



Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

1994

Law Reform in Estonia: The Role of Georgetown University Law Center

J. Peter Byrne

Georgetown University Law Center, byrne@law.georgetown.edu


Philip G. Schrag

Georgetown University Law Center, schrag@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1573>

J. Peter Byrne & Philip G. Schrag, Law Reform in Estonia: The Role of Georgetown University Law Center, 25 Law & Pol'y Int'l Bus. 449 (1994)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [International Law Commons](#)

LAW REFORM IN ESTONIA: THE ROLE OF GEORGETOWN UNIVERSITY LAW CENTER

J. PETER BYRNE AND PHILIP G. SCHRAG*

On June 19, 1992, we and seven other members of the Georgetown University Law Center community landed in Tallinn, the capital of Estonia, to help the Estonian government draft laws to support a market economy. Our group consisted of six students, two professors, and an alumnus. The country to which we had come had declared its independence from the Soviet Union less than one year before. After fifty years of imposed communism, the Estonian leaders wanted to understand and adopt the basic foundations for a Western legal system that would support democratic and market institutions.

Faced with such a formidable, yet historic, challenge, these leaders had turned to Georgetown for assistance. This brief essay recounts why they made that request and the nature of the help Georgetown has given to the Estonian government. Happily, this story describes what remains very much a work in progress.

The afternoon that our group landed, all shops had closed for a long holiday weekend. During that weekend, the government replaced the ruble with Estonia's new currency, the kroon, which henceforth would be the only legal medium of exchange. For the next three days, we saw a country virtually without exchange, but we also observed the foundation for fiscal integrity in Estonia.¹ We viewed at first hand the economic ruins of communism and the seeds of an energetic capitalism.

But we saw much more. Markets function badly without law. We heard from bankers about banks that would not lend money because no laws assured a right to collect debts, and from a collective farm manager about real estate development frozen because no one knew who would be given rights in the land. We learned about investment plans repeatedly structured as joint ventures simply because that was the only form of financial participation extant under Estonian law. Quickly, our students found themselves working on laws with the sense that an entire nation was waiting for the product of their labors. Many ironies and doubts qualified this sense, but it gave a purpose and a profundity to our work that none of us will forget.

* Professors of Law, Georgetown University Law Center.

1. Over the next year, the kroon remained relatively stable, while the ruble depreciated as a result of spiralling inflation. Cutting the nation loose from Russian currency was something of a gamble, but it paid off handsomely for the Estonian government.

I. ORIGINS OF THE GEORGETOWN PROJECT ON LEGAL ASSISTANCE

The origins of what we called the Georgetown Project on Legal Assistance to the Republic of Estonia lie in the early 1991 visit to Estonia by Georgetown Law alumnus John Russell Deane III. At that time, Estonia was still a constituent republic of the Soviet Union. Travelling with a group of U.S. business managers, Deane met Juri Raidla, then the Minister of Justice, a reformer who was anticipating Estonia's eventual independence. Raidla found in Deane a generous disposition to be helpful and just the sort of familiarity with the legal bases for democracy and the market system that were wholly lacking in Estonia. A few months later, during a subsequent visit by Deane, Raidla asked Deane whether he would help organize legal assistance for Estonian law reform. Raidla suggested that U.S. law professors and students would be preferable to practicing lawyers who had, Raidla believed, rigid conceptions about how states emerging from Soviet control should organize their legal systems.

That summer, Estonia declared its independence during the failed coup in Moscow. Shortly thereafter, Dean Judith Areen responded enthusiastically to a proposal by Deane that faculty and students from Georgetown become legal advisors to the Estonian Ministry of Justice. She requested us to work with Deane, whom she appointed Adjunct Professor, to organize a project, including student participants, to provide assistance during the summer of 1992. Deane insisted from the beginning that this contemplated project was merely the first step in what he envisioned as a long-term relationship between Estonia and Georgetown.

