question was to determine which are the supervisory bodies in charge of ensuring that the basic civil rights of people are guaranteed (including the rights of those currently housed in welfare facilities), to analyse both the practices and their extent in the institutions in question, with the goal of seeking an answer to the question of which basic civil rights violations are being referred to in the reports composed by the supervisory bodies. The additional aim was to find out if there are any violations of basic civil rights that have gone and continue to go undetected by the bodies in charge of the supervision of welfare facilities, what kinds of violations these are, what is the reason for them going undetected and if it would be necessary to undertake further inquiries to determine whether some changes should be made in the legislations and regulations currently in effect or the methods in which these legislations and regulations are being put into practice. As far as the authors of this research are aware of, no similar researches – which could have proved instrumental in finding solutions to problems identified and questions raised during the course of the inquiries – have been conducted in the past.

II. Methodology

The first part of the research report analyzed the principles and legal norms of international justice as well as the national justice of Estonia and the administrative and court practices in the application of these principles and legal norms. Additionally, the attention was focused on previous court rulings relevant to these matters, using those contemporary research methods as are employed in social sciences such as the philosophical-legal, comparative-dogmatic and logical methods.

The second part of the research report gave an overview of the control mechanisms put in place to guarantee the basic civil rights and freedoms and presented an analysis of the conclusions drawn from known cases where such rights had been restricted.

Cases were chosen, keeping in mind the purpose of covering all institutional levels responsible for executing the control measures (SPT – the United Nations level, CPT – the European level, Chancellor of Justice – the state level and local

4 Annual Report of the Chancellor of Justice 2008.
<https://www.oiguskantsler.ee/index.php?menuID=195>

5 The second inspection visit of the Chancellor of Justice at the Children’s Shelter of Tallinn.
<https://www.oiguskantsler.ee/?menuID=199>

governors – county level). During the course of the research, a qualitative analysis of the relevant documents (reports, summaries, recommendations) was conducted both in terms of substance as well as frequency.

III. Personal Freedom as a Fundamental Right

The entitlement to personal freedom is one of the central human rights.

Article 5 of the The Convention For The Protection of Human Rights and Fundamental Freedoms (alternately known as the European Convention On Human Rights) enacts every person's right for personal liberty and security.⁶ The analogous right is contained in the first sentence of Article 9 of the United Nation's international pact of civic and political rights,⁷ according to which every person has the right to liberty and security.

In the Constitution of the Estonian Republic,⁸ the fundamental right to personal freedom, aka everyone's right to liberty and security, is enacted by Paragraph 20 Section 1.. The right to liberty as enacted by Paragraph 20 Section 1, is in essence as well as to a great extent in wording, identical to what is stated in the Article 5 of ECoHR, as well as in the first sentence of Article 9 of United Nation's Pact of international civic and political rights. The list of circumstances that justify denying persons their liberty as enacted in Paragraph 20 Section 2 of the Constitution, is also in large parts identical to Article 5 Section 1 of EIÕK (EcoHR) – a fact which leads to the conclusion that the authors of the Constitution have modelled this article according to the text used in ECoHR. Paragraph 20 of the Constitution encompasses a domain that is both in universal justice as well as justice pertaining to human rights referred to as Habeas Corpus.⁹

In modern legal literature, it is generally agreed upon that the rights to liberty and security are not absolute, but rather relative in nature. This means that in the execution of these rights, exceptions deriving directly from the European Convention on Human Rights are possible and also binding to the legislative power.¹⁰

Legal scholar (and former judge of European Court of Human Rights) Rait Maruste points out that “most of the fundamental rights and freedoms are not limitless; only a select few are absolute in nature. Contradictions and the resulting restrictions are inevitable due to their very nature. The rights and liberties as well as rights and duties can come into conflict with each other and they can also come into conflict with universal rights and liberties as well as the duties of the public authority. “?

6 The Convention For The Protection of Human Rights and Fundamental Freedoms. RT II 2010,14,54. [https:// www.riigiteataja.ee/akt/13320295](https://www.riigiteataja.ee/akt/13320295)

7 UN international pact of civic and political rights (RT II 1993, 10/11, 11).

8 Constitution of the Estonian Republic. RT 1992,26,349.<https://www.riigiteataja.ee/akt/633949>

9 Constitution of the Estonian Republic. Commented edition. Second, improved edition. (Grundgesetz der Republik Estland. Kommentierte Ausgabe). 2. Aufl. Tallinn 2008, S. 204.

