Rearranging legal culture in Estonia 1992–2002: political context and factors of success[1]

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In this article, we will take an analytical look at the legislative reforms carried out in Estonia after its regaining of independence and identify the factors that helped a former Soviet republic to successfully restore the rule of law and implement modern Western-oriented legislation. Using the method of oral history, which helps to gain an insight to the background and emotions not available in written sources, we explore the decade between 1992 and 2002 when private as well as penal law was fully reformed, and several important administrative law acts were adopted. We conclude that the crucial factors for the success included, inter alia*, the choice made in the Estonian Ministry of Justice to recruit young ambitious lawyers with European educational background instead of experienced but Soviet-educated officials, extremely fruitful cooperation with the German Foundation for International Legal Cooperation and its renowned experts as well as somewhat non-traditional cooperation between the Ministry of Justice and the Parliament at the beginning of the decade, allowing a swifter legislative procedure. Not less important was the decision to follow the model of the Continental-European legal system, and in particular the German legal family: a choice motivated by Estonian legal history and hence legal continuity as well as rather practical reasons such as the availability of German legal literature and expertise. We are describing the legislative reforms of Estonia as a country in transition using the example of private law that was of vital importance for a radical turn from a Soviet-style planning economy to a modern market economy.*

I. Introduction

In this article, we will take an analytical look at the legislative reforms in Estonia between 1992 and 2002 and identify the factors that enabled Estonia as a country in transition, to quickly transform its legislation into one of a democratic state and restore the rule of law. The Republic of Estonia regained its independence on 20 August 1991 after 50 years of Soviet occupation. During the Soviet occupation, the rule of law was abolished in Estonia, and after the end of the occupation, the young republic faced the question of whether and how quickly it would be able to re-establish democratic government and introduce the legislation necessary for a market economy. In Estonia, the ground-

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breaking political processes leading to the end of Soviet rule, including the famous "Singing Revolution"[2] had already begun in the late 1980s and were surely encouraged by the fall of the Berlin Wall in 1989. However, at that time the restoration of independence for Estonia and the Baltic states, in general, was not yet finally decided: although Lithuania and Latvia had already declared their independence in 1990, the Russian army tried to prevent the process by committing a bloody massacre of independence supporters in Latvia and Lithuania in early 1991.[3] When Estonia's independence became a reality in August 1991, the need for legislation to return Estonia to a Western legal culture became acute. In this article, which is to a large extent based on materials collected for our book "Restoring the Rule of Law. Reforms of Estonian Law and Institutions 1992-2002" published in Estonian in 2022[4], we will explore the background of turbulent legislative processes that took place after regaining independence.

Our focus is set on the decade that began with the adoption of the new Constitution of the Republic of Estonia[5] in 1992 and ended ten years later, in 2002, with the completion of the Estonian penal and private law reforms and the adoption of several important pieces of administrative law legislation. We argue that the decade following the adoption of the Constitution was a crucial one for the restoration of the rule of law in Estonia, as it was a period when swift and far-reaching decisions and fundamental choices were made that enabled to shape the Estonian legal order similar to the ones of Western democratic states.[6] We also believe that an understanding of the Estonian experience allows shedding light on the factors that allow quick and successful legislative reforms in transition countries.

As the length of the article does not allow us to cover the entire legislative process in all legal areas, we will describe the reforms using the example of private law and show how within just ten years core private law legislation such as the Law of Property Act[7], the Commercial Code[8], the General Part of the Civil Code[9] and the Law of Obligations Act[10] – all indispensable for the functioning of a modern market economy – were adopted. The

2 On that, see Šmidchens, The Power of Song: Nonviolent National Culture in the Baltic Singing Revolution; Brüggemann and Kasekamp, 'Singing oneself into a nation? Estonian song festivals as rituals of political mobilisation', pp. 259–276.

3 See eg Bergmane, "'Is This the End of Perestroika?" International Reactions to the Soviet Use of Force in the Baltic Republics in January 1991', pp. 26–57.

4 Sein and Ristikivi, Õigusriigi taastamine. Eesti seaduste ja institutsioonide reformid 1992-2002. In addition to legislative reforms, this book also analyzes institutional changes in the Estonian judicial system, prosecutor's office, chamber of notaries, and judicial registers.

5 Riigi Teataja [State Gazette], 1992, 26, 349.

6 Due to these time frames, the ownership and land reform of 1991, which caused a lot of controversy in Estonia, is also excluded from the article. The preparation of the Land Reform Act and the implementation of the land reform are discussed in depth in the jubilee collection published in 2021, see Maareform 30. Artiklid ja meenutused.

7 Riigi Teataja [State Gazette] I, 1993, 39, 590.

8 Riigi Teataja [State Gazette] I, 1995, 26, 355.

9 Riigi Teataja [State Gazette] I, 2002, 35, 216.

10 Riigi Teataja [State Gazette] I, 2001, 81, 487.

article begins with a description and justification of the interview-based approach (II.), and of the Estonian political context during the years under scrutiny and the organization and working culture of the Ministry of Justice that was at the driver's seat of the legal reforms in Estonia (III.). It then shows how it was decided to follow the model of the Continental-European legal system and in particular the German legal family (IV.). Finally, we describe the process of the creation of the core private law legislative acts (V.). Before that, however, we will explain why and how we have used the oral history method for exploring Estonia's recent legal history.

II. Using the method of oral history

Considering the reforms after the restoration of Estonia's independence, it is often wondered, how was Estonia, after just being freed from the Soviet Union, in an extremely difficult economic situation and with few human resources, able to create in such a short period liberal and modern laws with values characteristic of today's Europe. The reform period of a few decades ago has so far seemed very recent and tangible, hence the published articles and studies have focused more narrowly on the development of one or another piece of legislation.[11] At the same time, these texts do not provide a comprehensive overview of the restoration of the rule of law in Estonia in the fast-paced 1990s, nor do they analyze what were the driving forces, starting points and influencing factors of these reforms. Also, what was the organizational side of the reforms, how people were chosen for working groups, and whether and how much was the randomness characteristic of that period in decision-making.

In the preparation of this article, one of the most important sources for analysis has been the material from the video interviews with key persons of these legal reforms, which took place between February 2020 and July 2021 in the buildings of the Faculty of Law of the University of Tartu in Tallinn and Tartu. The oral history method has enabled us to get an insight into the emotions of that era, which are not revealed in official sources. The interviews describe this rapid process, choices, persons, as well as contradictions in terms of different understandings.

The use of oral interviews in such research undoubtedly carries certain risks: memories from 30 years ago are inevitably subjective, partly incomplete, somewhat imprecise. However, we have not limited ourselves only to summarizing the information obtained from the interviews, but have also used legal publications, explanatory letters of draft laws and analyzes of the drafts. At times we have also used unpublished and not yet digitized materials, copies of which were available in private archives.

[11] Luts-Sootak and Siimets-Gross summarize the reforms that took place after regaining independence in their book "100 Years of Estonian Law" published in 2019 on the occasion of the 100th anniversary of the Republic of Estonia, but the focus of this work is aimed at providing an overview of the hundred-year legal history of the entire Republic of Estonia, and not more specifically at the analysis of post-independence reforms.

We interviewed the then Ministers of Justice Kaido Kama (Minister of Justice 1992-1994), Jüri Adams (Minister of Justice 1994-1995), Paul Varul (Minister of Justice 1995-1999), and Märt Rask (Minister of Justice 1992 and 1999-2003), Mihkel Oviir, who served as Chancellor of the Ministry of Justice for most of the explored period, and the then Deputy Chancellors Juhan Parts and Priidu Pärna. Video interviews with the heads of the legislative drafting departments of the Ministry of Justice and officials involved in drafting legislation were also recorded in the Tartu and Tallinn premises of the University of Tartu. Daimar Liiv, then chairman of the Legal Affairs Committee at the Estonian Parliament (*Riigikogu*), recalled the work of the Committee during the reform period. The recording of the first-hand memories of ministers of justice, members of the Parliament, legal academics, ministry officials as well as Chiefs of the Estonian Supreme Court (*Riigikohus*) enabled us to take a closer look at the legal reform process, its background, and driving factors.

During the video interviews, we explored the historical, comparative, political and educational-cultural context of the legal reforms by asking interviewees, among others, the following questions:

- Were the new laws adopted in Estonia based on the legislation in force in Estonia before the Second World War and if yes, to what extent?
- Which foreign legislation and what regulatory models were used as a blueprint for drafting the new legislation? Why were these particular countries and their legal systems chosen as model countries? Were the choices of Estonia influenced by the decisions of the Baltic neighbours Latvia and Lithuania, and what was the role of the European Union regulations at that time?
- Who and how decided the order in which laws were drafted? How was the legislative process carried out, and what changes were made during the legislative procedure in the Parliament? How would you describe the cooperation between legal scholars, officials of the Ministry of Justice and politicians during the drafting of laws? What role did knowledge of foreign languages play in the preparation of the drafts?
- How was the retraining of lawyers organized after the restoration of independence? What materials were used for this purpose and who conducted the training?

The text of the article has been enriched with quotes from the interviews. Through these quotes, we have tried to give an emotional insight into the era when law-making was best characterized by the adjective 'galloping' and when the Ministry of Justice resembled not a government agency based on a traditional hierarchy and clear rules, but rather an academic think tank of young undergraduates. Yet, it also describes the evolution of the Estonian Ministry of Justice into a modern, 'normal' ministry, where policy decisions are not made by officials, but by politicians with a mandate from the electorate.

III. The political context and the organization of legislative drafting in Estonia in 1992-2002

1. Key persons of the legislative reforms: Ministers of Justice and the Chancellor of the Ministry of Justice

To understand the meaning and scale of Estonia's legal reforms, it is necessary to understand the social and political context of the newly re-independent Estonia. In June 1992, a new constitution had been adopted and the Estonian currency *kroon*, replacing the Soviet ruble, had been introduced.[12] However, Estonian society was still characterized by the legacy of fifty years of Soviet rule. [13] Not to mention the fact that until 1994 there were still Soviet troops present in Estonia but there was also no functioning market economy or even a clear understanding of it.[14] There were also no clear rules regulating the relationship between the state and the individual; most of the land still belonged to the state; the courts were staffed by people who had received their legal education under the Soviet system; the prosecutor's office had extremely broad powers, including the right to intervene in civil cases; the number of prisoners was several times higher than was considered normal in Europe and the death penalty continued to apply, at least formally. On the other hand, the first government of Mart Laar[15], who became prime minister in 1992, was led by an ambition for quick reforms. Land and property reform had already been initiated in 1990-91, but civil law continued to be governed by the Civil Code of the Estonian SSR, and punishments continued to be handed down based on Soviet penal law, ie the Criminal Code of the Estonian SSR.