Preparation for the summer involved several steps. First, the type and purpose of the assistance had to be made more definite. In February 1992, Deane and Schrag visited Tallinn to meet with Juri Raidla. The situation there was troubled. Economic and political crises had led to bread shortages, a severe heating fuel shortage, and the fall of the government. Raidla, Deane, and Schrag met in the frigid offices of the Ministry of Justice and worked out a summer plan. A group of Georgetown students and faculty would travel to Estonia to help prepare the legislation that Estonia needed most: basic commercial laws, such as contract law, that would lay the foundation for an emerging market economy. Raidla also agreed to come to Washington for three weeks just prior to the visit to make sure that preparatory research and analysis would be relevant to Estonia's needs.

The fall of the Estonian government had just cost Raidla his cabinet post, but his successor, Mart Rask, had previously been Raidla's deputy,

and Rask enthusiastically supported the project. He agreed that Estonia would feed and house the delegation while in Estonia. Although the government was in an economic crisis, Rask cheerfully assured Deane and Schrag that although the accommodations might be spartan, "no guest of the Minister of Justice has ever slept under the stars."

The second step in preparation was obtaining financial assistance from the U.S. government. Although officials at the United States Information Agency waxed enthusiastic about the Georgetown proposal and administered new programs designed to assist former communist countries embrace democracy, they had trouble fitting a commercial law assistance project for Estonia into existing designations. Eventually, travel expenses and stipends were provided by the new Commercial Law Development Program for Eastern Europe at the Department of Commerce. The process of obtaining government support was time-consuming and often frustrating, because Commerce not only had never made a grant, but it had not yet established any procedure for making such grants. Thanks to the effort of Linda A. Wells, the program's director, the grant eventually was made, but only at the very last minute: the airline tickets arrived only the day before the scheduled flight.

The third step was to recruit students to participate in the project. We were committed to the notion of full participation by the students in the legal work, both in Washington and in Estonia. Indeed, we discussed the possibility of organizing the project as a summer clinical program, before concluding that a simple volunteer structure would raise fewer complexities.

Sixty students applied and, after two days of interviews, we selected six outstanding people. Margaret Chisholm, Christine Stoneman, and Elizabeth Whitaker were second year students, and Eli Cohen was in his first year. Eli, indeed, was destined to go within a month from his first-year contracts exam into a group that was writing a contract law for a country that needed one. Yvette Boone was a Hungarian lawyer and LL.M. candidate, who brought to our group a knowledge of the civil law system and of Hungary's effort at reform. Sara Finley, another LL.M. candidate and a clinic fellow, had practiced law for a decade. Each recognized that the project might be cancelled if the U.S. government funding failed or if the Estonian government fell again. But for each of them, the project represented an opportunity for both public service and personal growth.

II. THE CHALLENGE

The project officially began on May 26, 1992, the day after Georgetown Law Center's commencement exercises. Juri Raidla joined Deane, the

two professors, and the six students in a law center conference room to watch a "Mission Impossible" videotape of Minister Rask providing our official instructions. Raidla briefed the group on current legal and political conditions in Estonia. We would be arriving at a most exciting and historic time; the country would hold a referendum on a new constitution and introduce its new currency during our stay.

Raidla also brought more specific directions for our work from the Minister: we were asked to write a descriptive overview of all the laws Estonia would need to establish and regulate a market economy, a document that would be used to educate politicians and officials. We also were asked to undertake comparative law research in contracts, antimonopoly (antitrust) and consumer protection law. We were to emphasize European models, because Estonia understood itself to stand firmly within the continental civil law tradition and because it already aspired to future membership in the European Union.