10 Perusoikeudet / Pekka Hallberg, Heikki Karapuu, Tuomas Ojanen, Martin Scheinin, Kaarlo Tuori, Veli-Pekka Viljanen. Helsinki: WSOYpro, 2011, S. 293.

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In keeping with the principle of the rule of law, the legislative power is, in accordance with the Constitution, also competent to pass laws that further specify fundamental rights and liberties as well as adjust the practices of their execution. If there is a legal and constitutional basis for the restrictions, and these as well as other rules and principles governing these restrictions have been observed, then we are not talking about violations of fundamental rights and liberties, but rather a justified conflict. In this case, the execution of the rights and liberties has been meddled with, but they have not been violated. Only a legal conflict that has no foundation in the legislation is to be defined as a violation of fundamental rights and liberties. Thereby, not each and every meddling or interference qualifies as a violation.”¹¹

The purpose of Paragraph 20 is not to protect a person against all and any interferences by the authorities and the restriction of any liberties, but only against arbitrary arrests and apprehensions. “Arbitrary” means an interference by the public authority that has no foundation in legislation, and a lack of corresponding judicial supervision. Because of this, the Constitution sets very particularly defined legal boundaries for taking a person’s freedom.

According to Paragraph 20 Section 2 a person can only be denied his/her freedom in cases, and according to procedures, as enacted by and specified in the legislation, for the following purposes:

1. *executing a convicting court verdict or an arrest as prescribed by the court*
2. *in case of a failure to execute the court order or to guarantee the fulfilling of the obligation as enacted in the legislation*
3. *in order to prevent a crime or a misdemeanour, or to guarantee that subjects who are justifiably suspected of committing a crime or a misdemeanour will face justice, or to prevent such subjects from escaping justice*
4. *to establish an educational supervision over an underage subject or to deliver such a subject to an authority competent in establishing such a supervision*
5. *to apprehend mentally ill persons, alcoholics, drug addicts or persons carrying a contagious disease, who are deemed dangerous to themselves or their fellow citizens*
6. *to prevent illegal attempts to take up residence in the Republic of Estonia, to facilitate the expulsion of persons attempting to take up illegal residence in the country, or to deliver such persons to foreign authorities.*

Paragraph 20 Section 2 presents an exhaustive list of possible exceptions, in which cases denying a person their freedom are justified. “Exhaustive” in this case means that the public authority, including the executive power, does not possess a mandate to introduce additional scenarios, or to introduce alterations to pre-existing scenarios, according to which a person can be denied their freedom or be appre-

¹¹ Maruste, Rait. *Konstitutsionalism ning põhiõiguste ja vabaduste kaitse*. – Tallinn: Juura, 2004, lk 244-245.

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hended. Thereby, the public authority can only interfere with the fundamental rights enacted in Paragraph 20 Section 2 in the occasion of the occurrence of circumstances / legal foundations described in Paragraph 20 Section 2.

Considering the essentially overlapping nature of Article 5 of EcoHR and Paragraph 20 Section 2 of the Estonian Constitution as well as its position in the Estonian judicial system (according to Paragraph 3 Section 2, the universally acknowledged norms and principles of international justice are an inseparable part of the Estonian judicial system), the practices of the European Court of Human Rights as well as the Supreme Court of Estonia should be observed in the application of the legislations contained in Paragraph 20 Section 2 of the Estonian Constitution.

Personal freedom is an enormously crucial fundamental right. The Supreme Court of Estonia has acknowledged that liberty is one of the most important fundamental rights.¹²

The Supreme Court of Estonia has pointed out that:

“Paragraph 20 Section 1 enacts everyone’s right to liberty, which, according to Section 2 of the same paragraph, can only be suspended / denied under circumstances detailed in the legislation. It can also be done in order to apprehend a mentally ill person in case he or she has been deemed a danger to him/herself or other people (Constitution Paragraph 20 Section 2 Point 5). In accordance with Civil Court Litigation Law, the court will process the submission of a mentally ill person to an enclosed facility, a psychiatric ward or a welfare facility against the person’s own will, denying that person his freedom and submitting the person to medical treatment in arbitration. Thereby, an involuntary submission of a person to an enclosed facility as enacted in the Civil Court Litigation Law Chapter 54, is analogous to denying a person’s liberty as described in Paragraph 20 of the Constitution of Estonia.”¹³

The conclusion to be drawn from the presented material is that committing a person to an enclosed facility represents denying said person his/her liberty as defined in Paragraph 20 of the Constitution.

