# THE PLACE AND CONTENTS OF GOOD ADMINISTRATION IN ESTONIAN LAW ON THE EXAMPLE OF TERMINOLOGICAL DIVERSITY BASED ON CASE-LAW AND THE PRACTICE OF THE CHANCELLOR OF JUSTICE

**Sille Allikmets, Magister iuris**
*Member of the Estonian Bar Association and an attorney-at-law at the Aavik & Partners Law Office*

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## INTRODUCTION

The term "*good administration*" is well-known in the laws of the European Union and Estonia. There is no ambiguity in the terminology of good administration with regard to the English approach in EU law, as *the right to good administration* is referred to *expressis verbis* and contained in Article 41 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on the 7th of December 2000 (EU Charter of Fundamental Rights. OJ 2012/C 326/02). Pursuant to subsection 1 of the aforementioned, *the right to good administration* means that the institutions and bodies of the Union must handle one's affairs impartially, fairly and within reasonable time. These three principles can be called the key elements of good administration. Through their wording, the key elements of good administration allow the principle of good administration to provide a rather broad and varied content. To avoid this, Article 41 (2) of the Charter specifies the content of the key elements of good administration, providing everyone with the right to be heard before any individual measure which would affect him or her adversely is taken (EU Charter of Fundamental Rights. OJ 2012/C 326/02 Art 41 (2) (a)), to have access to his or her file (EU Charter of Fundamental Rights. OJ 2012/C 326/02 Art 41 (2) (b)), to demand reasons from the administration for its decisions (EU Charter of Fundamental Rights. OJ 2012/C 326/02 Art 41 (2) (c)), to determine the language to be used (EU Charter of Fundamental Rights. OJ 2012/C 326/02 Art 41 (4)) and to have the right to demand damages to be made good (EU Charter of Fundamental Rights. OJ 2012/C 326/02 Art 41 (3)). Through the regulation mentioned above, EU law has defined the term of *right to good administration* through specific content elements.

In Estonian law, only subsection 19 (1) of the Chancellor of Justice Act (Chancellor of Justice Act. RT I 1999, 29, 406) refers to good administration, more specifically, to good administrative practice, providing everyone the right of recourse to the Chancellor of Justice in order to have his or her rights protected by way of filing a petition to request verification whether or not a state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties adheres to the principles of observance of the

fundamental rights and freedoms and good administrative practice. It is not clear in the context of the aforementioned provision nor other provisions of the same act as to which specific elements are included in the concept of *good administrative practice*.

According to the judicial practice of the Supreme Court (Judgement of the Constitutional Review Chamber of the Supreme Court of 17.02.2003, 3-4-1-1-03, Clause 16), the *right to good administration* is subordinated to section 14 (Section 14 of the Constitution: "It is the duty of the legislature, the executive, the judiciary, and of local authorities, to guarantee the rights and freedoms provided in the Constitution.") of the Constitution of the Republic of Estonia (The Constitution of the Republic of Estonia. RT 1992, 26, 349), according to which comments, the substantive protection sphere of the section includes the fundamental right to *good administration* as a right specifying the right to organisation and procedure in the field of administrative law (The Constitution of the Republic of Estonia. Annotated edition. Juura 2017, page 203). Consequently, the *right to good administration* should be clear and unambiguous in Estonian law as well – similarly to the Charter of Fundamental Rights referred to in the article above, and as the Court of Justice has stated, the *right to good administration* does not confer rights on individuals, as such, unless it is an expression of specific rights within the meaning of Article 41 of the Charter of Fundamental Rights of the European Union declared on the 7th of December, 2000 (Judgement of the Court of First Instance of 04.10.2006 T-193/04: Hansa-Martin Tillack vs Commission of the European Communities, Clause 127 and the judgement cited therein).

Unlike EU law, where good administration has been given the legal value of everyone's fundamental right by the Charter and as such the fundamental right is embedded with clearly defined content elements, Estonian law lacks the necessary specificity. References to good administration are primarily made in judicial practice by using the terms "*right to good administration*", "*principle of good administration*" and "*good administrative practice*" but also "*practice of good administration*" and "*the principle of good administrative practice*" (Tallinn Administrative Court judgement of 11.07.2008 in administrative matter No. 3-08-390; Tartu Administrative Court judgement of 17.11.2014 in administrative matter No. 3-13-2063, Clause 14; Judgement of the Criminal Chamber of the

Supreme Court of 12.10.2016, 3-1-1-65-16, Clause 21). This article examines the different applications of terms related to good administration in the Estonian judicial practice – both in case law and the practice of the Chancellor of Justice, who performs provisional supervisory activities and thereby protects the fundamental rights and freedoms of individuals – by identifying whether different terms are also incorporated with different component elements. The concept of good administration-related terminology leads to the more general question regarding the legal value of good administration in Estonian law – whether it is a fundamental right, a general principle of law or custom. The terminological clarity of good administration is the first step in ensuring the protection of a person's subjective rights in situations where there is a need to rely on good administration. In order to invoke such rights, it must beforehand be clear whether a reference to a specific good administration-related term also relates to its relevant content or to good administration in general.