The Estonian legal tradition did not provide much helpful guidance for the contemporary shift to a market economy. Estonian law at that time consisted of the Code of the Estonian Soviet Socialist Republic and a few decrees of the current reform-minded government; the former was hopeless and the latter lacked systematic grounding. Estonians understandably looked back with pride to the only prior independent Estonian government, the Republic of 1919 to 1940. During that period, most Estonian private law was governed by the Russian Code of the Tsarist period (which of course was not in force in Soviet Russia). Estonians had prepared a draft civil code, the *Tsiviilseadustik*, but the Russian invasion of 1940 had prevented its adoption. It had never been translated into English. We had learned that there was substantial political sentiment for adopting the *Tsiviilseadustik* as current law, but that the Estonian lawyers who had studied that draft thought it obsolete and of doubtful quality. To accommodate these political sentiments, we and our Estonian counterparts always proclaimed that we took the draft as our starting point.²

For the next three-and-a-half weeks, the group worked strenuously and socialized happily in Washington, gradually becoming a mutually supportive team. We met almost every day to review the project and plan for future difficulties. Most of the time, however, we were divided into four subgroups, each charged with writing a briefing book for the Estonian government on one of the topics that it had identified. Each book clarified the major substantive issues within each area that Estonia would have to address and reported the answers to those questions that

2. Or, as we put it in our best Estonian, "*Alustame tsiviilseadustikuga.*"

representative Western countries had chosen. Appendices to these books included English translations or summaries of the relevant law of the several countries.³ During this time, Byrne also wrote hurried comments on a draft bankruptcy law; the rushed translation was faxed to him on Friday, and he was told that the Estonian parliament would vote on the measure on Monday.

We imagined that our time in Estonia would be spent largely conferring about our research with the Estonian lawyers who would draft new laws. Eli Cohen urged that we prepare a brief draft contract law as a starting point for discussion with the Estonians. We professors resisted this suggestion, partly due to the pressure of time and partly due to the fear of appearing presumptuous to the Estonians. Eli persisted, arguing that the Estonians might welcome such a starting point; if they did not, we could discard it. We finally agreed to prepare a draft in the three remaining days; events proved this one of the group's best decisions.

Preparing the draft was difficult, however. What was the appropriate model? The German Civil Code is certainly an intellectual monument; but its complexity and abstraction seem poorly suited both for the late twentieth century and for a country without a highly trained legal profession. The Swedish Contract Law is also old (1915) and so terse as to leave many basic issues unaddressed. The Hungarian Code provides a helpful update on German approaches. The United Nations Convention on the International Sale of Goods (CISG) offered the most accessible drafting style, but it does not address contract formation or contracts other than sales. Ultimately our working draft consisted of a short statute of ten articles that aspired to present consensual answers to the most basic issues of contract in a straightforward and practical style inspired by the CISG.

III. ESTONIA

Our two weeks in Estonia were unforgettable. Tallinn offers one of the most interesting and best preserved old cities in Europe, which we explored at every opportunity. We were housed at the Estonian Management Institute, a ten-story concrete block that typifies the Soviet-era high rises that spread beyond the older portions of the city. The food was wretched and hot water was sporadic, but the Estonians we met were welcoming and hard-working. In fact, we went right to work.

3. The appendix to the contracts book, for example, included summaries of how Germany, Hungary, Sweden, the United States, and the United Nations Convention on the International Sale of Goods had approached the basic issues of contract law.

The Minister of Justice promptly informed us he wished us to spend our time drafting, with Estonian officials, new laws on each of the subjects on which we had worked. Parliament was demanding rapid preparation of consumer protection and anti-monopoly laws, and although contracts law lacked similar political appeal, the Minister understood that it was even more important for economic reform. Within a few minutes, we were explaining to Mikhel Oviir, the head of the Ministry's economic law department, that contracts law in every market-oriented nation rested on the same foundational concepts. Eager to get down to brass tacks, Oviir asked if we had a draft with which we could begin work. The draft we had hesitated to prepare was instantly seized on by the Estonians and quickly translated so that collaboration on drafting could begin.