The European Convention on Human Rights also facilitates the possibility of the legal apprehension of mentally handicapped subjects. Of crucial significance here are the three criteria defined by the European Court of Human Rights in relation to the Winterwerp case (*European Court of Human Rights ruling Winterwerp vs Netherlands* 24.10.1979) which must always be satisfied in order to find a person mentally incompetent:

“1) A subject has to demonstrate beyond doubt that he or she is indeed in ill mental health, which requires the formation of an objective medical panel in order to determine the state of mental health of said subject.

12 Administrative Law Chamber of the Supreme Court of Estonia. 09.06.2006 verdict in case nr 3-3-1-20-06 point 15 <http://www.nc.ee/?id=11&tekst=RK/3-3-1-20-06>

13 Civil Chamber of the Supreme Court of Estonia. 02.03.2007 sentence nr 3-2-1-145-06 point 15 <http://www.nc.ee/?id=11&tekst=RK/3-2-1-145-06>

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2) The nature and gravity of the mental illness in the subject has to meet the legal standards that allow for denying the subject in question his or her liberty.

3) The confinement of the subject is justified only as long as the subject continues to exhibit signs of mental disturbance.”¹⁴

In the same case, the European Court of Human Rights ruled that:

“the confinement of someone for the simple reason that his/her views or behaviour are at odds with the prevalent norms of the society, is not in accordance with the convention. The possibility of submitting subjects that exhibit strong and obvious signs of mental illness, into an isolated environment or a health care facility, cannot be ruled out in case of an emergency. All that, however, presupposes that a consultation with a medical professional will occur as soon as possible.”¹⁵

In conclusion, it can be noted that because the forcible submission of a person to conditions of tightly supervised care constitutes an intense interference with the person’s fundamental rights, involving denying the person their liberty, such an intervention can only occur in extreme cases and with a court’s permission. The criteria for such cases have to be defined in the legislation clearly and unambiguously.

Unfortunately, in practice, there have been occasions in which persons (wards) have been involuntarily submitted to care under strict supervision in enclosed departments, for instance on the order of the director of a welfare facility. The reasons typically given to explain such unlawful procedures as described, argue that by issuing such an order, the director is acting in the best interests of the ward, as well as the other individuals in the facility. Additionally, it is pointed out that, as a rule, such action is taken at the inclination and/or with the permission of the party legally representing the ward with limited legal capacity. The person’s right to exercise his/her own discretion is thereby not taken into consideration.

The regulation personal self-determination has been established in Estonia for the instances of the application of psychiatric attention. Paragraph 3 of the Law of Psychiatric Aid enacts the voluntary nature of psychiatric aid. Generally, psychiatric attention is applied at the person’s wish or with his/her knowing consent. Meanwhile, a person with limited legal capacity receives psychiatric attention with the consent of his/her lawful representative and at the person’s own volition to the extent that the person is able to express his/her will. A lawful representative cannot express the will to receive psychiatric attention in place of the party he or she represents (Paragraph 3 Section 2).¹⁶

The right of personal self-determination is also the subject of Recommendation R(99)4 by the European Council of Ministers on principles concerning the legal

¹⁴ *European Court of Human Rights ruling* 24.10.1979 in the case nr 6301/73 Wintwerp vs Netherlands (§-d 16-18). <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=25748374&skin=hudoc-en&action=request>

¹⁵ Constitution of the Estonian Republic. Commented edition. Second, improved edition. (Grundgesetz der Republik Estland. Kommentierte Ausgabe). 2. Aufl. Tallinn 2008, S. 204.