The government led by 32-year-old historian Mart Laar which was the first government to take office under the 1992 Constitution of Estonia and was free of the Soviet nomenklatura, wanted to change the *status quo* rapidly and fundamentally. The coalition consisted of the national conservatives (Isamaa), the Estonian National Independence Party (ERSP),[16] and the Moderates, and its main objective was to swiftly carry out the reforms necessary for the transition to a market economy, to liberalize the economy in the spirit of Milton Friedman and to integrate Estonia into the Western world.[17]

The first Minister of Justice in the reform decade was Kaido Kama, a member of the national conservative party Isamaa, who served in Mart Laar's first government in 1992-1994. Kaido Kama recalls that his appointment as the Minister of Justice was somewhat

12 See on that Hoag and Kasoff, 'Estonia in Transition', pp. 919-931.

13 A thorough analysis of the process of restoring independence in Estonia is available in Taagepera, Estonia: Return to Independence.

14 In an interview on the 30th anniversary of the restoration of Estonia's independence, Estonian leading social scientist and former member of the Estonian Parliament and European Parliament, Prof Marju Lauristin, recalls that as a Minister of Social Affairs in the early 1990s, she had difficulties explaining to medical doctors that their services also had a financial value. Doctors believed they were just helping people. See Karnau, 'Marju Lauristin: tahtsin isa sõnad vastupidi pöörata'.

15 Mart Laar (born in 1960) was the Estonian prime minister in 1992-1994 and 1999-2002.

16 Founded in 1988, the ERSP was largely led by Soviet-era freedom fighters and dissidents. See Pettai and Toomla, 'Political Parties in Estonia', p. 3.

17 Kasekamp, Balti riikide ajalugu, pp. 218, 227, 236; Laar, Pööre, pp. 189-197, 297-309.

unexpected and coincidental, as he had initially thought of becoming the Minister of Defense, but that post went to his coalition partner ERSP. Kama's interest in the position of a Minister of Justice stemmed from the fact that he had been a member of the Estonian soviet-time parliament for a couple of years; during that time, he had served in the Legal Affairs Committee, chaired the Property and Land Reform Committee, and drafted the relevant legislation in close cooperation with the Ministry of Justice and its officials. In this way, he had already become acquainted with both the Ministry of Justice as well as many of its officials.[18] As was typical of the era, Kaido Kama had never studied law, but only architecture.

In September 1994, Mart Laar's first government stepped down because of the so-called "rouble scandal"[19], and in November 1994 a "Christmas-peace government" led by the moderate Prime Minister Andres Tarand took office. Jüri Adams became the Minister of Justice in this government, which at times acted as a minority government and functioned until April 1995. The biggest 'battle' of his short term – but one that was extremely important in the context of legal reforms – concerned the adoption of the Commercial Code, which he led together with the Chairman of the Legal Affairs Committee of the Parliament, Daimar Liiv, and which was adopted a few weeks before the end of the mandate of the 7th *Riigikogu*.[20]

The winners of the 1995 Parliament elections were mainly the parties and electoral alliances that had been in opposition in the previous *Riigikogu*, ie the center-left Estonian Centre Party and the center-right Estonian Coalition Party. They were joined by the Maarahva Ühendus (Rural People's Union), which united the parties representing the rural niche that had been marginalized in the previous elections. The government was led by the leader of the Estonian Coalition Party, Tiit Vähi[21], who later defined the political aim of the government as the introduction of a social market economy. However, Vähi's government has also been described as pragmatic and technocratic[22], and primarily composed of Soviet-era professionals and administrators.[23] Still, the governments of Tiit Vähi also remained faithful to the earlier goal of joining the European Union and NATO and did not seek to reverse earlier reforms to any significant extent. In the first government of Tiit Vähi, several ministers were not politicians but specialists in their fields. This is also true of Paul Varul, a professor at the University of Tartu, who served as the Minister of Justice in the second and third governments of the Estonian Consolidation Party from April 1995 to March 1997, as well as in the government led by Mart Siimann from March 1997 to March 1999. During his time as the Minister of Justice, many institutional

18 Interview with K. Kama in Tartu, 02.07.2020.

19 The ruble scandal is the scandal arising out of the secret sale of rubles collected during the 1992-1993 monetary reform to Chechnya. This was done by a decree of the then Monetary Reform Committee and rubles withdrawn after the introduction of the Estonian kroon were not returned to Russia. See the respective memories of the then prime minister Mart Laar (Fn. 17), pp. 148-151.

20 Interview with J. Adams in Tallinn, 06.03.2020.

21 Tiit Vähi (born in 1947) was the Estonian prime minister in three governments during 1995-1997.

22 Kiisler, 'Tiit Vähi: praegu käib poliitikas üks juramine'.

23 Pettai and Toomla (Fn. 16), p. 5.

reforms were carried out, starting with the reorganization of the prosecutor's office and ending with preparations for the construction of new prisons. At the same time, the drafting of various pieces of legislation in the field of private law continued, as well as the preparation of the Penal Code[24], and several legislative acts in the field of public law.

The last Minister of Justice in the period under scrutiny was Märt Rask, who served as Minister of Justice of the liberal Estonian Reform Party from 1999-2003, both in the second government of Mart Laar and in the government of Siim Kallas. During Märt Rask's term of office, a number of important bills were adopted, most of which had already been prepared under previous ministers, in particular Paul Varul. These included the new Penal Code, the Law of Obligations Act together with the new General Part of the Civil Code Act, the Private International Law Act[25], and their implementing legislation. While during the earlier period the officials of the Ministry of Justice played a much greater role in legal policy choices, it is with Märt Rask's term of office that the end of the major legal reforms and the establishment of a normal parliamentary organization of work are associated.[26]

While there were six ministers of justice during the ten years of the legal reforms, the Chancellor of the Ministry of Justice for almost the entire period was Mihkel Oviir[27], who became both a guarantor of stability and a catalyst for major reforms and, above all, a shaper and nurturer of young, ambitious civil servants. Mihkel Oviir was already involved in the Ministry of Justice during the Soviet era: from 1972 he worked at the Ministry of Justice of the Estonian SSR, heading its economic law department. He was offered the position of Chancellor and the task of building up the Ministry of Justice of young independent Estonia by Kaido Kama, Minister of Justice in the first government of Mart Laar, who agreed to accept the ministerial portfolio only on the condition that Mihkel Oviir would become the Chancellor.[28]

Many of the officials and key legislative figures of the time recall Mihkel Oviir's astonishingly good leadership qualities. Despite his Soviet-era education and more than 10 years of working experience in the Soviet structures, he had the instinct to attract young, promising people around him and to trust them – and the willingness to protect them when necessary.[29] The remarkable role played by Mihkel Oviir, Chancellor of the Ministry of Justice, in the selection process has been acknowledged by many of Estonia's top lawyers, then and now. The authors of voluminous drafts of private law legislation recall:

> *"I think only today we understand how difficult it must have been for him to actually isolate us, to let us do our job, and to protect us so that we could*

24 Riigi Teataja [State Gazette] I 2001, 61, 364.

25 Riigi Teataja [State Gazette] I 2002, 35, 217.

26 Interview with M. Oviir in Tallinn, 28.02.2020.

27 Mihkel Oviir (born in 1942) became the first Chancellor of the Estonian Ministry of Justice in 1992 and worked there until 2002.

28 Interview with M. Oviir (Fn. 26).

29 Interview with V. Kõve in Tallinn, 27.08.2020; interview with J. Parts in Tallinn, 19.08.2020; interview with H. Loot and M. Ernits in Tartu, 01.07.2021.

> *do it. In such a bureaucratic structure, that is a tremendous achievement that cannot be underestimated.*" [30]

In the retrospective they acknowledge Mihkel Oviir's interest in technology: it was him who made the development of electronic registers a priority in the Ministry of Justice and found the funding for it, which was also not a given at that time.[31] In the second half of the 1990s, some countries, such as Austria, had already started to set up electronic registers. At the same time and inspired by the Austrian endeavors the idea of creating electronic judicial registers also emerged in the Estonian Ministry of Justice – an idea that has later been seen as the birth of the Estonian e-state.[32]

2. Restructuring and selection of staff in the Estonian Ministry of Justice

The answers of the interviewees show that the key factor for a swift and efficient legislative reform was a successful choice of personnel and a fundamental decision that the reforms would not be carried out by experienced officials with a Soviet legal education but rather by young people who have either just finished the university or are even still in continuing their studies. The background to this policy decision was the understanding that lawyers are victims of dogma: they tend to think in the concepts that they have learned at the university, and it is very difficult for them to let go of the past. It was therefore clear to the key figures of the Ministry of Justice that if you rely upon lawyers who had been educated predominantly in the Soviet system, nothing will change as they would not see the need to change what they themselves had learned.[33] As the then Chancellor Mihkel Oviir put it: "The Ministry of Justice needed young people who were eager to learn and who did not have to go through the trouble of forgetting the old."[34]

Kaido Kama, who took up his post as Minister of Justice in the autumn of 1992, recalls that the Ministry of Justice had already begun to change during the time of his predecessors Jüri Raidla and Märt Rask, when the Department of Economic Law was created, which later concentrated on civil law-making. It was in this department that, at the end of the Soviet era, the first legislative frameworks for private initiatives (the so-called cooperatives) were developed.[35]

> "*The mood and the people had already changed there, and I don't remember that in the autumn of 1992 I had to fight with any Soviet-era persons. Anyway, the people who were in that building at the time, this hundred people, went along with the reforms.*" [36]

30 Interview with V. Kõve, M. Käerdi and H. Mikk in Tallinn, 27.08.2020.

31 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30); interview with J. Parts in Tallinn (Fn. 29); interview with P. Kama in Tallinn, 28.08.2020; interview with P. Pikamäe in Tartu, 03.07.2020; interview with V. Peep in Tallinn, 17.08.2020.