Soon we were meeting daily in three working groups, each working on a separate draft law. Each working group had a Georgetown professor and students and a delegation of Estonian lawyers, economists, and law students from Tartu University. The presence of the Estonian law students deserves special mention. Because lawyers trained under the Soviet system often lack the knowledge and skill necessary for legal work in a market economy, law students and recent graduates enjoy extraordinary prestige, especially those trained by Professor Paul Varul, the country's leading private law expert. The central presence of young Estonian lawyers and law students assured that the Georgetown students were taken seriously by all the Estonians as full members of the working groups. The meetings were held in conference rooms at the Estonian Management Institute and usually ran all day, with brief breaks for lunch or logistical business.⁴

The intensity of concentration and openness to collaboration in the working groups were extraordinary. The participants sought only to craft laws beneficial to Estonia; there was neither lobbying nor concern for special interests. Most of the work was conducted in English, although the consumer protection bill was drafted simultaneously in English and Estonian, and all of the drafts were prepared with attention to the problems of expression in Estonian, a language which was stretched to provide words for new concepts. The U.S. team tried to explain legal concepts that rested on widely shared assumptions about behavior in the market; the Estonians tried to explain their distinct legal and economic conditions, which qualified many Western assumptions. For example, the Estonians had a low opinion of their judges and sought

4. A 17-minute videotape documentary of our summer project, featuring Georgetown students and young Estonian lawyers and students drafting together, is available from the authors.

to draft laws with sufficient precision to leave them with little but ministerial application, while the U.S. contingent worried that such precision would dictate bad decisions in unforeseen cases. Also, the Estonians could not rely on established commercial practices to fill gaps, because commerce was just developing. Eli Cohen recalled an example of collaboration from the contracts group:

We initially wrote our draft with some very general default rules, which courts could use to interpret contracts. But the Estonian lawyers explained that Estonian courts need clear cut rules. So drawing on the Hungarian code, we began explaining possible default provisions in case a contract didn't specify the time and place of performance. The Estonians searched through the *Tsiviilseadustik* and the Soviet Civil code for comparable rules, but when they couldn't find anything analogous, they rejected our proposals. Then after we gave a few examples of how courts used default provisions, a wave of understanding passed through the room, and the Estonians wanted to draft default terms for every possible contract provision.

During evenings, weekends, and holidays, the Estonians introduced us to their social, political, and cultural life. We visited the Prime Minister, a collective farm, several business leaders, two mayors, and University of Tartu (its law school building is pictured on the two-kroon note). We celebrated the shortest night of the year with a midnight garden party. We saw the earnest faces of Estonian citizens waiting in lines to vote on their new constitution. In some ways, we also heard the echo of the departing Soviets. Former hard currency stores were still open, though without a clear function. Tallinn's huge flea market offered for sale the relics of communism, such as busts of Lenin, Red Army medals, and officers' caps (as well as counterfeit U.S. money). One evening we drove through a squalid district where the families of Russian army officers still lived.

Drafts of each law were completed before we left. The contracts draft remained short and pragmatic but had taken on more of the detail and logical thoroughness that the Estonians sought.⁵ The anti-monopoly law followed European Union law and gave extensive powers to the Estonian Price Office. The consumer protection draft drew on Scandinavian and

5. In deference to Estonian concerns, the draft contains definitions of "contract" and "reasonable," as well as a provision identifying when a contract is terminated.

U.S. models and banned the abusive practices that accompanied the emergence of capitalist enterprises. Minister Rask received the drafts with praise for the efforts and products of the drafting groups.

The subsequent careers of these drafts have been interesting. Portions of the anti-monopoly draft were promulgated as a decree shortly after we left; the entire law with minor changes was reported to have been passed by the fall of 1993. The consumer protection law likewise was reported to have been passed in late 1993. We have not seen English translations of either, yet. The contracts draft has been absorbed into a larger Estonian project, now underway, to draft complete civil and commercial codes. The passage of the constitution ironically delayed consideration of the draft laws. A new parliament was elected and consisted largely of first-time politicians (virtually none of whom are lawyers), who had very full agendas and little understanding of the issues addressed in the draft laws.