¹⁶ Law of psychiatric aid <https://www.riigiteataja.ee/akt/992425>

protection of incapable adults, in which it is stated that “in a situation in which an adult is in actuality competent to give free and informed consent to a medical intervention, the intervention may only be carried out with the consent of that adult”. If an adult with a limited capacity for decision making comprehends his/her circumstances, the lawful representative must take his/her wishes into account.¹⁷

IV. Supervising Bodies on International, European and National Level

The main supervising bodies put in place to guarantee the preservation of fundamental rights in facilities in which the rights of subjects are restricted, are the United Nations level Committee Against Torture (CAT), the United Nations Subcommittee on Prevention of Torture (SPT), or a subcommittee created to prevent torture as well as other cruel, inhuman or degrading treatment or punishment. CAT has been created on the basis of a United Nations anti-torture convention¹⁸ UNCAT – United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. CAT’s duty is to review the reports on following the convention which are presented by countries all over the world and also to give general comments on interpreting the convention.

SPT has been created on the basis of OPCAT – Optional Protocol to the United Nations Convention against Torture.

The mentioned protocol envisions a two-dimensional system of institutions visiting the places of confinement on a regular basis in order to prevent mistreatment – firstly on the international level, forming a so-called subcommittee (SPT) and secondly, forming at least one national institution to perform inspections.

The main objective of SPT is to visit the places of confinement of the member states. On the basis of information acquired from the visits, the subcommittee can make suggestions to member states concerning the better protection of subjects that have lost their liberty.

On the European level, the supervising body is the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), created on the basis of the European Council’s Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.¹⁹

Act 3 of OPCAT charges a member state with the obligation of forming or appointing a national preventive mechanism or guaranteeing its existence. From 2007, the Chancellor of Justice is appointed as that preventive mechanism in Estonia. Also, in numerous other countries, an ombudsman (Sweden, Albania, Poland) or an om-

17 Council of Europe Recommendation R(99)4 of the Committee of Ministers to Member States on principles concerning the legal protection of incapable adults. 23.02.1999. <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=536854&SecMode=1&DocId=396848&Usage=2>

18 United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. RT II 2006,26. www.riigiteataja.ee/akt/12753417

19 European Council’s Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. RT II 1996, 36/37,132. www.riigiteataja.ee/akt/13088648

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budsman in co-operation with a non-profit organisation (Denmark, Slovenia), has been appointed as the national preventive mechanism. The obligations of a preventive mechanism can also be carried out by several bodies simultaneously (United Kingdom) or an entirely new organisation can be formed (Austria, Switzerland).

Thereby, the state level supervising body in Estonia is the Chancellor of Justice, or National Preventive Mechanism in OPCAT's definition. In Estonia, the Chancellor of Justice simultaneously fulfils the functions of the parliamentary ombudsman, which, according to the law of the Chancellor of Justice, also grants him the authority to supervise that the rights of people in welfare facilities are guaranteed.²⁰

Also a national supervising body, but at the county level, is the governor, who, as defined in the law of social care,²¹ carries out an inspection on the quality of the social services offered in his county, and annually presents a report on these matters to the national government. In addition to that, the same law from 2009 burdens the Social Insurance Board with the obligation to supervise, on the state level, the practices of those facilities offering services of special social care.

Even though the SPT has only existed for a couple of years and is yet to publish an official report on the findings of its inspections, the CPT has been active for years and has put into place a particular system of inspecting countries. The CPT visits on average 10 countries each year, conducting inspections of police departments, prisons, deportation centres, psychiatric hospitals and welfare facilities. It has to be noted that welfare facilities represent the smallest percentage of the institutions inspected by CPT. Often, the CPT does not visit a single welfare facility during its inspections, focusing solely on police facilities and prisons. At the same time, on the several occasions that welfare facilities were actually inspected, the CPT has discovered violations both in terms of the national law not corresponding to international conventions as well as factual violations of the fundamental rights of subjects receiving the social service. Implementing restrictions upon the subjects receiving the social service, which was the main focus of the study, is in turn only one subset of questions reviewed by the CPT during the course of its inspections.