As a reference to the different terms of good administration in Estonian law, Article 41 of the EU Charter of Fundamental Rights has been used, to which the Supreme Court referred to already in 2003, i.e. before Estonia became a member of the EU and before the Charter became legally binding to the Member States (The Charter became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009 and currently has the same legal value as the EU Treaties). The usage of the Charter as an example has been justified by the Supreme Court with the fact that the Charter itself is based, "inter alia, on the constitutional traditions of the Member States of the European Union and on the principles of democracy and the rule of law. The principles of democracy and the rule of law also apply in Estonia" (Judgement of the Constitutional Review Chamber of the Supreme Court of 17.02.2003, 3-4-1-1-03, Clause 16). Following the example of Article 41 of the Charter, the Supreme Court has also listed one's right to have access to their files, right to be heard, right to be entitled to compensation for damages caused by administrative bodies and the administrative bodies' obligation to justify their decisions as components of good administration (Judgement of the Constitutional Review Chamber of the Supreme Court of 17.02.2003, 3-4-1-1-03, Clause 15). In this article, Article 41 of the Charter of Fundamental Rights is used as a reference only for the content elements of good administration and the scope of the Charter, which under Article 51 (1) of the Charter is addressed to the institutions and bodies of the Union with due regard

for the principle of subsidiarity and to the Member States only when they are implementing Union law, has been disregarded (Explanations on the Charter of Fundamental Rights. „Explanations on Article 51 - Scope". – ELT C 303, 14.12.2007, pp 17-35).

## 1. THE RIGHT TO GOOD ADMINISTRATION

A key element in the development of good administration-related judicial practice is the Supreme Court's judgement of 2003, which, based on Article 41 of the Charter of Fundamental Rights, recognised everyone's *right to good administration* and incorporated it in accordance with the Charter with one's right to have access to their files, right to be heard, right to be entitled to compensation for damages caused by administrative bodies and the administrative bodies' obligation to justify their decisions (Judgement of the Constitutional Review Chamber of the Supreme Court of 17.02.2003, 3-4-1-1-03, Clause 15). As mentioned above in this article, the Supreme Court relied on the Charter of Fundamental Rights despite the fact that the Charter was not legally binding for Estonia at the time. Transposed from the preamble to the Charter of Fundamental Rights, the Supreme Court incorporated good administration as part of democracy and the rule of law, as well as other general principles and legal values of European law, which, irrespective of the legal validity of the Charter, were valid in Estonia at the time of that decision.

While Article 41 of the Charter of Fundamental Rights and the judicial practice of the Court of Justice (Judgement of the Court of First Instance of 04.10.2006 T-193/04: Hansa-Martin Tillack vs Commission of the European Communities, Clause 127 and the judgement cited therein) implementing it provides exhaustive content for *good administration*, the Estonian judicial practice extends the bounds of the *right to good administration* to a greater extent when compared to the regulation set forth in the Charter, additionally incorporating the right to challenge the decision of the administrative body under such right (Judgement of the Constitutional Review Chamber of the Supreme Court of 20.10.2009, 3-4-1-14-09, Clause 44). Undoubtedly, the described right serves as an important right of defence, which, within the contents of good administration but without using that term *expressis verbis*, has been mentioned in the Council of Europe Committee of Ministers resolution (77) 31 of 1977 on the protection of the individual in relation to the acts of administrative authorities (Resolution 77 (31) of the Council of Europe, „On the Protection of the Individuals in Relation to the Acts of the Administrative Authorities") as a safeguard in administrative proceedings, in addition

to the right to be heard, the right to access information, the right to be assisted and represented and the administrative bodies' obligation to state reasons for their actions. The base for the adoption of this resolution, despite the differences between the Member States' administrative and judicial systems, was the broad consensus on the primary principles which should guide the administrative procedure in order to ensure the fairness in relationships between the individual and the administrative bodies (Resolution 77 (31) of the Council of Europe, „On the Protection of the Individuals in Relation to the Acts of the Administrative Authorities"). By approaching the *right to good administration* through the interpretation of section 14 of the Constitution as a specification of general organisational and procedural rights in the field of administrative law (The Constitution of the Republic of Estonia. Annotated edition. Juura 2017, p 203), this principle also applies to the right to challenge the decision of an administrative body – to ensure fairness in relationships between the individual and the administrative bodies.