32 Interview with J. Parts in Tallinn (Fn. 29).

33 Interview with P. Pikamäe (Fn. 31).

34 Interview with M. Oviir (Fn. 26).

35 Interview with K. Kama (Fn. 18).

36 Ibid.

When asking where and how it was possible to find young people suitable for such tasks, the first answer was the communication with the professors at the University of Tartu, who gave the Ministry recommendations for students with a broad vision and interest in legislative drafting. At the same time, most of the students who had enrolled with the Faculty of Law in 1992 were already employed by the end of their second year: the shortage of lawyers was so extensive that headhunters were looking for people who either had or were in the process of obtaining a law degree.[37] More importantly, the Ministry of Justice was looking for ambitious young people who were not eager to say "yes, Chancellor" or "yes, Minister".[38] Characteristic of that era, pure chance also played a major role in recruiting personnel. For example, Priidu Pärna, later Vice-Chancellor and Chancellor of the Ministry of Justice, recalls that he learned about the possibility of working on the draft Law of Property Act through a fellow student who had heard that German-speaking graduates were being sought for the working group.[39]

It was Chancellor Mihkel Oviir who recruited several young officials who have played a key role in the legislative reforms.[40] Several key persons also came to the Ministry of Justice at the invitation of the Minister of Justice, Paul Varul: when he became the Minister of Justice in 1995, he made a structural reform of the Ministry. This involved the transformation of the Soviet-era department of economic law into a department of private law, with the addition of separate departments of public law, penal law, and legislative methodology. As a professor at the University of Tartu, Paul Varul had good contacts that he could use to recruit new people. It was him who in 1995 brought 24-year-old Heiki Loot, previously a consultant at the Supreme Court, to head the public law department.[41] Varul also prevented Priidu Pärna, also 24 years old at that time, from taking up a job as a notary by offering him the post of Vice-Chancellor in 1995 and the opportunity to coordinate all legislative drafting in the Ministry of Justice.[42] As a result of the structural reform of 1995-96, the penal law department was separated from the public law department and in October 1996 its head became 22-year-old Priit Pikamäe.[43]

For these reasons outlined above, the legislative drafting departments of the Estonian Ministry of Justice were dominated by recent graduates. Above all, they were looking for people with a command of the German language and, ideally, a knowledge of German law: since a fundamental decision had been taken to use the model of the German legal family as the basis for drafting the Estonian legislation[44], a knowledge of German was,

37 Interview with P. Pikamäe (Fn. 31).

38 Interview with M. Oviir (Fn. 26).

39 Interview with P. Pärna in Tallinn, 28.08.2020.

40 Interview with P. Varul in Tartu, 03.07.2020.

41 Heiki Loot started as the head of the public law department in September 1995. Interview with P. Pärna (Fn. 39); interview with P. Varul (Fn. 40).

42 Priidu Pärna worked as Vice Chancellor for legislative drafting at the Ministry of Justice until 2002, when he became Chancellor of the Ministry. Interview with P. Pärna (Fn. 39).

43 Interview with P. Pikamäe (Fn. 31).

44 On that, see infra at chapter IV.1.

for obvious reasons, indispensable. At the same time, the Ministry of Justice also had the opportunity to send young civil servants to Germany for a year or two to study and acquire a legal education there. In addition to German, knowledge of English was also essential for working at the Ministry, to be able to understand and participate in the European Union developments. Language skills were often a particular advantage of young people over middle-aged people[45], as learning foreign languages was at a low level in Soviet-era schools.

Since finding young officials eager to learn was one of the key factors in the success of Estonia's legal reforms, it is worth briefly exploring how it was possible to find and keep such young people in the Ministry of Justice at that time. Salaries were low in the public sector back then, but demand for lawyers was high. Law firms, notaries, business sector - everyone was looking for qualified lawyers. Young and talented people were attracted to the Ministry of Justice by various measures. Many were motivated by a series of questions "What will you be telling your grandchildren about yourself in 30-40 years' time? Will you tell them that you bought yourself a Žiguli car back then, which was rusting five years later? Or can you say that you were involved in unique processes?"[46] On the other hand, there was also an effort to find financial means for young civil servants. One of these means was affording an apartment in a house built by the Ministry of Justice.[47] Additionally, the key persons of the legal reforms were paid extra from the 'legal drafting money' under separate contracts, and the sums were not only modest.[48] Thus, the Ministry's fundamental decision to find extra payment for young talents also played an important role. Of course, the unique opportunity for young people to develop their careers, not only within the system of the Ministry of Justice but also in the whole Estonian state played an important role as well: figuratively speaking, they had a white sheet in front of them and could write what they saw better on it. Much of the legislation drafted and adopted back then is still in force today.[49]

3. Work culture at the Ministry of Justice during the reform period

All the interviewees stressed the exceptional working culture and commitment to work at the time. Enthusiasm, idealism, and high working ethics were the order of the day: 12-14 hour working days were commonplace, including sometimes – although not always – Saturdays and Sundays.[50] The legend goes that it was Priit Pikamäe – the current Attorney-General at the Court of Justice of the European Union – who finally said that it was

45 Interview with P. Kama (Fn. 31).

46 Interview with M. Oviir (Fn. 26); interview with H. Loot in Tartu, 30.10.2020.

47 Interview with P. Pärna (Fn. 39); interview with R. Maruste in Tallinn, 06.03.2020.

48 Ibid.

49 Interview with K. Kama (Fn. 18); interview with H. Loot (Fn. 46).

50 Interview with M. Oviir (Fn. 26); interview with R. Maruste (Fn. 47); interview with P. Pärna (Fn. 39); interview with P. Pikamäe (Fn. 31); interview with P. Kama (Fn. 31).

time to stop scheduling working group meetings and conferences at weekends and start living like Europeans.[51]

Different Ministers of Justice describe the working atmosphere back then:

> *"I always sat there until half past midnight anyway, but one night I went out at eight o'clock to smoke in the street. It's a dark winter night, and I look up and all the lights in the building are on. At eight o'clock in the evening, the house was full of people, and everyone was working. They should put up a statue for the people who were doing the work at the time."* [52]

> *"No matter what time I left in the evening, I don't remember being the last one. What justified inviting these young people and giving them the opportunity was the fact they were ready to work like that."* [53]

The then Chancellor of the Ministry of Justice, Mihkel Oviir, remembers that it was a kind of emotion and excitement that could not be compensated with a salary: people just felt that they were doing the right thing and that this was the time to do it.[54] There was an understanding that this was a unique opportunity – that drafting the whole law from scratch could only happen in revolutionary circumstances, and that a similar opportunity would not be given a second time in life. From there came a tremendous motivation to do great things, and to do them fast.[55] There was undoubtedly a similar idealism, work enthusiasm and drive for action in other government departments, though not all. For example, Minister of Justice Kaido Kama, a later Minister of the Interior Affairs recalls that when he took up his ministerial post at the Ministry of Internal Affairs in the autumn of 1994, it was a very different world, and the "smell of the Russian militia" still was felt all over the place.[56] Partly, this could also be linked to the *de facto* super-ministerial status of the Ministry of Justice at the time: it was the Ministry of Justice that largely set the pace, vetoed and controlled the activities of other ministries.[57]

All in all, the period of restoring rule of law is described as a crazy time with its enormous pace of work, long days and weekends, as well as exhausting disputes and legal-political battles.[58] This was compensated by a free and academic research atmosphere in the Ministry and a lively group of young people in their twenties, among whom Chan-

51 Interview with P. Pärna (Fn. 39).

52 Interview with K. Kama (Fn. 18).

53 Interview with P. Varul (Fn. 40).

54 Interview with M. Oviir (Fn. 26).

55 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30).

56 Interview with K. Kama (Fn. 18).

57 Interview with J. Adams (Fn. 20).

58 To describe the pace of this, it is enough to refer to the memories of Villu Kõve on how just in one year the Commercial Code was drafted, in another year it was implemented, the acts related to the commercial register were drafted and in parallel, the draft Law of Obligations was prepared. Clearly, at this pace, not everything could have been worked out in detail: it was more a case of going with one's gut instinct, trying to identify and adopt more modern solutions. Interview with V. Kõve (Fn. 29).

cellor Mihkel Oviir, now of a more respectable age, clearly enjoyed himself.[59] There was also an extraordinary disregard for almost any hierarchical system: an official could disagree with a minister and criticize a minister's position. This was allowed in those days when hierarchical, top-down subordination was largely non-existent.[60] Nor was it realistic at the time to expect that a newly recruited person would receive any kind of support, guidance, and training. It did not even occur to the new officials that such on-the-spot mentoring or training could be asked for or expected: tasks had to be solved, but finding solutions, either with the help of external experts or with the help of foreign literature, was everyone's own responsibility.[61]

While the younger generation of lawyers focused primarily on legal drafting, the older generation was largely concerned with institutional reforms: new premises had to be found for various institutions, and personnel had to be recruited and trained. This was something that the slightly older lawyers, with their previous experience, were keen to do, and their experience in that particular area was much needed. [62]

4. Cooperation between the Ministry of Justice and the Parliament

The parliamentary Committee on Legal Affairs, chaired alternately by Jüri Adams and Daimar Liiv during the reform decade, naturally played an important and largely decisive role in the adoption of the new laws. To a large extent, the two of them determined the cooperation between the Ministry of Justice and the Legal Affairs Committee of the Parliament in the enacting of major legal reforms.