V. Problems Arisen as a Result of the Analysis

1. The legal position of the subjects receiving the service

In the national welfare facilities of most European countries, it has been defined that a person is submitted to institutional care only in the case that the methods of communal care have been exhausted for that person. The Estonian Law of Social Care, for instance, enacts care in a welfare facility as a social service (Paragraph 10 Section 6). Submitted to care in social welfare facilities are those subjects who, due to their special needs or social circumstances, are not fit to live independently, and

²⁰ Law of the Chancellor of Justice. <https://www.riigiteataja.ee/akt/12788991>

²¹ Law of Social Care. <https://www.riigiteataja.ee/akt/12851852> (15.09.2011).

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their welfare cannot be ensured by other social services or different forms of support (Paragraph 16 Section 3).

The social care provided by institutions constitutes a novelty approach, according to which a specialized welfare facility is a Social Service Provider and the person put in the care of such a facility is a Social Service User. This, in turn, presupposes signing a contract on providing / receiving social services between the two parties, where the rights, obligations and responsibilities of both parties have to be clearly defined.

On several occasions, the CPT has found that persons suffering from dementia and other serious health problems, therefore requiring more care, and are voluntarily receiving the service, have been placed into enclosed departments within the facilities. For example, in the report presented to the Slovenian government in 2006, it has been pointed out that “the placement of persons into enclosed sections in the retirement home of Fuzhine, qualifies as de facto deprivation of liberty of the persons in question. Slovenia was advised to take steps to guarantee access to legal counselling as well as periodical reviewing of their cases by a competent court for subjects in the Fuzhine retirement home and all social welfare facilities in Slovenia.”²² At the same time, it was also pointed out that the exact same violation had already been identified in a report on Slovenia in 2001. A similar problem was ascertained in the Kiskunhala nursing home in Hungary.²³

In addition, the CPT has identified cases, for instance in its report to the Government of the Estonian Republic from 2003, where the wards had been declared as being without active legal capacity and then placed into nursing homes at the request of their intercessor, or with a court order, without the person him- or herself ever having appeared before the court. During the course of the legal procedure, the court never did appoint a legal representative ex officio and the parties involved in the case did not even receive a copy of the court verdict. Several wards have claimed never to have been informed of the option to contest the court verdict.²⁴ In its report, the CPT found that the legal status of numerous wards at the Estonian Kernu Welfare Facility was unclear to the personnel of the nursing home, including the administrator. Because of that, there were instances in which the wards, whose stay at the nursing home was de jure voluntary, were hindered in their attempts to leave the facility (allegedly in their own best interests), without a legal procedure ever having been initiated to facilitate care of those persons in such an institution without their own

22 Report to the Slovenian Government on the visit to Slovenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 31. January to 8 February 2006, p 110 jj. <http://www.cpt.coe.int/documents/svn/2008-07-inf-eng.htm>

23 Report to the Hungarian Government on the visit to Hungaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 8 April 2005, p 171. <http://www.cpt.coe.int/documents/hun/2006-20-inf-eng.htm>

24 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, p 116. <http://www.cpt.coe.int/documents/est/2005-06-inf-eng.htm>

consent in the first place. Violations of the ward's rights in Estonian social welfare facilities were isolated cases, but in several welfare institutions in Bulgaria, almost all of the wards were in a similar undefined legal situation. In its 2006 report to the Bulgarian government, the CPT noted that it had already drawn attention to the existing problem in its 2002 and 2003 reports, having advised addressing the need to legally review the stay in social welfare institutions of those mentally handicapped patients who had been placed in these facilities in a manner which de facto constitutes deprivation of the liberty of these subjects. Unfortunately, no steps have been taken to obtain a proper legal evaluation of the persons in question, as advised by the CPT.

The CPT discovered that although the persons staying at the nursing home had given their signatures on contracts determining the terms of providing / receiving the service, it was obvious – and also acknowledged by the staff of the institution – that the majority of the subjects receiving the service, were in fact not capable of comprehending the document they had signed. This, however, renders such contracts on providing social service invalid.²⁵

2. The right to complain/appeal of the party receiving the service

In a number of its reports, the CPT has emphasized that from the conversations conducted with the wards on the premises of social welfare facilities, it has been determined that they are factually unaware of their right to present complaints both within the facility they are lodged in as well as, confidentially, to independent institutions outside of it. In certain cases, no order of presenting formal complaints had been established in the facility.²⁶