In addition to the right to challenge a decision, the Estonian judicial practice refers to negligence of an administrative body and maladministration as a violation of the *right to good administration* (Tallinn Administrative Court judgement of 27.01.2011 in administrative matter No. 3-10-1919, Clause 4) Such an "indictment" of negligence of an administrative body could be qualified as a breach of the general duty of care of the administrative body, which Article 41 of the Charter of Fundamental Rights does not specifically mention in the context of good administration. From the aspect of the protection of the subjective rights of a person, the duty of care of an administrative body plays an important role in the proper conduct of administrative procedures.

Pursuant to the Supreme Court's decision of 2003 referred to in this article, the Chancellor of Justice of the Republic of Estonia also recognises *the right to good administration* as everyone's fundamental right arising from section 14 of the Constitution. Contrary to the Charter of Fundamental Rights and the judicial practice of the Supreme Court, the Chancellor of Justice, in addition to *the right to good administration*, embodies the obligation of the public authorities to "act in a humane manner", additionally emphasising that "public authorities must show due care in their dealings with a person, treat him/her as a subject and not as an object, and contribute in every way to the effective protection of his/her rights

and freedoms." (Overview of the activities of the Chancellor of Justice in 2008. Tallinn 2009, pp 11-12; Overview of the activities of the Chancellor of Justice in 2009. Tallinn 2010, pp 17-18; Overview of the activities of the Chancellor of Justice in 2010. Tallinn 2011, p 17). *The right to good administration* as enforced by the Chancellor of Justice could thus be summarised as a separate duty of care in addition to the requirement of due diligence expressed above.

The analysis of Estonian judicial practice suggests that the content elements of *the right to good administration* are largely similar to those stipulated in Article 41 of the Charter of Fundamental Rights, integrating into its composition everyone's right to have access to their files, right to be heard, right to be entitled to compensation for damages caused by administrative bodies and the administrative bodies' obligation to justify their decisions. Nonetheless, Estonian judicial practice nor the Chancellor of Justice do not utilise the *right to good administration* identically to the Charter. Thus, the Estonian judicial practice incorporates everyone's right to challenge the decisions of an administrative body and the requirement of due diligence and the so-called duty of care of an administrative body into the composition of *the right to good administration*. It is difficult to argue that these elements do not specify the general organisational and procedural rights within administrative law. Therefore, for the purpose of section 14 of the Constitution, the content components differing from the ones stipulated in the Charter can be considered as component elements of *the right to good administration* as well.

The Supreme Court has recognised the *right to good administration* as a fundamental right of everyone (Judgement of the Constitutional Review Chamber of the Supreme Court of 17.02.2003, 3-4-1-1-03, Clause 16). In order to invoke a fundamental right, it must be clear and understandable, both verbatim and in substance. The Estonian law of today lacks such clarity, which in turn calls into question the value of the fundamental *right to good administration* itself. The question of whether good administration is a specific fundamental right or a general principle of law developed by judicial practice has also been raised at the EU level. Wathelet, an Advocate General of the European Court of Justice has given his opinion on this question, emphasising, that the title of the Charter alone, and, moreover, the title and wording of Article 41

of the Charter put an end to the uncertainty as to whether the *right to good administration* is a fundamental right or a general principle of law. Wathelet explains that "this is the '*right to good administration*', a right which includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, the obligation of the administration to give reasons for its decisions" (Opinion of Advocate General Wathelet in court case Marchiani vs parliament, ECLI:EU:C:2016:22, C-566/14 P, Clause 37). Advocate General Wathelet's position is supported by the above-mentioned standpoint of the European Court of Justice, according to which the *right to good administration* does not confer rights on individuals as such unless it is an expression of specific rights within the meaning of Article 41 of the Charter of Fundamental Rights (Judgement of the Court of First Instance of 04.10.2006 T-193/04: Hansa-Martin Tillack vs Commission of the European Communities, Clause 127 and the judgement cited therein).

Taking into consideration the differences in legal regulation between the EU and Estonian law, certain doubts arise as to whether it is correct within Estonian law to consider the *right to good administration* as a fundamental right, relying on the *principle of good administration* used and embodied in Estonian judicial practice. The following analysis clarifies whether Estonian judicial practice uses the terms "*right to good administration*" and "*principle of good administration*" as synonyms, or whether there are substantive differences between the fundamental right and *principle of good administration*, and thus whether Estonian law includes a specific (fundamental) *right to good administration* or a more general principle of such.