At least in the early years, cooperation between the Ministry of Justice and the Parliament was in many ways untraditional and did not always meet the standard of good modern lawmaking. For example, in the early and mid-1990s, it was common for ministry officials to participate both in the government meetings and the plenary meetings of the Parliament instead of ministers and to present draft legislation and answer questions from the Cabinet and Parliament members. Today, this tradition is long forgotten, but it was rather common back then.[63] Likewise, there were cases, nowadays clearly considered to be maladministration, where the texts of draft legislation were corrected during parliamentary proceedings simply by asking the clerk of the Legal Affairs Committee to add paragraphs to already existing drafts that quickly solved one or another practical problem. Of course, such additions were duly processed and voted on, but the attention of committee members to such amendments was perhaps not always drawn.[64] On a number of occasions, individual members of the Parliament submitted bills that were in fact raw government drafts in order to speed up the legislative procedure: it was simply agreed with the chairman of the committee or a political group that the bill would be

59 Interview with P. Pikamäe (Fn. 31).

60 Interview with M. Oviir (Fn. 26).

61 Interview with P. Kama (Fn. 31).

62 Interview with M. Oviir (Fn. 26).

63 Interview with P. Pärna (Fn. 39).

64 Interview with P. Kama (Fn. 31).

brought to Parliament and then the committee would work together with the Ministry officials to finalize it.[65]

Such cooperation was, of course, only possible on the basis of a very high level of mutual trust. At least in the first half of the 1990s, according to the memoirs of Jüri Adams, there was no confrontation between the Legal Affairs Committee of the Parliament and the Ministry of Justice. On the contrary, the committee's only reproach to the Ministry of Justice was that the draft was still not delivered, that it was being delayed. It was in the early days of legal reforms that the Legal Affairs Committee of the Parliament saw itself as a partner of the Ministry of Justice and considered its task to get the bill passed within a reasonably short time and without delay. Nor was the understanding at that time that the draft that had come from the government should not be changed much in the Parliament.[66] Daimar Liiv, the Chairman of the Legal Affairs Committee of the Parliament, recalls that the Legal Affairs Committee developed a rational and trusting relationship primarily with the officials of the Ministry of Justice who dealt with private law drafts. They did not, however, trust them blindly, as the committee discussed all the critical points and issues of the draft from beginning to end.[67] This mutual trust was probably based on the fact that both the politicians seeking changes in the Committee and the young private law officials in the Ministry of Justice had a largely overlapping goal – rapid legal reforms in Estonia.

Various interest groups were often invited to the meetings of the Legal Affairs Committee: the Estonian Chamber of Commerce and Industry and the Estonian Banking Association being the usual partners. Judges with extensive experience were also frequent guests.[68] However, it should be stressed that the influence of interest groups on lawmaking was much smaller back then than it is now.[69]

Daimar Liiv recalls that during his time as the head of the Legal Affairs Committee, the processing of drafts was speeded up by the fact that if a stalemate arose in the legislative procedure and the Legal Affairs Committee needed political support to move forward, Kaido Kama, Jüri Adams as well as Paul Varul were strong justice ministers who had authority in the government and the prime minister. When they went to the prime minister with their concerns, he usually supported their decisions in the coalition.[70] As pointed out above, at least in the early 1990s, the Ministry of Justice was a ministry with a very strong position in the government, and the role of the Minister of Justice carried considerable weight alongside the prime minister.[71]

65 Interview with P. Pärna (Fn. 39).

66 Interview with J. Adams (Fn. 20).

67 Interview with D. Liiv in Tallinn, 28.08.2020.

68 Ibid.

69 Ibid.

70 Ibid.

71 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30).

Later cooperation between the Ministry of Justice and the Legal Affairs Committee of the Parliament was not always so easy and common understanding was not always shared, and the members of the Legal Affairs Committee started to play a more important role in the preparation of the draft. The main stumbling block between the officials of the Ministry of Justice and the Legal Affairs Committee was the legislative procedure of the two major drafts, the Penal Code and the Law of Obligations Act. For both drafts, the Legal Affairs Committee was appointed as the lead committee in Parliament, headed by Jüri Adams in the new 9th Riigikogu, who had a very clear personal view of both drafts. This was largely based on his belief that large, fundamental bills such as the Law of Obligations Act and the Penal Code must be linguistically comprehensible to everyone. The demand for a high linguistic standard led to a long pause in the drafting process in the Committee on Legal Affairs, even up to three-quarters of a year. This, of course, caused indignation in the Ministry of Justice, which was hoping to move ahead quickly with these two important drafts. However, instead of moving forward quickly, the Committee on Legal Affairs stumbled into a constant argument about whether this or that sentence was worded correctly in Estonian or what this or that term meant.[72] Jüri Adams even submitted an alternative draft of the general part of the Penal Code, written by himself, to the Parliament, which was, however, rejected as the submission of such a draft by the head of the Legal Affairs Committee raised questions at the political level.[73]

IV. Decision to follow the Continental-European model

1. Choices on the table

> *"I've heard a legend, I don't know if it's true, but it probably is. In 1992, when there was that first big battle about the Law of Property Act in the government, Chancellor Mihkel Oviir put forward a legendary argument for why German law should be chosen as a model – because the Estonian* kroon *is tied to the German mark. It was true and, of course, nobody could say anything against it."* [74]

One of the priorities of the Ministry of Justice of Estonia was to establish as quickly as possible a regulation of private law that would meet the requirements of a modern European market economy. When preparing legislation to restore the rule of law, to become market-oriented and respect human rights, the central question naturally was the choice of model: what should be the basis for building the Estonian legal system? Should Estonia opt for a Continental- European (and, more precisely, a German or Roman legal family) or Anglo-American legal system, or should it design its own, uniquely Estonian legal order? Or should Estonia simply re-establish the legislation that existed before the

72 Interview with P. Pikamäe (Fn. 31).

73 Ibid.

74 Ibid.

Soviet occupation? It was clear that the new republic could not continue with the Soviet legislation, but the fundamental choices about the model for creating a new legal system were far from made by the time Estonia regained its independence.

This was hotly debated in the early 1990s. Since Estonia has never had a very strong influence of Anglo-American law, either historically or culturally, moving in that direction seemed to make little sense to almost anyone.[75] There were, however, 'intermediate' options, such as the Louisiana Civil Code or Scandinavian law. In the case of the Louisiana Civil Code, the linguistic aspect was certainly a strong argument: although there were significantly fewer English speakers in Estonia at the time than there are today, there were still considerably more of them than German speakers. The United States offered Estonia assistance in shaping its legislation, with an emphasis on the already mentioned state of Louisiana: this state has a civil code based on the Roman system and it was recommended to Estonia.[76] Thomas Wilhelmsson, a renowned Finnish civil law professor, also advised Estonian officials on various issues and recommended a more flexible Scandinavian approach.[77]

Among the legal community and elsewhere, views were also expressed that Estonia should create a unique legislation, not copying the solution of any other country and taking into account Estonia's historical-cultural factors. The argument put forward was that law is part of the culture and that we cannot hand over our culture to other countries.[78] However, this perception quickly collided with reality: there was simply no time to develop an ideal legal system unique to Estonia.[79] Nor, at least in the early days of lawmaking, did we have the capacity to keep us informed of the choices that Latvia and Lithuania were making at the same time, at least not in all legal areas.[80]

Looking back at the Estonian legal history before World War II, a draft Civil Code had been developed by 1940, but it was not adopted before the Soviet occupation.[81] In 1992, when Estonia regained its independence and a new civil law was being drafted, a couple of members of the Legal Affairs Committee of the Parliament came up with the idea of reintroducing the draft. The argument for this solution was that it would have ensured legal continuity and it would not have taken too much time and effort to implement.[82] Estonia's neighbouring country, Latvia, for example, had taken this path: as they were

75 Interview with P. Pikamäe (Fn. 31).

76 Interview with P. Varul (Fn. 40).

77 Ibid.

78 Interview with M. Oviir (Fn. 26).

79 Interview with K. Kama (Fn. 18).

80 Ibid. In the later phase, however, cooperation with other Baltic states deepened and became relatively close on some issues. Interview with P. Kama (Fn. 31). This cooperation was also facilitated by the Ministry of Justice's external partners, in particular the German Foundation for International Legal Cooperation, which organized joint events for Baltic experts and researchers.

81 More on that Code and its drafting process see Siimets-Gross, Luts-Sootak and Kiirend-Pruuli, 'The Private Law Codification as an Instrument for the Consolidation of a Nation from Inside – Estonia and Latvia between two World Wars', pp. 285–310.

82 Interview with J. Adams (Fn. 20).

able to adopt their Civil Code before 1940, they simply re-enforced it after regaining independence.[83] However, it became apparent that the Estonian draft Civil Code of 1940 was outdated in many respects and the idea of enforcing it was abandoned rather quickly. As the 1940 draft Civil Code was based on the German system, the pandectic system, it was one of the reasons why the decision was taken to prefer the German legal system as a basis for the reconstruction of the Estonian legal order.[84]

At about the same time, in December 1992, the Parliament adopted a resolution entitled "Continuity in Legislative Drafting", which postulated that the preparation of draft laws should be based on the laws in force in the Republic of Estonia before 16 June 1940.[85] Thus, the decision was also taken at the parliamentary level to use the model of Continental European law as a basis for the Estonian legal system. This choice was also influenced by history, as Estonian legislation was based on German law also before the Soviet occupation, and it was natural and pragmatic to continue this tradition.[86] In other words, it was Estonia's history that gave the moral legitimacy to use models from the German legal family[87], although the then Minister of Justice, Kaido Kama, for example, does not recall that this was a conscious policy of the Ministry of Justice at the time.[88] Undoubtedly, however, Estonia was encouraged to carry out legal reforms by the memories still existing in Estonian society about the functioning of the Republic of Estonia and its institutions before the Second World War.

The principle that German law should be taken as the basis for the Estonian legal system was also written into the coalition agreement for the formation of the government in 1992. It stipulated that "Legislation must be brought into conformity with both the Constitution and the generally accepted norms of international law. In doing so, the pre-war legislation of the Republic of Estonia (in particular, the relevant parts of the 1940 draft Civil Code) must be used as a basis, while the German legal system, which had previously served as the basis for Estonian lawmaking, must also be used to modernize it."[89] This, in turn, provided a strong backing to follow this chosen path and, among other things, provided an opportunity to summon representatives of other ministries, who used randomly other legislative models.[90]

At least in the case of civil law, the understanding finally dominated that the pandectic system was clearer, simpler, more understandable, and appropriate to Estonia.[91] The in-

83 Civillikums. Adoption 28.01.1937. Valdības Vēstnesis, 41, 20.02.1937. Entry into force 01.09.1992. In Estonia, too, pre-war regulations were adopted in some matters. Minister of Justice Kaido Kama recalls that, for example, the pre-war defence forces regulations and the internal army regulations were reintroduced due to time pressure. Interview with K. Kama (Fn. 18).