Additionally, on several occasions, the CPT had not confined itself to pointing out the missing right to present complaints, but had addressed the rights of the par-

25 Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 26 April 2002, p 178. <http://www.cpt.coe.int/documents/bgr/2004-21-inf-eng.htm>

Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 22 December 2003, p 49,50,52. <http://www.cpt.coe.int/documents/bgr/2004-23-inf-eng.htm>

Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 September 2006, p 176-177. <http://www.cpt.coe.int/documents/bgr/2008-11-inf-eng.htm>

26 Report to the Slovenian Government on the visit to Slovenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 31. January to 8 February 2006, p 114. <http://www.cpt.coe.int/documents/svn/2008-07-inf-eng.htm>

Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 22 December 2003, p 52. <http://www.cpt.coe.int/documents/bgr/2004-23-inf-eng.htm>

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, p 123.

<http://www.cpt.coe.int/documents/est/2005-06-inf-eng.htm>

ties receiving the social service, in broader terms. In a number of its reports, CPT had pointed out the need to issue an informative bulletin describing in comprehensible terms the rights and obligations of the parties as well as the internal orders of the institution to a person upon his or her arrival at the social welfare facility.²⁷

3. The problem pertaining to large nursing homes

In some cases, the CPT had found that there are persons receiving institutional social service who need services that would restrict their fundamental rights considerably less. For instance, in a report presented to the Hungarian government in 2005, it was found that “out of the 353 inhabitants of the Kiskunhala Nursing Home, at least 20-25 persons could live a much more independent life, but are receiving the current type of service because of the lack of services more suitable to them - all this in a situation where close to a 100 persons are waiting in line to receive the service in question, 65 of them requiring the service urgently.”²⁸

In the quoted report, it has also been suggested that the number of patients housed in a nursing facility should all in all not exceed 100 inhabitants. In certain cases, the situation in such large facilities offering nursing services has been so poor on the whole that CPT has deemed it necessary to suggest to the state that in addition to the reorganization or liquidation of certain facilities, a whole new system offering social services for persons with special needs should be developed.

4. Control over the use of restraint methods

In every welfare facility, a need to restrain restless and/or violent wards may arise. As CPT itself has noted, it is this aspect that is subject to its particularly keen interest because of its inherently high potential for malpractice and mistreatment.²⁹

Numerous reports reference instances when the staff of an institution had failed to follow the proper restraining procedures. For example, a report on Sweden from 2003 makes mention of several instances upon which the staff of Bärby Youth Home

27 Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 January to 5 February 2003, p 127. <http://www.cpt.coe.int/documents/swe/2004-32-inf-eng.htm>
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, p 122.

<http://www.cpt.coe.int/documents/est/2005-06-inf-eng.htm>
Report to the Cyprus Government on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 17 December 2004, p 139.
<http://www.cpt.coe.int/documents/cyp/2008-17-inf-eng.htm>

28 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 8 April 2005, p 157. <http://www.cpt.coe.int/documents/hun/2006-20-inf-eng.htm>

29 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, p 103. <http://www.cpt.coe.int/documents/est/2005-06-inf-eng.htm>

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had offhandedly resorted to physical violence towards its wards.³⁰ The report emphasized the need to utilize verbal methods of calming the restless wards and to enable all the staff of an institution to undergo training in various restraint techniques and methods which do not call for the use of physical force. The CPT has also issued general guidelines as to which procedural rules have to be followed when isolating the subjects.

In several reports, attention has been called to the need to create a special register wherein all instances of physical restraint of the wards (manual control, straps, straight jacket, and isolation) shall be recorded.³¹

The CPT had discovered instances where an isolated subject had been left without supervision, and there had also been cases of isolation having been used as a measure of disciplinary punishment.³² Thereafter, the CPT has always particularly emphasized that in those extreme cases in which the use of physical restraint methods is called for, the use of these methods has to be stopped at the first opportunity, and it is not permitted to prolong the use of force as a measure of punishment.