## 2. THE PRINCIPLE OF GOOD ADMINISTRATION

Article 41 of the Charter of Fundamental Rights, as well as the composition of the *right to good administration* as embodied by the Estonian judicial practice, does not explicitly mention the obligation to include a person, through which the judicial practice incorporates the *principle of good administration* (Judgement of the Administrative Chamber of the Supreme Court of 11.12.2006, 3-3-1-61-06, Clause 20, Clause 23; Judgement of the Administrative Chamber of the Supreme Court of 11.10.2007, 3-3-1-37-07, Clause 9; Judgement of the Administrative Chamber of the Supreme Court of 18.11.2009, 3-3-1-44-09, Clause 14). Without explicitly mentioning the obligation to include a person to a proceeding within the composition of *the right to good administration*, this obligation can be considered as a part of this composition "by default", given that neither the right to be heard stipulated in the Charter nor the right to access one's personal data can be exercised without including that person in the proceedings. On the example of the obligation to include a person in a proceeding, such a conclusion enables the terms – *right to good administration* and *principle of good administration* – to be used in the Estonian judicial practice as synonyms.

In incorporating the *right to good administration* in accordance with Article 41 of the Charter of Fundamental Rights, the judicial practice also mentions the right to be heard (Judgement of the Administrative Chamber of the Supreme Court of 11.10.2007, 3-3-1-37-07, Clause 9, Judgement of the Administrative Chamber of the Supreme Court of 19.12.2006, 3-3-1-80-06, Clause 20, Tartu Circuit Court judgement of 25.05.2012 in administrative matter No. 3-10-2889/46, Clause 16; Tartu Administrative Court judgement of 15.03.2007 in administrative matter No. 3-06-2484) and the obligation to state reasons (Judgement of the Constitutional Review Chamber of the Supreme Court of 30.09.2009, 3-4-1-9-09, Clause 31; Tartu Administrative Court judgement of 18.09.2018 in administrative matter No. 3-17-2076, Clause 18) for administrative acts as a substantive element of the *principle of good administration*. The mutual overlap of these content elements leads to the conclusion that the terms *right to good administration* and *principle of good administration* can only be used synonymously.

In addition to the similar content elements referred to above, Estonian judicial practice – unlike the Charter of Fundamental Rights and the given contents of the *right to good administration* – refers to the administrative body's obligation to justify their actions not only as a component of the *principle of good administration* (Judgement of the Administrative Chamber of the Supreme Court of 11.12.2006, 3-3-1-61-06, Clause 20, Clause 23; Tartu Circuit Court judgement of 10.11.2015 No. 3-14-186, Clause 14, Clause 17; Tallinn Circuit Court judgement of 29.03.2010 in administrative matter No. 3-09-277, Clause 12), but also as a subcomponent alongside it (Tallinn Circuit Court judgement of 08.04.2014 in administrative matter No. 3-12-2196, Clause 12; Tartu Circuit Court judgement of 05.02.2008 in administrative matter No. 3-07-38). In the latter case, the Court has emphasised that "the administrative body's duty to ensure that, in conjunction with the principle of investigation, the obligation to justify their actions and the *principle of good administration*, the person's lack of knowledge of the need to provide certain information would not become a hindrance" (Tallinn Circuit Court judgement of 08.04.2014 in administrative matter No. 3-12-2196, Clause 12). There is no doubt that the requirement for an administrative body to justify their actions specifies general administrative and procedural rights in the field of administrative law and thus also complies with the principle of good administration. The different approach to the administrative body's obligation to justify its actions within or outside the *principle of good administration* demonstrates the lack of unequivocal clarity on the meaning of good administration in Estonian law.

Unlike the Charter of Fundamental Rights and the content elements of the *right to good administration* as embodied by Estonian judicial practice, the case-law further incorporates the contents of the *principle of good administration* with the administrative body's obligation to respond (Judgement of the Administrative Chamber of the Supreme Court of 18.11.2009, 3-3-1-44-09, Clause 14), to investigate facts, gather evidence, consider different options (Judgement of the Administrative Chamber of the Supreme Court of 11.10.2007, 3-3-1-37-07, Clause 9; Judgement of the Administrative Chamber of the Supreme Court of 18.11.2009, 3-3-1-44-09, Clause 14) and to make reasonable efforts to eliminate or reduce the possible adverse effects (Judgement of the Administrative Chamber of the Supreme Court of 16.12.2010, 3-3-1-83-10, Clause 17), moreover, with the person's right to demand the administrative body to consider an earlier promise made to him or her and the legitimate expectation