84 Interview with P. Varul (Fn. 40).

85 Riigi Teataja [State Gazette], 1992, 52, 651.

86 Interview with M. Oviir (Fn. 26).

87 Interview with P. Kama (Fn. 31).

88 Ibid.

89 Mikk, 'Tsiviilõiguse reformist Eestis', p. 114.

90 Interview with K. Kama (Fn. 18).

91 Interview with P. Varul (Fn. 40).

fluence of German law has been somewhat more limited in the area of public law, where the contents of the legislation are an expression of the constitution and the domestic political culture. Therefore, it was considered dangerous to take a direct example from another country's model when it came to public law legislation, let alone the structure of the state.[92] In the context of developing penal law, it has also been argued that there was not a very conscious choice made between one or another legal system, but rather models were drawn from different countries. Yet, it was undoubtedly noticed that the doctrinal bases of the general part of penal law were most elaborated in German law and their legal literature was also most accessible.[93]

There were not only historical and legal-dogmatic arguments in favour of the German legal model but also more practical reasons. The young Republic of Estonia desperately needed foreign investments. However, investors needed a clear and firm message as to the state's guarantees for their investments and the model on which the entire civil law system of the Estonian state was based. A pragmatic solution would have been to take a large, well-known country, model the Estonian legal system on its legislation, and tell investors that Estonian law is almost the same and protects their rights on the same principles.[94] In addition, the leadership of the Ministry of Justice quickly realized that the legislation was only a very small part of the whole system; in addition, training and help in institution-building were needed. Only Germany, according to Chancellor Oviir's recollections, was prepared to offer such an integrated solution.[95] On the practical side, alongside the purely pragmatic arguments, it is also pointed out that German law is much more adaptable than, for example, French law: not only is German law much more detailed, but it also comes with a very large body of legal literature, which is detailed, thoroughly researched, and answers all the questions that may arise.[96]

Naturally, the Ministry of Justice's decision to base its legislative drafting primarily on the German legal model also met opposition. For example, in the case of other ministries, there was no such conceptually clear starting point, which in turn led to conflicts between the Ministry of Justice and other ministries. When other ministries sent their drafts for consultation, it was often the case that the Ministry of Justice refused to give its approval on the grounds that the draft was not in line with the fundamental substantive law choices that had already been made.[97] Nor did all leaders of the Estonian legal community at the time consider following the example of German law to be reasonable. For example, Rait Maruste, then President of the Supreme Court, recalls that his German lawyer acquaintances warned him against rushing into a decision in favour of Ger-

92 Ibid.

93 Interview with P. Pikamäe (Fn. 31).

94 Interview with M. Oviir (Fn. 26).

95 Ibid.

96 Interview with P. Pikamäe (Fn. 31).

97 Interview with P. Pärna (Fn. 39).

man law, saying that Estonians had a unique opportunity to start afresh. But if you adopt the German system, you will never get out of it.[98]

2. The importance of EU law in the period of legislative reforms

Although the importance of the European Union law seems self-evident today, it should be remembered that Estonia joined the European Union only in 2004 and that even the accession negotiations started only in 1998. It is true that Estonia formally applied for membership in late 1995, but in the early 1990s, Estonian politicians had no certainty or confidence that membership of the European Union could be achieved in the near future. However, accession to the European Union was of even greater political importance then than it is today because there was no widespread belief in Estonian society at that time that Estonia could join NATO any time soon. The European Union was therefore perceived not only as an opportunity to promote the common market and the economy but also as a security guarantee or even, to some extent, as a substitute for NATO.[99]

Moreover, when the reform of civil law started in the early 1990s, there was not even a clear political decision to join the European Union. However, the argument of conformity with European Union law was already put forward in the discussions on the Commercial Code in the Parliament in 1994-1995.[100] It was also one of the strong arguments in favour of using German law as a model that it was one of the quickest ways of bringing Estonian private law into line with EU law. The Scandinavian countries, on the other hand, were still in the process of joining the European Union in those years, their legal tradition was historically more distant, and the language barrier for the Scandinavian languages was also a little higher than it has historically been for the German language in Estonia.[101] There is no doubt, however, that European Union law had a very strong influence on Estonian lawmaking after the start of the formal accession negotiations in 1998: after all, the accession negotiations were based on Estonia's readiness to adopt the *acquis communautaire* and implement it from the moment of accession. Thus, for example, the Law of Obligations Act, which entered into force in 2002, transposed into Estonian law many European directives on consumer contract law.

3. The role of politicians and public servants in law-making

To understand the legislative process in Estonia during the reform period, it is necessary to briefly touch on one of its specific features back then: the so-called political guidelines. It is inherent to democratic governance that the politicians in government postulate the main directions of legislation; it is natural that ministry officials follow the political guidelines given to them when drafting legislation. However, the 1990s in the Estonian Ministry of Justice were characterized by a situation that was largely the opposite, with legal

98 Interview with R. Maruste (Fn. 47).

99 Interview with P. Kama (Fn. 31).

100 Ibid.

101 Ibid.

policy choices largely determined by officials who were part of drafting working groups, or by other members of the working group, such as legal academics.

Political guidance for lawmakers was undoubtedly important during the period of property and land reform, when ministers tried to achieve a situation where there was a very clear political agreement before the law was written, to avoid unnecessary work for the lawyers drafting the legislation.[102] The regulation of municipalities was also one of the situations that the coalition discussed very seriously beforehand, and which was the subject of a very long and in-depth debate. Based on this decision made at the political level, the Ministry of Justice was given a clear political mandate as to what kind of law needed to be drafted.[103]

However, the shaping of modern legislation was not heavily influenced by politicians.[104] For example, no political guidance was given by the minister on how or on what principles to follow when drafting the Law of Obligations Act. Nor were ministers of justice presented with the initial concepts of the drafts.[105] In these issues, the proposals of the drafting working groups and the use of the basic sources of the model legislation were decisive. However, it is also true that in the field of public law, including matters of public organization, there was much more guidance on drafting from the minister. For example, prior to the adoption of the renewed Civil Service Act[106], it was of course necessary to coordinate in the cabinet meetings how the structure of ministries should be organized.[107] In the case of penal law, on the other hand, the minister was consulted on certain options, but that was about it. Priit Pikamäe, then head of the penal law department, recalls that there were no guidelines at the level of detail.[108] Other key figures at the time have also stressed that there were no political guidelines for choosing between different concepts and that, compared to today, the role and freedom of officials for shaping legislation and making fundamental legal policy decisions were considerably greater.[109]

This situation lasted until Märt Rask took over as Minister of Justice: it was then that the ministry's meetings became increasingly based on what had been decided at the political level. This change indicated that Estonian politics had become significantly professionalized and modernized by the end of the 1990s. All in all, until about 2000, there were no strong political guidelines from the Ministry of Justice to the officials. Nor, at least up to that time, did a change of Minister of Justice provoke a major change in staff.[110]

102 Interview with K. Kama (Fn. 18).

103 Ibid.

104 Interview with M. Oviir (Fn. 26).

105 Interview with P. Pärna (Fn. 39).

106 Riigi Teataja [State Gazette] I, 06.07.2012, 1.

107 Interview with P. Varul (Fn. 40).

108 However, the Minister of Justice, Paul Varul, brought with him his own legislative agenda, which was the basis for the Ministry's work plans at the time. According to this agenda, the aim was to complete the legal reforms, in particular those relating to legal institutions. Interview with P. Pikamäe (Fn. 31).

109 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30); interview with R. Tiivel in Tallinn, 28.02.2020; interview with P. Pärna (Fn. 39).

110 Interview with M. Oviir (Fn. 26).

This situation was undoubtedly due, among other things, to the fact that in the early 1990s resources were scarce and there was simply neither the time nor the people to develop precise political guidance.

4. Cooperation with the German Foundation for International Legal Cooperation

One of the key factors in the success of Estonia's legal reforms is certainly the fruitful cooperation between the Estonian Ministry of Justice and the German Foundation for International Legal Cooperation (*Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit*), founded in 1992 by the German Minister of Justice Klaus Kinkel. The significance and success of this cooperation can undoubtedly be described in retrospect as exceptional. As with the choice of legislative models, such cooperation was by no means automatic or predetermined from the outset.

In the early 1990s, a situation had arisen in Europe where the former Soviet republics had become independent and the legal situation of these new states was attracting interest from other countries, both from the economic point of view, particularly in terms of investment and business opportunities, and at the state level. These two were inextricably linked: inevitably, legal questions arise when an investment decision is taken, such as whether it is possible to obtain a loan in the country of destination, what can be used as collateral for a loan, and whether and under what conditions it is possible to become the owner of real estate. Because of the high interest in Estonia and the investment opportunities here, the young Estonian Ministry of Justice did not have to make an effort to find foreign experts, but various foundations in several countries offered Estonia experts, draft laws, and other legislative cooperation.[111] For example, several foundations established in the United States were very active in offering their assistance and funding experts to come to Estonia.[112] As indicated above, lawyers from Louisiana in the United States were willing to assist Estonia on the grounds that Louisiana is the only state in the United States with a Continental-European legal tradition and that its experience could be of interest in the development of a new Estonian civil law. This assistance was used to some extent under Minister of Justice Paul Varul.[113]

However, the German Foundation for International Judicial Cooperation became the main cooperation partner for the Ministry of Justice. Germany, too, was interested in how Estonia's economy and legal system would develop[114], and this foundation was the only one to offer Estonia, which was at the beginning of the restoration of the rule of law, a 'complete package': legal literature, expertise for drafting, consultations, study visits to German institutions and finally training for judges and other legal professionals.[115]