Before we departed, we laid plans for future cooperation between Georgetown and Estonia. Byrne agreed to prepare a draft law on the sale of goods. As part of the same project, we agreed that a young Estonian lawyer who had distinguished himself in work on the contracts draft, Raino Paron, would pursue an LL.M. at Georgetown and collaborate with Byrne on the Sales Act. Georgetown waived tuition for Mr. Paron, and the Department of Commerce made a grant for travel and living expenses so he could work on the Sales Act.⁶ At the same time, the Estonians expressed interest in a wide range of associations with Georgetown. The nature and future direction of this collaboration are discussed below.

IV. PHASE TWO: NEW PROJECTS

Subsequent organization of new work proved more complex than we had anticipated. The change in government in Estonia following the election of the first Parliament under the new constitution changed priorities and time frames. The new school year plunged faculty and students into other demands and activities in the fall of 1992. Nonetheless, important new work was begun.

In June 1993, Professors Gregg Bloche and Carlos Vázquez, along with Adjunct Professor Juan Méndez (now General Counsel of Human

6. Mr. Paron received his degree *cum laude* in 1993. Asko Pohla, former chief city attorney of Tallinn, is now studying at Georgetown under the Muskie Program of the United States Information Agency. We hope to have at least one talented young Estonian lawyer studying at Georgetown each year as a continuing part of the cooperative program.

Rights Watch) and student Lisa Landmeier, conducted a three-day seminar on international human rights law in Estonia. The seminar was organized under auspices of the Estonia Human Rights Institute, founded by President Lennart Meri. The Georgetown experts explained and analyzed international and European law concerning the rights of ethnic minorities, citizenship, the physical treatment of detainees, and freedom of expression. Estonia has struggled with the status of the nearly forty percent of its population who are of Russian extraction, many of whom came to the country under a conscious Soviet policy to undermine Estonian identity. Estonian restrictions on the ability of such persons, many of whom were born in the country, to vote and hold office have been controversial. Thus, the Georgetown group was dealing with sensitive issues, and, shortly after they departed, the President (essentially) vetoed legislation that would have gravely burdened non-citizens.

During the same summer, Professor Tom Krattenmaker, along with Keith Callow, former Chief Justice of the Washington State Supreme Court, conducted a week-long seminar on constitutional adjudication for members of the new Estonian National Court. This court is the equivalent of our Supreme Court in that it has final authority to interpret the constitution.⁷ Krattenmaker introduced the judges to fundamental issues of constitutional adjudication, such as jurisdiction, opinion writing, briefs, and oral argument, but he also stimulated them with the socratic methods of U.S. legal education. The great success of Professor Krattenmaker as a teacher and the personal rapport he developed with the Chairman of the National Court, Rait Maruste, has led to current steps to create, with Georgetown's help, a permanent Estonian judicial training center, a description of which is offered below.

The lengthiest project has been the drafting of a Sale of Goods Act by Byrne and Paron. Based on their experiences working on the draft contracts law, they quickly concluded that U.S. law, in this case Article Two of the Uniform Commercial Code, would not be a suitable model for an Estonian law. Article Two is too flexible and requires too active a role for the judiciary to be suitable for a country with a strong continental tradition. After deliberation, they decided that an Estonian sales law might best be based on the CISG.

This modern (1980) convention has successfully blended approaches from many legal traditions into a sales law that has won general acceptance from commercial lawyers around the world; its drafting style seems relatively direct and free from excessive jargon. Moreover, Esto-

7. The Estonians avoided the name "Supreme Court" for their new tribunal because that was the name of the chief appellate court in Soviet times.

nian lawyers will need to learn the CISG because of the large number of international sales transactions that such a small state must have, so it seems sensible to adopt a domestic law that comports with the CISG. Professor John Honnold of the University of Pennsylvania Law School, who had done important work on the CISG on behalf of both the United Nations and the United States and has written a leading treatise on the Convention, provided valuable encouragement toward using the CISG as a basis for a domestic law.