that may have arisen from it (Tartu Administrative Court judgement of 15.03.2007 in administrative matter No. 3-10-769, Clause 16), the administrative body's obligation to interpret contentious facts in favour of that person (Order of the Administrative Chamber of the Supreme Court of 22.09.2014, 3-3-1-59-14, Clause 14) and with each party's requirement of respectful cooperation (Tallinn Administrative Court judgement of 15.06.2017 in administrative matter No. 3-16-2636, Clause 13.2). In addition to the listed, rather specific content elements, the Chancellor of Justice has further embedded the *principle of good administration* with the administrative bodies' obligation to "generally behave in the most so-called citizen-friendly way" (Overview of the activities of the Chancellor of Justice in 2006. Tallinn 2007, p 181). Whether the principle of good administration incorporated with such a requirement actually specifies general administrative and procedural rights in the field of administrative law (The Constitution of the Republic of Estonia. Annotated edition. Juura 2017, p 203) remains unanswered. In addition to the requirement of citizen-friendly conduct, the Chancellor of Justice has also mentioned administrative bodies' requirements such as purposefulness, simplicity, speed, involvement and hearing, helpfulness and impartiality as substantive elements of *the principle of good administration* as a "blanket term" (Overview of the activities of the Chancellor of Justice in 2006, p 179). The aforementioned list recognises, in light of the above, both the general principle of good administration (impartiality) contained in the Charter of Fundamental Rights and the specific content elements (i.e. the obligation to be consulted and heard, as well as the speed, which the Charter calls "reasonable time"). The "requirement of helpfulness" mentioned by the Chancellor of Justice as an additional element of good administration could be subordinated to the aforementioned duty of care, while the requirement of "purposefulness" and "simplicity" could be included in the requirement of due diligence or considered as completely separate component elements.

Turning back to the terms of good administration analysed insofar, with the purpose to answer the main question of the article – whether the use of different good administration-related terms in Estonian law is random or are different terms incorporated with different component elements – a comparative of the content elements of the *right to good administration* and the *principle of good administration* so far discussed show that there are both overlaps and differences between the content elements of the

two different terms. For example, by treating an administrative body's obligation to hear a person's testimony or to justify its actions as both, a *right to good administration* and a *principle of good administration*, it is possible to deduct the random use of good administration-related terms on the given example alone, hence disregarding the legal distinction between "(fundamental) rights" and "principles of law".

Unlike fundamental rights that are governed and implemented by the law, the general principles of law exist in both, written and unwritten law. Most of such principles are found as unwritten law, which is why it has been said that the general principles of law are unwritten law that are not based on the Treaty establishing the European Community (the European Union), but on the legal orders of the Member States of the EU. The general principles of law are dogmatically collected ideas that are not rules of law, but create cohesion only when combined with many principles. The general principles of law are created and found by the (European) court (J. Laffranque. Co-existence of the Estonian Constitution and European Law. Juridica III/2003, p 182). U. Lõhmus, the former Chief Justice of the Supreme Court, has also described the general principles of European Union law in the most general form as unwritten law introduced by the Court of Justice of the EU to fill in the gaps left by the European Union legislature as a tool for interpretation and as a basis for judicial review (U. Lõhmus. Fundamental Rights and General Principles of EU Law: Functions, Scope and Range. Juridica IX/2011, p 651). As in Estonian law, the gaps left by the legislator in the regulation of good administration have been primarily filled by judicial practice (which is supported and to some extent supplemented by the practice of the Chancellor of Justice), it is appropriate to consider good administration primarily as a legal principle of Estonian law through the term "*principle of good administration*" referred to in this section.

In addition to the terms "law" and "principle", Estonian case law and the practice of the Chancellor of Justice also considers good administration as a "practice". The following analysis shows whether or not there are differences in the contents of *good administrative practice* and *practice of good administration* formed by the Estonian case law and the practice of the Chancellor of Justice, but as well as its legal value, as compared to the *right to good administration* and the *principle of good administration* discussed above.