111 Interview with P. Varul (Fn. 40).

112 Ibid.

113 Interview with K. Kama (Fn. 18).

114 Interview with P. Varul (Fn. 40).

115 Interview with M. Oviir (Fn. 26); interview with V. Kõve (Fn. 29).

The cooperation between the German Foundation for International Legal Cooperation and the Ministry of Justice started through the Estonian notaries.[116] Experts from the Foundation had offered training to them, and such opportunities attracted the interest of the Ministry of Justice on a broader level. One of the most important opportunities in the early years of cooperation was undoubtedly the use of external experts for legal drafting.[117] Typically, a working group of the Ministry of Justice would prepare a draft and send it to an expert selected by the German Foundation for International Legal Cooperation, who would write a thorough expertise on the draft. However, with some experts, closer and more flexible forms of working were used. For example, Peter Schlechtriem, a professor at the University of Freiburg, who had a significant influence on the development of the new Estonian civil law, first gave general advice to the working group, then provided written expertise, and was also ready to spend long days discussing various issues related to the draft with members of the Estonian working group.[118] In the area of penal law, the longest working relationship was with Erich Samson, then professor of penal law at the University of Kiel, who took a keen professional interest in the reform of Estonian criminal law. He, too, advised the Ministry of Justice's Penal Code working group during several on-site visits to Estonia, and later provided a very thorough expert opinion on the draft, which has also been published.[119]

Part of the enthusiasm of these foreign experts was that they saw Estonia as a place where their advice would not only be listened to but would actually become law. In their home country, with its stable legal system, making any legislative changes was much more difficult and they did not have such an exciting opportunity there.[120] The expertise also provided valuable insights into the weaknesses of German law that the experts recommended avoiding in Estonia.[121]

In addition to expert opinions and consultations on draft legislation, the German Foundation for International Legal Cooperation took on the ambitious task of providing training on new legislation for the Estonian legal professionals, in particular for judges and prosecutors. The training was offered in all three branches of law: public law, penal law, and private law. It took place in the framework of an EU-funded twinning project, in which German professors trained Estonian legal professionals based on new or draft Estonian legislation. Lectures on penal law were given by professor Erich Samson from the University of Kiel, who was an expert on the draft Penal Code[122], while the first part of the training program on private law was conducted by the charming professor Günther Hager from the University of Freiburg. The twinning project was a resounding success,

116 Interview with M. Oviir (Fn. 26).

117 Interview with P. Varul (Fn. 40).

118 Ibid.

119 Ernits, Pikamäe, Samson and Sootak, Karistusseadustiku üldosa eelnõu: eelnõu lähtealused ja põhjendus.

120 Interview with P. Varul (Fn. 40).

121 Interview with P. Pärna (Fn. 39).

122 Interview with P. Pikamäe (Fn. 31).

with very positive feedback from the participants, who still remember it fondly 20 years later.[123] It was a valuable endeavour in two aspects. On the one hand, the judges learned the basics of the new legislation already during the preparation of the drafts, under the guidance of high-level German lecturers. On the other hand, in parallel to the twinning training, eg the draft Law of Obligations Act was being finalized and much of what was discussed during the training could be taken into account when finalizing the draft.[124]

In addition to the large-scale twinning training, other events were organized in cooperation with the German Foundation. For example, until 2000, the annual Land Registry and Notary Days, organized by Rein Tiivel, head of the land registry and notary department of the Ministry, discussed legal issues related to the land registry (*Grundbuch*) and the notaries. Speakers were invited from Germany, Austria, and Switzerland, and participants came not only from Estonia but also from other Eastern European countries: Latvia and Lithuania, as well as Belarus, Ukraine, and Poland.[125] The presentations of these conferences were later published in Estonian as well as in German.[126]

5. Overview of the private law reform in Estonia

a. Property Law Act

As Estonian civil law is based on a pandectic system, it would have been logical to start the creation of a new civil law by drafting and adopting the General Part of the Civil Code Act. However, of all the parts of the Civil Code, the Law of Property Act was the first to be drafted. The draft Law of Property Act was prepared in parallel with the launch of the land and property reforms in the early 1990s, and the implementation of these reforms was the main reason why the drafting of the Law of Property Act came first.[127] As is well known, Soviet civil law did not recognize the concept of immovable property or real estate ownership, the immovable property could not be sold or mortgaged: all land belonged to the state.[128] Moreover, the Soviet era was the time of the now completely unimaginable principle that there were two kinds of legal persons: those who were the owners of their property and those who were not.[129] Immediately after Estonia regained its independence, therefore, land and property reform were launched, land and buildings

123 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30).

124 Interview with P. Varul (Fn. 40).

125 Interview with V. Peep (Fn. 31).

126 Kinnistusraamatu- ja notaripäevad. 26.–30. juuni 1994. Ettekanded; Kinnistusraamatu- ja notaripäevad. 15.–27. juuni 1995. Ettekanded; Kinnistusraamatu- ja notaripäevad. 16.–18. mai 1996. Ettekanded; Kinnistusraamatu- ja notaripäevad. 15.–17. mai 1997. Ettekanded; Kinnistusraamatu- ja notaripäevad. 28.–30. mai 1998. Ettekanded; Kinnistusraamatu- ja notaripäevad. 13.–15. mai 1999. Ettekanded; Kinnistusraamatu- ja notaripäevad. Ettekanded 2000.

127 See Varul, 'Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia', pp. 104–106, 110.

128 This situation was not improved by the Ownership Act of the Republic of Estonia adopted on 13 June 1991, under which natural persons became, in principle, equivalent owners with the state, but the Act did not allow for the civil ownership of land and the land remained the property of the state.

129 Varul (Fn. 127), p. 111.

were returned to their rightful owners, but there was still no legal concept of real estate and no land register.[130]

Thus, after the restoration of independence, the situation was that the rightful owners were waiting for the restitution of their unlawfully expropriated property, people wanted to start privatizing their apartments, but there was no regulation on the turnover of real estate. Consequently, the time pressure in drafting the Property Law Act was also extremely tight, and the initial draft focused exclusively on the regulation of the turnover of immovable property.[131]

When talking about the creation of modern private law, the activities of the so-called High Commission of Civil Law, and its impact on the drafting of private law cannot be ignored. This commission was set up on 22 December 1992 by the then Minister of Justice, Kaido Kama, and chaired by Paul Varul, professor at the University of Tartu and later Minister of Justice. In total, the High Commission of Civil Law – with somewhat different members and functions – operated for more than ten years[132], until the adoption of the Law of Obligations Act in 2001. Its members included the so-called elite of the private law of the time – University of Tartu lecturers, judges, and representatives of the Bar Association. Generally, the working group of the Ministry of Justice had to prepare and submit the draft to the High Commission, and the High Commission analyzed it, amended it, or sent it back. In this way, Minister Varul wished to establish a kind of quality control system[133] and to obtain the approval of the legal community for drafts prepared by young ministry officials. However, the role of the High Commission was largely limited to language editing of the drafts, removing unnecessary repetitions and provisions well as legal editing.[134] So admitted the then Minister of Justice, Paul Varul, in 1998:

> *"The members of the working groups are mostly young people without much experience in legal drafting. They may have a good idea of the substance, but they have no experience in drafting and expressing their ideas in writing."* [135]

However, the substantive ideas, concepts, and legislative choices came from the members of the working group that prepared the draft. One must also admit that cooperation and relationships between the drafting working groups and the High Commission of Civil Law were not always smooth. The conflict was most acute at the very beginning, in the early stages of the preparation of the Property Law Act[136], where the High Commission and the working group preparing the draft Property Law Act had radically diffe-

130 Interview with K. Kama (Fn. 18).

131 Draft Real Estate Act. 05.05.1992, ENA, ERA.4973.1.10/4.

132 Interview with P. Varul (Fn. 40).

133 Ibid.

134 Interview with P. Pärna (Fn. 39).

135 Prööm, 'Intervjuu justiitsminister Paul Varuliga', p. 110.

136 This conflict is even described in the memoirs of Mart Laar, the then Prime Minister. See Laar (Fn. 17), p. 116.

rent views on fundamental legislative choices. In fact, two different drafts of property law were developed in parallel at that time.[137]

In retrospect, it can be argued that it was during the preparation of the Property Law Act that it was decided both that the new Estonian civil law would be codified in the same way as the 1940 draft, and that the five parts of the Civil Code would be adopted not in the form of a code, but as separate acts in the interests of speed and flexibility.[138] It was also decided that the new legislation would not be based on concepts from the Soviet Civil Code but on modern Western European legislation.[139] Although the initial draft of the Property Law Act generally followed the draft Civil Code of 1940, which was finalized shortly before the outbreak of the Second World War[140], the Property Law Act adopted in 1993 was already largely based on the legal doctrines of Germany and Switzerland. Villu Kõve, a member of the working group and the current President of the Estonian Supreme Court, recalls that it was largely an intuitive decision: the land register that existed in Estonia before 1940 was also based on German law, and it was the desire to restore the land register and to use its entries as a basis for the restitution of unlawfully expropriated property that led to the decision in favour of the German system.[141]

Even after the decision was taken in favour of the draft prepared by the law students at the University of Tartu, which was in principle approved by the Ministry of Justice, it took a long time before the High Commission commissioned by the Ministry declared the draft sufficiently mature and it finally acquired political support. But even during the legislative process at the Parliament, the working group submitted a new version of the draft, which had been edited and systematically improved, and which had been sent to Germany for an expert opinion via the German Foundation for International Legal Cooperation. The experts for the draft of the Property Law Act were professors Günther Brambring and Sigrun Erber-Faller, and it was in this expert opinion that the strengthening of the land register system and the concept of the Estonian mortgage based on the combination of the German mortgage types were proposed.[142] No doubt that the principle of abstraction also found its way into Estonian law through German law.[143]

Priidu Pärna, a member of the working group on the draft, recalls an interesting nuance from the parliamentary debate:

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137 In depth, see Kõve, Varaliste tehingute süsteem Eestis, pp. 146-147.

138 "Once the Property Law Act had been adopted, and it was based on the premise that it is part of a codified civil code, the decision had fallen." Interview with P. Varul (Fn. 40).

139 Varul (Fn. 127), pp. 107–109.

140 The draft was prepared for almost 20 years under the leadership of professor J. Uluots during the first independence of Republic of Estonia, but it was not adopted before the beginning of the Soviet occupation. The draft was republished in 1992. See Traat, Tsiviilseadustik.