In certain cases, the CPT has drawn the countries' attention to the need to close down rooms on the premises of social welfare facilities that are being used to isolate the wards and which are referred to as "lockups" or "punishment cells", clearly denoting their retributive purpose. For instance, in a 2003 report on Bulgaria, it was

30 Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 January to 5 February 2003, p 108. <http://www.cpt.coe.int/documents/swe/2004-32-inf-eng.htm>

31 Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 January to 5 February 2003, p 119. <http://www.cpt.coe.int/documents/swe/2004-32-inf-eng.htm>

Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 26 April 2002, p 176

<http://www.cpt.coe.int/documents/bgr/2004-21-inf-eng.htm>

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, p 103.

<http://www.cpt.coe.int/documents/est/2005-06-inf-eng.htm>

32 Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 January to 5 February 2003, p 120. <http://www.cpt.coe.int/documents/swe/2004-32-inf-eng.htm>

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, p 103.

<http://www.cpt.coe.int/documents/est/2005-06-inf-eng.htm>

Report to the Cyprus Government on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 17 December 2004, p 137.

<http://www.cpt.coe.int/documents/cyp/2008-17-inf-eng.htm>

Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 26 April 2002, p 176. <http://www.cpt.coe.int/documents/bgr/2004-21-inf-eng.htm>

noted that “although during the inspection of the welfare facilities in Razdol and Pastra the former lockups were no longer in use, the wards themselves believed that they could still wind up being confined in them”.³³

In some cases, the CPT has drawn the countries’ attention to certain inaccuracies inherent in their national regulations concerning the restraint methods (such as the placement of persons into isolation cells, certain fastening measures).³⁴

The topic of restraint methods is more extensively and exclusively discussed in the CPT’s general reports 8 and 16; the latter contains, among other things, general instructions for the choice and use of restraint methods.³⁵

5. The need for educating the personnel

On several occasions, the CPT has specifically addressed the need to provide specialized training for those employees of welfare facilities who are working with especially difficult clients, including violent, restless or mentally handicapped persons. For instance, in the report presented to the government of the Republic of Estonia in 2003, it is noted that “upon visiting the welfare facility in Kernu, the CPT delegation received numerous complaints about verbal and physical abuse having been inflicted upon the wards by their fellow residents. Several female subjects claimed they were continuously “terrorized” and beaten by a group of male wards, and that they live in constant fear of such physical attacks. The delegation itself witnessed an incident where a male subject hit his female co-resident, but the staff of the institution did not intervene as the regulations would demand. The victim of the attack received bruises on her face and upper lip area.”³⁶ The CPT called for immediate measures to review the treatment of violent wards in the Kernu welfare facility and consequently to compose and put into practice an action plan directed at reducing the violent behaviour of the wards. The committee also recommended that it be reminded to all personnel that they have the responsibility to guarantee the safety and physical inviolability of the wards and protect them from those fellow residents who might constitute a physical threat. The need for the personnel to receive train-

33 Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 22 December 2003, p 47-48. <http://www.cpt.coe.int/documents/bgr/2004-23-inf-eng.htm>

34 Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 January to 5 February 2003, p 118. <http://www.cpt.coe.int/documents/swe/2004-32-inf-eng.htm>

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, p 106. <http://www.cpt.coe.int/documents/est/2005-06-inf-eng.htm>

35 European Council’s Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 16th General Report. (CPT/Inf(2006) (p 39, 47). <http://www.cpt.coe.int/en/annual/rep-16.pdf>

36 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, p 89. <http://www.cpt.coe.int/documents/est/2005-06-inf-eng.htm>

ing in the use of restraint techniques was also noted in the report presented to the Swedish government.”³⁷

6. The need for systematic control

It has been noted in several reports that before the CPT first started inspecting the nursing homes and social welfare facilities, no independent national supervising body had ever examined whether the practices of a given institution are corresponding with the legal regulations in effect, and if the rights of the subjects in such institutions are guaranteed.³⁸ In some cases, the CPT found that the only aspect of these facilities’ practices which had been subjected to inspections was the use of financial resources, not the quality of services, and in certain cases the CPT pointed out that instead of relying on conducting random inspections, a system of continuous supervision over such institutions on a national level should be implemented.

VI. Conclusions and Propositions

As a result of the research, the conclusion was drawn that in providing welfare services, in certain cases it is inevitable and in everybody’s best interests, to restrict the fundamental rights of the party receiving the service. The applicable legal regulations, including the requirement that a person’s liberty can only be restricted on a court order, must be established by national legislations. Unfortunately, the CPT has discovered instances in several countries where the subjects receiving the welfare service are placed in enclosed departments within the institution providing the service, on illegal grounds. This gives reason to believe that similar cases where the personal rights of people are being restricted also occur in providing services of this type in other countries.