## 3. PRACTICE OF GOOD ADMINISTRATION AND GOOD ADMINISTRATIVE PRACTICE

A good illustration of the terminological ambiguity in Estonian law regarding good administration is the court's assessment, according to which an administrative body did not act in accordance with *good administrative practice* nor the *principle of good administration* (Judgement of the Administrative Chamber of the Supreme Court of 18.10.2004, 3-3-1-37-04, Clause 8). By identifying the existence of misconduct on the part of the administrative body against two different requirements of good administration, one can conclude that the court distinguishes and substantiates the *principle of good administration* from that of the *practice of good administration*. It is applicable to expand on the substantial differences between the two good administration-related terms through the same exemplary court case, which discussed the altering of the use of the applicant's plot of land by the local authority through the establishment of a comprehensive plan 3 years after the sale of the plot to the applicant and with it, the assignment of the plot that corresponded to the applicant's interests. According to the applicant, the alteration of land use through the introduction of a new comprehensive plan violated his rights and interests. This position was also upheld by the higher court, finding inconsistencies in the earlier positions of the administrative authority and in the conduct, which misled the applicant. According to the court, such misleading acts of the administrative body breached both, "*the practice of good administration*" and "*the principle of good administration*". From the composition of the *principle of good administration* discussed above, it is possible to describe through the similar usage of the same term in the instance of the referred court case, with the intent to incorporate the person's right to demand the administrative body take into account an earlier promise made to him or her and the legitimate expectation which may have arisen from it (Judgement of the Administrative Chamber of the Supreme Court of 18.11.2009, 3-3-1-44-09, Clause 14). However, in order to identify what the court has intended to separately incorporate - the term "*practice of good administration*" - within the same court case, it would be appropriate to more generally clarify such a term, as well as the term of *good administrative practice* embodied by the Estonian case law and the practice of the Chancellor of Justice in general.

In the case of the term of *practice of good administration* (as well as *good administrative practice*), the Estonian courts and the Chancellor of Justice refer to the obligation to include a person in administrative proceedings (Overview of the activities of the Chancellor of Justice in 2014. Tallinn 2015, p 114) and thereby the obligation to hear a person's opinion (Judgement of the Administrative Chamber of the Supreme Court of 13.06.2003, 3-3-1-42-03, Clause 37; Judgement of the Administrative Chamber of the Supreme Court of 25.11.2003, 3-3-1-70-03, Clause 19; Tallinn Administrative Court judgement of 11.01.2006 in administrative matter No. 3-05-339, Clause 7; Tartu Administrative Court judgement of 22.09.2009 in administrative matter No. 3-09-220; Tartu Administrative Court judgement of 02.07.2013 in administrative matter No. 3-13-729, Clause 19). As a part of the composition of *good administrative practice*, the case law and the practice of the Chancellor of Justice further expand on the administrative bodies' obligation to conduct the proceedings within a reasonable time (Tallinn Administrative Court judgement of 28.12.2007 in administrative matter No. 3-07-912; Tartu Administrative Court judgement of 19.10.2011 in administrative matter No. 3-11-870; Tartu Circuit Court judgement of 15.10.2013 in administrative matter No. 3-12-1000, Clause 19; Tartu Administrative Court judgement of 03.06.2014 in administrative matter No. 3-14-203, Clause 21; Overview of the activities of the Chancellor of Justice in 2006. Tallinn 2007, p 152; Overview of the activities of the Chancellor of Justice in 2012. Tallinn 2013, p 35), to justify their decisions (Tartu Circuit Court judgement of 20.09.2013 in civil case No. 2-12-10337, Clause 3; Tallinn Administrative Court judgement of 23.05.2007 in administrative matter No. 3-07-315; Tallinn Administrative Court judgement of 17.11.2014 in administrative matter No. 3-14-50113, Clause 11) and to compensate damages incurred to the parties of the proceedings (Tartu Administrative Court judgement of 15.11.2012 in administrative matter No. 3-12-1000). All of the listed components of good administration are inherent in both, the Charter of Fundamental Rights and the *right to good administration* and the *principle of good administration* embodied by Estonian case law and the practice of the Chancellor of Justice as referred to above, thereby allowing, through these content components, to infer a random use of various terms of good administration in Estonian law either as a law, principle or custom.

In addition to overlapping content components, Estonian judicial practice and the practice of the Chancellor of Justice also embody the *practice of good administration* (also referred to by the court as *good administrative practice*) with the administrative bodies' obligation to inform (Overview of the activities of the Chancellor of Justice in 2004. Tallinn 2005, pp 68, 107, 144; Overview of the activities of the Chancellor of Justice in 2005. Tallinn 2006, p 358), emphasising that due to the principle of democracy and good administration, the authority must inform the public of more important decisions more intensively than required by the law (Order of the Administrative Chamber of the Supreme Court of 07.05.2003, 3-3-1-31-03, Clause 26). In doing so, the court extends the scope of good administration beyond the boundaries of law. This position is also supported by the court's standpoint, according to which the procedural requirements set out in the Administrative Procedure Act must be regarded as minimum standards of *good administrative practice* (Tartu Administrative Court judgement of 22.12.2006 in administrative matter No. 3-06-2129), further taking account that *good administrative practice* additionally encompasses moral and ethical values (Tallinn Administrative Court judgement of 08.02.2008 in administrative matter No. 3-07-1178, Clause 33), as well as the duty of dignity, helpfulness and care of an official in accordance with the principle that the state must act in the best interests of the people (Tartu Administrative Court judgement of 14.11.2016 in administrative matter No. 3-16-1315, Clause 13). The Chancellor of Justice has also embodied the practice of good administration with similar values in mind, treating the violent and rude behaviour of an official as a breach of good administrative practice (Overview of the activities of the Chancellor of Justice in 2012, p 35).