141 Interview with V. Kõve (Fn. 29).

142 Brambring and Erber-Faller, 'Expertise zum estnischen Sachenrecht (Gesetzentwurf vom 27.01.1993)', ENA, ERA.1973.1.10/9; Kõve (Fn. 137), p. 147.

143 On that, see Kõve (Fn. 137), pp. 148-152.

> *"The main issue discussed by the members of the Parliament was how it should be possible to pick mushrooms and berries in another person's forest. Whether there is a principle of abstraction or whether we have a mortgage, whether it is accessory to the obligation or not – this did not interest the members of the Parliament too much."* [144]

Despite of various discussions, disputes, and conflicts, the Riigikogu passed the draft Property Law Act already on 9 June 1993 and it entered into force on 1 December 1993.

b. The General Part of the Civil Code Act of 1994

Already one year after the adoption of the Property Law Act, the first post-independence General Part of the Civil Code Act was adopted on 28 June 1994.[145] Although it was not yet systematically elaborated in all its aspects and did not comply with the principles of modern civil law, it introduced several fundamental changes compared to the General Part of the Civil Code of the former Estonian Soviet Republic.

One of the most fundamental changes in the whole act was the abandonment of the Soviet-era tripartite division of enterprise-establishment-organisation.[146] The then-widespread Soviet-era understanding of a seal and a bank account as the central features of a legal person, and of treating all subdivisions of the state, such as schools, hospitals, and ministries as separate legal persons, was replaced by a new principle of *numerus clausus.* The State and local authorities became legal persons of public law; schools, ministries, and other State or local authority bodies lost their legal personality. Moreover, Estonia had retained from the Soviet era the now unimaginable principle that the state is not a separate legal person.[147]

However, it was not possible to incorporate all the modern principles into the 1994 General Civil Code Act. For example, under that Act, it was still only possible to annul transactions judicially, although the possibility of extra-judicial annulment was also seriously discussed.[148] The rules on limitation and transactions were somewhat modernized, for example by introducing the violation of good morals as a ground for the voidness of a transaction, by introducing the general principle of good faith[149], and the principle of freedom of form of a transaction. Despite these amendments, the 1994 General Part of the Civil Code Act has been referred to as an update of the Civil Code of the ESSR, although the fundamental importance of the change in the concept of legal persons in the context of that time has been recognized as well.[150]

144 Interview with P. Pärna (Fn. 39).

145 Riigi Teataja [State Gazette] I, 1994, 53, 889.

146 See the related criticism Kask, 'Isikud tsiviilseadustiku üldosa seaduses', pp. 87–90.

147 Varul (Fn. 127), p. 111.

148 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30).

149 Ibid.

150 Interview with V. Kõve (Fn. 29). Martin Käerdi, the main author of the 2002 draft of the General Part of the Civil Code Act, also admits that the 1994 Act was of great significance in its time of transition from Soviet civil law to a modern legal system focused on the needs of a market economy. See Käerdi, 'Regu-

c. Commercial Code

Immediately after, or even before, the adoption of the General Part of the Civil Code Act, a draft of the Commercial Code was prepared, initially under the name of the Business Code.[151] Like the draft Property Law Act, the Commercial Code was initially also prepared in two places: at the Faculty of Law of the University of Tartu and at the Ministry of Justice. Unlike in the case of the Property Law Act, the Commercial Code was finally drafted by a united group, without major conflicts.

Sometimes big and fundamental decisions are the result of a simple coincidence. This was the case with the evolution of the basic concept of the Commercial Code. In 1993, Villu Kõve, who had been sent by the Ministry of Justice to study at the University of Hamburg, attended a seminar given by Karsten Schmidt, a legendary German professor of commercial law, under the title "*Wir machen einen kleinen HGB-Reform*" (We are making a small HGB reform). In this seminar professor Schmidt introduced a visionary concept of how German law could regulate entrepreneurs (*Kaufmann*) that differed considerably from the German law in force.[152] It so happened that the later Estonian concept of the entrepreneur was based on a seminar paper by Villu Kõve, which he wrote for professor Schmidt, and the so-called *Formkaufmann* principle[153] became the basis for the general part of the future Estonian Commercial Code. According to Villu Kõve, he also intuitively decided that the commercial transactions section should be abandoned and that this subject should be left to the law of obligations alone, as this simply seemed more modern than the conservative dualist approach in Germany.[154]

Nevertheless, the German Commercial Code remained the main basis for the structure and principles of the new Estonian Commercial Code. In addition to it, the Austrian, Polish, Czech and Bulgarian Commercial Codes, the Swiss Obligations Act, the Dutch Civil Code, the German Public Limited Companies Acts the Hungarian Business Companies Act, the Swedish, Danish and Spanish Public Limited Companies Acts, as well as the Business Registration Act and the Companies Act in force in the Republic of Estonia prior to 1940, and already the EU directives on company law, were analyzed and used in the preparation of the draft.[155] It was also decided to regulate capital companies, ie private limited companies and public limited companies in the Commercial Code. The main battles during the legislative procedure were held with the representatives of Estonian industry representatives who were opposing the new much stricter rules for conducting business as well as the higher minimum capital requirements.[156]

lation of Limitation Periods in Estonian Private Law: Historical Overview and Prospects', p. 69.

151 Explanatory letter of the draft Business Code, ENA, ERA.5119.2.715j, 198.

152 Interview with V. Kõve (Fn. 29); Mikk (Fn. 89), p. 120.

153 Formkaufmann is an enterpreneur within the meaning of German commercial law who is an enterpreneur solely by virtue of his legal form.

154 Interview with V. Kõve (Fn. 29).

155 Kõve, 'Äriseadustiku põhialused', p. 134.

156 Interview with V. Kõve (Fn. 29); Mikk (Fn. 89), p. 119; Vutt, 'Austatud lugeja!' p. 133. Later, however, the Estonian Chamber of Commerce and Industry realized that the regulation of the Estonian business en-

d. Law of Obligations Act

Preparation of the draft Law of Obligations Act started already after the adoption of the Property Law Act. At first, however, it was not centrally coordinated and was based on drafts regulating individual areas, which largely originated from working groups formed in 1993-1994 consisting of students and lecturers at the University of Tartu.[157] Initially, it was hoped that the new law would be based on the pre-World War II Estonian law of obligations. Villu Kõve recalls that when he was sent by the Ministry of Justice to study law at the University of Hamburg, he was given a draft of the 1940 Civil Code translated into German, which he showed to his supervisor, Hein Kötz, professor of comparative law at the University of Hamburg. However, his assessment of the draft Estonian Civil Code of 1940 was a devastating one: it was a very casuistic and outdated piece of legislation. In conclusion, he recommended not using the 1940 draft as a model and looking more at Swiss law or the Vienna Convention on the International Sale of Goods (CISG) as a starting point.[158] It thus became clear relatively early on that the pre-war draft was out of the question as a starting point for a modern, market-oriented law of obligations and that more modern solutions were needed.[159]

Speaking of the models of the general part of the Law of Obligations Act, the first ones to be mentioned are the Principles of International Commercial Contracts (PICC[160]), the text of which arrived in Estonia in 1994, and of course the Vienna Convention on the International Sale of Goods, which was already introduced to Villu Kõve by professor Kötz. Further inspiration was drawn from the Principles of European Contract Law (PECL[161])[162], published in 1995, and of course also from German, Swiss, Dutch, Quebec, Louisiana, and Russian law, as well as from the directives of the European Union containing consumer contract law rules.[163]

Peter Schlechtriem, professor at the University of Freiburg, who came to advise the working group of the Ministry of Justice through the German Foundation for International Legal Cooperation, and with whom the working group developed a close and extremely friendly relationship, played a noteworthy and, might even say, a central role in the development of the concept of the general part of the Estonian Law of Obligations Act.[164]

vironment and the functioning of the business register gave an important advantage to the Estonian economy.

157 Mikk (Fn. 89), pp. 122–123.

158 Interview with V. Kõve (Fn. 29).

159 Varul (Fn. 127), p. 114.

160 Principles are published in UNIDROIT webpage: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994.

161 Lando and Beale, Principles of European Contract Law, Part I: Performance, Non-Performance and Remedies.

162 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30).

163 Varul (Fn. 127), p. 114; Mikk (Fn. 89), p. 124; Sein, 'Estland – ein Versuchsfeld für das Europäische Privatrecht? Estnische Erfahrungen mit der Anwendung der Prinzipien des vereinheitlichten Europäischen Privatrechts', S. 13-14.

164 P. Schlechtriem has also published scientific article on the Estonian obligations law, see Schlechtriem,

Villu Kõve, the leader of the working group, considers it a very fortunate coincidence that professor Schlechtriem came to Estonia at the right time to advise through the German Foundation for International Legal Cooperation.[165]

The overall aim of the working group was to use the most modern models for the design of the law of obligations, while still systematically adhering to the Continental European approach. Unlike the drafting of the Property Law Act, where many decisions were taken simply by intuition due to a lack of time and knowledge, the drafting of the general part of the Law of Obligations Act was no longer done intuitively but was already based on a clear conceptual vision. For example, there was, from the outset, a fundamental understanding that termination of the contract should be extrajudicial, and that price reduction should be introduced as a general remedy and not only as a remedy specific to a sales contract.[166] It was also clear that compensation for non-pecuniary damage had to be regulated, and that the law of obligations had to include, for example, the regulation of standard terms, which in Germany at the time was regulated in a separate law.[167]

A couple of conflicts on legal policy also arose during the preparation of the Law of Obligations Act. One of the biggest disputes concerned the regulation of employment contracts. At the time of the preparation of the Law of Obligations Act, the Employment Contracts Act of the Republic of Estonia adopted in 1992 was in force, and although the need for its renewal was clear to everyone[168], there were heated debates about whether the Ministry of Justice or the Ministry of Social Affairs should draft the new regulation of employment contracts, and in which legal act the employment contract provisions should be located. To ensure that the future employment contract provisions were consistent with general civil law, the working group on the Law of Obligations Act wanted to keep the drafting of the employment contract provisions in its own hands, and initially, some of the draft articles of the Law of Obligations Act were reserved for employment contracts. At the same time, however, a working group of researchers at the University of Tartu, led by professor Inge-Maret Orgo, was commissioned by the Ministry of Social Affairs to draw up its own draft Labour Code, which found strong support, particularly from trade unions.[169] Thus, two competing drafts of the employment contract regulation came into being, and the debate, or even the fight, which at times became quite heated, took place while the draft Law of Obligations Act was already pending in Parliament.