Having determined that the CISG offered a useful model, the drafters investigated which countries had adopted domestic laws based on it. To their delight, they learned that in recent years the Scandinavian countries had adopted substantially uniform sales laws based directly on CISG, although filled out with detail for domestic issues. This seemed providential, since Finland and Sweden are Estonia's largest trading partners. With written assistance from Leif Savon, who had worked on the Finnish law and was now a member of Finland's Supreme Court, the drafters began their study of Swedish and Finnish sales law in light of their knowledge of the CISG. We received valuable comments on the first draft of the Estonian law from Professors Barry Nicholas of Oxford University (who represented the United Kingdom in work on the CISG) and Richard Hyland of Rutgers Law School.

The draft that emerged followed the structure and most substantive provisions of the Finnish and Swedish laws, although it departed from them on some policy choices. In July 1993, the drafters sent their draft, in English and Estonian, to Professor Paul Varul, the head of the Estonian commission entrusted with preparing Civil and Commercial Codes. In October 1993, the drafters travelled to Estonia to discuss the draft with the Commercial Code working group on sales law, which warmly welcomed the approach of the draft law.

By October 1993, the Georgetown visitors to Estonia found a country rapidly evolving from the conditions of June 1992. The Estonian kroon had maintained parity with the German mark, helping to reduce inflation and create the fiscal conditions in which future growth could be anticipated. Ancient streetcars had been refurbished in the bright colors and garish logos of sponsoring businesses, such as Coca-Cola. Western goods greatly outnumbered Russian products in multiplying shops. Reorganized courts had opened and new law firms were sprouting. Legislation was flowing from the new parliament, and the Code Commission was hard at work.

Such changes also required a change in the form of assistance offered by Georgetown. Estonia no longer needed basic instruction or immediate drafts. Georgetown now has been asked to assist the training of

Estonian legal professionals in operating a western legal system. Many current lawyers graduated from Estonia's only law school, at Tartu University, while Soviet law and communist dogma held sway. Although Tartu now seeks rapidly to meet the needs of Estonia for training and study of new law, its resources are stretched. Moreover, there is no tradition of continuing legal education.

Georgetown now is working with several other groups to create an Estonian Judicial Training Institute, to be located primarily in Tartu.⁸ As mentioned above, this initiative emerged from the highly successful seminar offered to the new National Court by Professor Krattenmaker. The court has asked Georgetown to provide ongoing training to Estonian judges. With the indispensable leadership of John Russell Deane in organization and fundraising, Georgetown faculty are now preparing for the assignment.

Work will begin in the spring of 1994, as Estonian experts, many from Tartu University, give classes to the National Court on Estonia's new legislation. Georgetown is helping to create a new law library in the building that now houses the National Court. In the next two years, Georgetown law faculty will offer seminars for members of the National Court on legal principles underlying western law and on the judicial function. Our Estonian colleagues hope that these classes and seminars also can be expanded to include lower appellate and trial judges. The Ministry of Justice has asked that the program also be expanded to include retraining the country's lawyers. How far expansion can go will depend on the success of the instruction and the availability of resources.

V. SUMMARY

The close relations that have developed between Estonia and Georgetown can be seen in a recent visit of twelve leading Estonian legal officials to Georgetown in February 1994. The delegation included the Chairman and Vice-Chairman of the National Court, a former Minister of Justice, the Chancellor of the Ministry of Justice, and the head of the Civil Code Commission. Our discussions included classes on U.S. law and institutions, review of pending civil code drafts, and plans for the judicial training institute.

Both Georgetown and Estonia have reaped enormous benefits from

8. One of the organizations with which Georgetown is collaborating is the Center for International Management Education, the president of which is our Estonia Project colleague John Russell Deane III.

both the 1992 summer project and subsequent efforts. For the Estonians, the project has brought not only useful legal products, but an ongoing relationship with U.S. legal experts able to draw on the wide resources of the largest law school in the United States and a sympathetic constituency for funding within the U.S. government. Likewise, we at Georgetown are experiencing the thrill of participating in an historical movement toward human liberty and the reawakening of an occupied nation. This participation involves professionally challenging and absorbing tasks, stretching our knowledge and skills. For the larger Georgetown University Law Center community, the project has created—and continues to create—educational and service opportunities that flow from a unique partnership between an Eastern European country and a U.S. law school.