In addition to addressing the individual content elements, the Chancellor of Justice has addressed the location and general nature of good administrative practice in various variations. Thus, through its competence, the Chancellor of Justice has defined the ability to respond to actions that are not in accordance with the "rule of law, the Constitution, laws or other legal instruments, or the *practice of good administration*" (Overview of the activities of the Chancellor of Justice in 2003-2004, p 44), placing the *practice of good administration* alongside the rule of law, the Constitution and other laws; at the same time, also respecting the *practice of good administration* as both a fundamental right (Overview of the activities of the Chancellor of Justice in 2004 p 196) and a constitutional principle

aimed at ensuring that administrative authorities are informed in adopting their decision, compelling the authorities to take into account a person's interests and improving the general quality of administrative decisions (Overview of the activities of the Chancellor of Justice in 2012 p 35). In addition to the varying definition of the legal position of (*the practice of) good administration*, some ambiguity can also be noted about the general nature of the good administration given by the Chancellor of Justice. More precisely, in addition to the right specifying the general organisational and procedural rights in the area of administrative law arising from the meaning of section 14 of the Constitution (The Constitution of the Republic of Estonia. Annotated edition. Juura 2017, p 203), the Chancellor of Justice has characterised good administrative practice as an unambiguous set of rules, which should nevertheless be a "perceptible code of conduct in dealing with people" (Overview of the activities of the Chancellor of Justice in 2005 p 252), listing administrative bodies' obligation to quick and efficient procedure, to explain its actions and, if necessary, to refer the person to the right administrative body, moreover, the openness of general public authorities and their role in balancing conflicting interests as content elements of good administration (Overview of the activities of the Chancellor of Justice in 2005 p 252). However, only a year later, the Chancellor of Justice has noted that "*the principle of good administration* contained in section 14 of the Constitution is no longer an incomprehensible concept, but is very clearly reflected in the various procedural acts." (Overview of the activities of the Chancellor of Justice in 2006 p 280).

The various approaches outlined above regarding the value of *good administration* and the content elements of this concept could be continued, however, in the light of the main purpose of the article, the analysis of the sources discussed in the article reveals the most differences between the value and contents of *good administrative practice* / the *practice of good administration* on one hand and between the *right to good administration* and the *principle of good administration* on the other. Such, at times principled and outside the realm of law, concepts of *good administrative practice* / the *practice of good administration* would allow, in Estonian law, the distinction to be made between custom and law, or rather a principle of law. However, taking into consideration the overlap between the content components of practice and law, or of principles of law, one could conclude that the various terms of good administration

are used randomly. The somewhat abstract contents of *good administrative practice* / the *practice of good administration*, shows the most uncertainty about the place of good administration in Estonian law. One could also argue that the case-law-based understanding of *good administrative practice* / the *practice of good administration* does not, at least in part, serve the essential purpose of good administration, which is to specify the general administrative and procedural rights in the field of administrative law (The Constitution of the Republic of Estonia. Annotated edition. Juura 2017, p 203).

Returning to the exemplary case referred to at the beginning of the current section (Judgement of the Administrative Chamber of the Supreme Court of 18.10.2004, 3-3-1-37-04, Clause 8), in which the court assessed the administrative body's actions to be contradicting with, in addition to the *principle of good administration*, also the *practice of good administration*, it is difficult to provide the latter's content through a specific component, thus enabling the *practice of good administration* to be considered synonymous with the *principle of good administration*.

## 4. A TIME FOR CHANGES IN THE VALUE PROCESS OF GOOD ADMINISTRATION AND ITS CONTENTS IN ESTONIAN LAW

An analysis of the Estonian judicial practice and the practice of the Chancellor of Justice on good administration as a (fundamental) right, principle of law or custom, and the varied content attributed to each of them by case law and the practice of the Chancellor, shows a lack of clear understanding of both, the place and contents of good administration in Estonian law. However, good administration should be the cornerstone of modern administrative procedures. In order for the entire administrative procedure to be able to rely on this cornerstone, it is first necessary to clarify the place of good administration in Estonian law – whether good administration will continue to be specified by judicial practice and the practice of the Chancellor of Justice, and thus remain a legal principle without specific content components or a custom that would enable even broader and more abstract approaches or will good administration become a universally understandable fundamental right, which actually specifies the organisational and procedural rights in the field of administrative law.