The working group on the Law of Obligations Act, which came into conflict with trade union representatives partly due to youthful bravado, poor communication skills, and a lack of compromise, was unable to reach an agreement with stakeholders and ultimate-

'The New Law of Obligations in Estonia and the Developments Towards Unification and Harmonisation of Law in Europe', pp. 16-22.

165 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30).

166 In depth of the remedy of price reduction in the Estonian contract law, see Kalamees, Hinna alandamine õiguskaitsevahendite süsteemis.

167 Interview with V. Kõve (Fn. 29).

168 Orgo, 'Töölepingu seadus vajab muutmist ja täiendamist', p. 172.

169 Interview with P. Varul (Fn. 40).

ly the employment contract regulation was left out of the law of obligations.[170] However, the Labour Code drafted by the working group of the Ministry of Social Affairs was not adopted either, and so the Employment Contracts Act of the Republic of Estonia, which was adopted in 1992 and amended several times, continued to regulate employment contracts until 2009. Hence, it was not until 2008 that the first modern Employment Contracts Act was adopted in line with the general principles of civil law.[171] Villu Kõve, head of the working group on the Law of Obligations Act, has expressed the view that the Employment Contracts Act adopted in 2008 and still in force, is considerably more disadvantageous for employees than the draft law developed by the Ministry of Justice in 2000-2001 and which was planned to be integrated into the Law of Obligations Act. This is so, particularly regarding the regulation of the termination of employment contracts.[172]

Another issue that was at the centre of the political controversy was the regulation of tenancy agreements. Prior to the preparation of the Law of Obligations Act, the rules on residential tenancy contracts were contained in the Housing Act, thus outside the Civil Code, which otherwise regulated tenancy contracts. As in the case of employment contracts, the political disputes around tenancy agreements were partly related to the location of the provisions. Tenants' advocates believed that a separate law on residential tenancy would better protect tenants' interests: if there were simply a single chapter on tenancy in the law of obligations, the protection of tenants' interests in residential tenancies would be diluted.[173]

At the heart of the political debate were the issues related to the protection of the rights of tenants in so-called "forced tenants", i.e. tenants living in buildings returned to their rightful owners in the course of restitution of property.[174] In the end, the compromise left in place not only the Law of Obligations Act but also some provisions of the Housing Act protecting (forced) tenants.[175] Paradoxically, in the last decade, the tenancy regulation in the Law on Obligations has been accused of being too tenant-friendly and, largely under pressure from the landlords' representative body, the package of amendments to the tenancy law was adopted in 2020.[176] These amendments substantially relaxed the general principle of the mandatory protection of tenants in the Law on Obligations and made the regulation more favourable to landlords.

The Law of Obligations Act entered into force in July 2002, but in practice, it was already being applied by the courts before: certain new principles proved necessary in practice and were referred to in case law. In the same way, the rules contained in the draft Law of Obligations Act were already being taught in lectures at the Faculty of Law of the University of Tartu. Overall, the implementation of the Law of Obligations Act was relative-

170 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30).

171 Riigi Teataja [State Gazette] I, 2009, 5, 35.

172 Interview with V. Kõve (Fn. 29).

173 Interview with P. Varul (Fn. 40).

174 Ibid.

175 Ibid.

176 Riigi Teataja [State Gazette] I, 04.01.2021, 2.

ly smooth, given its complexity, and the twinning program with the German Foundation for International Legal Cooperation, in which German experts trained Estonian judges, also played an important role.[177]

e. The General Part of the Civil Code Act of 2002

As the General Part of the Civil Code Act, adopted in 1994, was completed in a hurry due to the time pressure and contained only a few fundamental changes compared to the previously valid Civil Code of the former Estonian Soviet Republic, the amendment of the General Part of the Civil Code Act was also undertaken in parallel with the preparation of the Law of Obligations Act.[178] However, it became clear from the very beginning that it would be sensible to prepare a completely new draft, rather than limiting oneself to amendments to the existing law.

The starting point for the draft was the general part of the German civil code, although the concept of legal persons in the 1994 General Part of the Civil Code Act, which was not inspired by German law, was largely retained. However, a provision on the principles of separation and abstraction were added to the beginning of the new General Part of the Civil Code Act, and thus the principle of abstraction, which had already been recognized in legal literature and case law, was finally given a legal basis.[179]

Rules on legal transactions law also got a fresh theoretical basis in the new General Part of the Civil Code Act. The regulation of the avoidance of transactions was not only inspired by German law, but also by a more modern solution of the Dutch Civil Code, the Principles of European Contract Law, and the UNIDROIT Principles of Commercial Contracts. Other regulations, in particular those of Switzerland and Austria, but also those of the State of Louisiana, were used as a blueprint.[180] The concept of judicial avoidance of a transaction was abandoned and avoidance became a *Gestaltungsrecht*, i.e. the other party to the transaction can avoid the transaction by making a declaration of intention to the other party.[181] The rules of limitation periods needed to be reviewed and updated as well, as they had not been systematically elaborated and based on new foundations when the General Part of the Civil Code Act of 1994 was drafted. On the other hand, there was no significant legal debate on the regulation of limitation, and the discussions were limited mainly to members of the working group.[182]

One of the central innovations in the 2002 General Part of the Civil Code Act was a conceptual change relating to natural persons, in particular to their active legal capacity.

177 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30). For more on the training of judges, see Kull, Ristikivi and Kelli, 'Transplants in Estonian legal education', pp. 195-200.

178 Interview with P. Varul (Fn. 40).

179 Kõve (Fn. 137), pp. 151–152. Villu Kõve, who was himself one of the drafters of the Property Law Act, admits that "even the members of the working group had no real idea of the existence or absence of the principle of abstraction in the law". Ibid., p. 148.

180 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30). See also Varul (Fn. 127), p. 111–112.

181 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30); also Mikk (Fn. 89), p. 125.

182 Käerdi (Fn. 150), p. 66.

Whereas both Soviet law and the 1994 General Part of the Civil Code Act were based on the principle that the limitation or withdrawal of a person's active legal capacity depends on a court decision, the new General Part of the Civil Code Act is based on the concept of factual active legal capacity, derived from the German law. The aim of this fundamental change was to protect persons who had difficulty controlling their actions and understanding their legal consequences[183]: whereas previously the legal consequences of their transactions were avoided only by a court decision, the new rules still in force today, were based solely on the person's factual mental state and capacity to understand at the time of the transaction.[184] To sum up, while the 1994 General Part of the Civil Code Act fundamentally reformed the concept of legal persons, the 2002 Act introduced a modern regulation of active legal capacity that respects the fundamental rights of persons and takes into account the interests of persons in need of protection in civil transactions.

The adoption of the new General Part of the Civil Code Act did not give rise to much political debate: it was very abstract, legally complex, and politically insensitive. The fact that the draft General Part of the Civil Code Act formed a package with the draft Law of Obligations Act, and that the political debate at the time focused primarily on the draft Law of Obligations Act's provisions on employment and tenancy contracts, as described above, certainly helped to reduce disputes on issues such as the doctrine of contracts or limitation.[185]

6. Conclusions

The legal reforms of 1992-2002 restored the democratic rule of law in Estonia. The fundamental decisions made during the decade decisively turned the newly re-independent country away from the previous Soviet legal system and integrated it again to the European legal space.

Video interviews conducted in 2020-2021 with 25 of the most central figures of the reforms to explore the period under review highlight key success factors. One of the main factors of the fast and effective legislative reforms was the successful selection of personnel and the support of the leading figures of the Ministry of Justice for young ambitious lawyers. The legal reforms were not carried out by officials with a Soviet-era education, but the law-making departments were dominated by young people who had just graduated from university and were open to changes: they were free from the dogmas of Soviet law and, in the second half of the 1990s, already with education from Western European universities and a remarkably high work ethic. Of course, they also had an extremely large opportunity for self-realization.

Characteristic of the era, officials were left with a great deal of discretion, and the number of political guidelines given to them was rather modest at the beginning of the deca-

183 Varul, Avi and Kivisild, 'Restrictions on Active Legal Capacity', p. 103.

184 Varul (Fn. 127), p. 112. In depth, see Varul et al, Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne, pp. 35-39.

185 Interview with V. Kõve, M. Käerdi and H. Mikk (Fn. 30).

de. Ministers usually did not prescribe on which principles the codes should be based on, and in many fundamental policy choices, the young drafters could decide upon themselves. By the end of the decade, the stormy reform period had already developed into a calmer direction, with 'normal' legislative process including interest groups and longer preparation times.

A central factor in the success of the reforms was certainly the close cooperation with the German Foundation for International Legal Cooperation (*Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit*), which offered Estonia a complete package: legal literature, expert opinions on drafts, consultations, study visits to German institutions, and training of legal officials. The high-level experts sent by the Foundation contributed significantly to the content of the drafts and helped the young ministry officials with their experience and extensive knowledge. This cooperation became especially important for the development of private law: the creation of private law acts necessary to start a normal market economy was one of the most burning issues and the most important political goals of the reform decade. The twinning training conducted in cooperation with the German Foundation for International Legal Cooperation helped to explain the new law to the Estonian legal professionals and eliminate their possible opposition.

In the preparation for the restoration of the rule of law, the choice of role models also became a central question. As a starting point for the construction of the Estonian legal system, the Continental European and Anglo-American legal systems were considered. The creation of a unique Estonian legal system, re-enforcement of legislation in force before the Soviet occupation as well as following the Scandinavian example were also discussed as alternative options. In the end, the understanding prevailed that the German legal system is historically more typical to Estonia as well as more easily accessible. In hindsight, the key persons of the reforms find that the choice made in favor of the German legal system has justified itself: Estonia could rely on a well-elaborated existing system and adapt it to local conditions, if necessary.

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