The CPT has discovered cases in which the client has been provided with a service which restricts his or her rights excessively just because the types of services in an institution that would be more suitable, and less restrictive, for this particular client, have been insufficiently developed and organized. This also indicates that problems of this type may be occurring elsewhere as well.

In very many cases, persons receiving the service are unaware of their rights, from the right to submit complaints both within the facility as well as, confidentially, to independent outside institutions, to the right to appeal to the court of law in order to demand a reassessment of the person’s involuntary placement into a welfare

37 Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 January to 5 February 2003, p 108. <http://www.cpt.coe.int/documents/swe/2004-32-inf-eng.htm>

38 Report to the Slovenian Government on the visit to Slovenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 31. January to 8 February 2006, p 115. <http://www.cpt.coe.int/documents/svn/2008-07-inf-eng.htm>
Report to the Hungarian Government on the visit to Hungaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 8 April 2005, p 175. <http://www.cpt.coe.int/documents/hun/2006-20-inf-eng.htm>

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facility. The latter likewise directly points to the possibility of the illegal restrictions of a person's fundamental rights also occurring elsewhere.

The conclusions, in which the CPT denotes the lack of knowledge and skill amongst the personnel of the facilities providing the service, are of a particularly worrying nature. Since the persons receiving the welfare service are a very vulnerable group of people that may not fully know their rights and do not always have an accurate understanding of these rights, the people providing the services have an enormous responsibility in seeing that the rights of clients are not violated, and therefore their professional knowledge and skills are of absolutely crucial importance.

The most problematic questions in providing the social welfare service are the insufficient means of control over the methods used to restrain the wards. As the CPT has noted, it is precisely here that, due to the lack of knowledge and skill amongst the personnel, a serious danger of mistreatment of the clients may arise.

In conclusion, one has to note that the resources available for conducting this research were rather limited, which is why comprehensive answers to all these questions were not found. The SPT as a United Nation level monitoring organ, is yet to present inspection reports on the social welfare facilities, and the CPT as a European level monitoring organ has so far still only been able to visit a relatively small number of welfare facilities (for example, in Estonia, there are only 3 institutions that have undergone a CPT inspection thus far – Valkla welfare facility, Kernu welfare facility and Võisiku welfare facility). The research was also limited by the fact that the actual publication of the CPT reports always involves a certain delay; depending on the country the report is addressing, the publication of the report may be delayed for up to 2 years after the inspection actually took place. For a particularly startling example, the report by the CPT on paying a visit to the government of the Republic of Estonia in May 2007 was only published in April 2011. Therefore, it was concluded that a more detailed overview of the condition of the persons receiving the social welfare service in various institutions, including information on the restrictions of their fundamental rights, is to be derived from the analyses of the national monitoring organs. At the same time, it was indicated in several CPT reports that the national supervising bodies have not been monitoring the conditions of subjects receiving the welfare service at all, or have done so only to a very limited extent. Thereby it is safe to assume that in practice, instances of illegal restrictions of persons' rights in such institutions continue to take place and a lot of these instances may never be discovered. Since, in a few cases, the CPT has pointed out shortcomings in the states' legislations in respective matters, it is assumed that the regulations on the national level do not always guarantee the protection of the fundamental rights of the persons housed in social welfare facilities.

Deriving from what is mentioned above, it was found that a desirable course of action would be to conduct further investigations on the basis of one or several

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countries, addressing the activities of the national monitoring organs of the countries in question and the conclusions drawn from the quality control conducted on their social welfare facilities. The purpose of the further investigations mentioned above would be to determine whether a particular national welfare system and its monitoring system is efficient and able to guarantee a situation in which the fundamental rights of persons receiving the social service are not illegally restricted.

Additionally, it is recommended that a case study focusing on one or several welfare facilities be conducted, with the purpose of finding out what the restriction of the fundamental rights of persons looks like in practice and if some such cases may ever be discovered. An additional purpose of the case study would be to determine whether Estonian national legislation and its execution should undergo any kind of change.