The need for clarity about the place and contents of good administration in Estonian law has also been emphasised by U. Lõhmus (Former judge at the European Court of Human Rights and Chief Justice of the Supreme Court of the Republic of Estonia), according to whom, in today's Estonian law, the meaning of good administration is amorphous (U. Lõhmus' Minutes Speech at the meeting of a body of Constitution experts convened by the Minister of Justice via decree No. 110 of 05.12.2016 on 23.05.2018. Ministry of Justice. Tallinn 2018, pp 331-337) and there is no clarity as to what is the core of this right (Ministry of Justice. A body of Constitution experts. Activity report of the body of Constitution experts. IV Fundamental rights and freedoms. Tallinn 2018, p 55). In order to eliminate the existing ambiguity, U. Lõhmus, as a rapporteur of the Constitutional Expert Committee established in 2016 by the Minister of Justice of the Republic of Estonia, has proposed to supplement the Estonian Constitution with a "new right" – *right to good administration*, specifying good administration with an exhaustive list of everyone's

right to have the authorities dealing with his or her question impartially, fairly and within a reasonable time, moreover, with everyone's right to be heard before any individual measure which would affect him or her adversely is taken and with the administrative bodies' obligation to justify their decisions (Ministry of Justice. A body of Constitution experts. Activity report of the body of Constitution experts. IV Fundamental rights and freedoms. Tallinn 2018, p 343). Although the suggested proposal, though not exhaustive, looks similar to the wording of Article 41 of the Charter of Fundamental Rights, it is not a transcription of the content of Article 41 of the Charter into the Estonian Constitution. This article does not focus on the substantive comparison of U. Lõhmus' proposal with Article 41 of the Charter of Fundamental Rights, nor does it analyse the substantive quality of the proposal. However, the Ministry of Justice's subsequent amendment of U. Lõhmus' proposal's wording deserves mentioning – with the aim of submitting them to the Government of Estonia and the Parliament of Estonia for their position (Ministry of Justice. A body of Constitution experts. Activity report of the body of Constitution experts. IV Fundamental rights and freedoms. Tallinn 2018, p 4). This editorial change of Lõhmus' proposal by the Ministry of Justice is minor in form: the proposed amendments state that "everyone has *the right to good administration*. This right includes, in particular: …" (Ministry of Justice. A body of Constitution experts. Activity report of the body of Constitution experts. IV Fundamental rights and freedoms. Tallinn 2018, p 7). However, the addition of only one term, i.e. the term "in particular", to U. Lõhmus' proposal alters the whole concept of good administration's substantial clarity. By leaving good administration's list of contents open, good administration would remain in many respects a right to be specified by judicial practice and would not serve the essential purpose of good administration – to give concrete expression to general organisational and procedural rights in the area of administrative law.

## 5. CONCLUSION

Unlike in EU law, where the *right to good administration* is referred to and defined in Article 41 of the Charter of Fundamental Rights of the European Union with specific component elements, Estonian law lacks clarity as to the definition and contents of good administration due to the lack of legal regulation in this regard. The ambiguity stems from the broad terminology used in practice: the terms "*the right to good administration*", "*the principle of good administration*", "*good administrative practice*", "*the practice of good administration*" as well as "*the principle of good administrative practice*" are used, without considering that "right", "principle" and "practice" are not synonymous. Although judicial practice and the Chancellor of Justice predominantly value good administration as a fundamental right in Estonian law - irrespective of the applicable term, it would be more appropriate to consider good administration as a legal principle through the *principle of good administration*.

Under different concepts of good administration, Estonian law presents good administration with variations - under different terms there are both overlapping and different content elements. The overlapping elements of "right", "principle" and "practice" are elements with which *the right to good administration* has been exhaustively embodied in Article 41 of the Charter of Fundamental Rights of the European Union and recognised by the Court of Justice as elements of good administration (Judgement of the Court of First Instance of 04.10.2006 T-193/04: Hansa-Martin Tillack vs Commission of the European Communities, Clause 127 and the judgement cited therein). In particular, the elements of good administration overlapping in regard to the contents of "right", "principle" and "practice" enable the possibility to infer the random use of different good administration related terms to Estonian judicial practice. The long-standing ambiguity in the value and contents of good administration confirms the necessity for legal clarity. In order to value *the right to good administration* as a fundamental right understandable for everyone, the founding document of the Estonian state - the Constitution - needs modernisation. However, in order for such a fundamental right to have intrinsic value in terms of ensuring the protection of subjective rights, good administration needs clear and framed content – either by

following the lead of the near 20-year old Charter of Fundamental Rights or by filling it with a clear list of contents based on case law and the practice of the Chancellor of Justice. Only in this way can good administration fulfil its essential purpose – to specify general organisational and procedural rights in the field of administrative law.

**Contact:**

**Sille Allikmets**
E-mail: sille.allikmets@aaviklaw.ee

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