

# Why is a “Good Abortion Law” Not Enough? The Case of Estonia

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## Abstract

There are various ways to critically discuss abortion. Constructing or finding the most suitable analytical framework—whether rooted in legal formalism, socio-legal considerations, or comparativism—always depends on the country of subject and whether the analysis is for litigation, advocacy, or more theoretical purposes. This paper offers a model for analyzing abortion in Estonia in order to connect it as a thought-provoking case study to the ongoing transnational abortion discussions. I set out by describing the Estonian Abortion Act as a “good abortion law”: a regulation that guarantees in practice women’s legal access to safe abortion. Despite this functioning law, I carve a space for criticism by expanding the conversation to the broader power relations and gender dynamics present in Estonian society. Accordingly, I explain the state of the Estonian feminist movement and gender research, the local legal community’s minimal engagement with the reproductive rights discourse, and the lingering Soviet-era narratives of reproduction and health, which were not fully extinguished by the combination of human rights commitments and neoliberalism upon restoration of independence in the early 1990s. I consequently show that Estonia’s liberal abortion regulation is not grounded in a sufficiently deep understanding of human rights-based approaches to reproductive health, therefore leaving the door open for micro-aggressions toward women and for conservative political winds to gain ground.

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## Introducing the case study: Estonia and its “good abortion law”

Estonia is a parliamentary democracy in the Baltic region of Northern Europe, with a population of 1.3 million. There is no state church, only 30% of the population describes itself as religious (Lutheran, Catholic, Orthodox, Muslim, Buddhist, Pagan, or other), and religion does not play an essential role in Estonian society. Having restored independence in 1991 after the nearly 50-year-long Soviet Union occupation, Estonia became a member of the European Union and the North Atlantic Treaty Organization in 2004. Estonia has signed every important regional and international human rights treaty, and its Constitution, adopted in 1992 through a referendum, upholds the rule of law, democracy, and equality.<sup>1</sup>

Abortion in Estonia is regulated by the Termination of Pregnancy and Sterilization Act (hereafter the Abortion Act), which came into force in 1998 in the context of the country’s transition to parliamentary democracy.<sup>2</sup> The Abortion Act has been amended a few times over the years, and the regulation currently in force combines the two most common approaches to abortion regulation: the indications model and the term model. Namely, it stipulates that abortion is available on request before 12 weeks of pregnancy. If the pregnancy has lasted for more than 12 but fewer than 22 weeks, it can be terminated if there is a danger to the woman’s health, if the child may suffer a severe health damage, if there is a danger of an illness or health problem which would hinder the woman from raising the child, or if the woman is younger than 15 or older than 45 years. Abortion is subsidized by the state, and women do not need a referral from a general practitioner.

The preparatory works of the Abortion Act’s draft bill from 1998 cited the Patient’s Rights Declaration of the World Health Organization (1994), the European Convention on Human Rights and Biomedicine (1997), and practice and laws in Sweden and Finland.<sup>3</sup> These references speak of an ideological choice—Estonia considered the standards of the United Nations, the European Union, and Scandinavian countries as models. This

was not surprising since after the restoration of independence, the new democratically elected parliament and the government were fully committed to reconnecting Estonia with the West.

Furthermore, when the then minister of social affairs presented the draft bill, she emphasized that the Abortion Act was meant not to influence the declining birth rate but to respect “free choices of the woman” and aim for “safety and protection.”<sup>4</sup> The transcripts of the parliamentary hearings from 1998 do, however, reveal some hesitation about the law. For example, one member of parliament (MP) referred to “other countries” and asked the minister whether abortion is “a violent act of taking a life” and whether the term-based model is somewhat arbitrary. Another MP raised the issue of requiring a husband’s (or partner’s) consent. Nevertheless, both of these questions were phrased as inquiries of general interest rather than expressions of strong opposition to abortion. One MP also noted supportively how “Estonia is not a Catholic country, so women have the right to give birth, or have an abortion if necessary.”

Overall, it can be said that opposition to a liberal abortion law was not strong. The conservative voice against abortion emerged more vigorously and strategically only in the 2000s, as I show later below. When I asked the then minister of social affairs Tiiu Aro about this phenomenon, she explained that in the mid-1990s medical expertise regarding abortion was well respected by politicians. Thus, the health and safety argument supported by the medical community kept potential moral and political opposition at bay.

In addition, as noted above, Estonia was not—and continues to not be—a religious society with a strong church presence; thus, in the mid-1990s, typical religious arguments were not raised. Furthermore, Tiiu Aro noted that she and some colleagues had just attended the International Conference on Population and Development in Cairo in September 1994 and were aware of the reproductive rights language, which also inspired the founding of the Estonian Family Planning Society (now the Estonian Sexual Health Society) in November 1994.<sup>5</sup> The high-quality work of the Estonian Sexual

Health Society—which brings together not only gynecologists, obstetricians, and midwives but also people from other disciplines—has proved an essential force in supporting reproductive rights in Estonia in the 2000s.

In short, timely and legal access to abortion is guaranteed to women in Estonia in both law and practice. Such a conclusion, backed with supporting empirical data, would not necessarily spark further examination. However, with this paper I carve a space for a more insightful discussion in which I argue that it is possible to find subtle but persistent harmful narratives about women's bodies and sexuality, even in a country with a perfectly commendable human rights track record and liberal access to reproductive health services.

### The “white-cube syndrome” of abortion analysis

In 1976, Irish art critic Brian O'Doherty published an essay collection in which he deconstructed the impact of a white-walled gallery space. O'Doherty explained how although the white-cube space serves as a seemingly neutral context in which art is presented, it actually creates an illusionary world where some of the everyday context is left out, thus constructing a reality for us in one specific way.<sup>6</sup> O'Doherty's essays commented on the crisis of post-war art and had no link to the second-wave feminist agenda concerning women's sexuality and reproductive rights. Still, I borrow from O'Doherty and explain briefly how the contemporary legal analysis of abortion and women's reproductive rights in general in Europe suffer from what I term “white-cube syndrome.”

White-cube syndrome may reveal itself on two levels. First, it can create a general research bias, which means that the majority of human rights scholarship on reproduction is often tilted toward studying the extremes: countries that criminalize or prohibit abortion entirely, that have high maternal mortality rates, or that show a continuing unwillingness to fight against systematic forced sterilizations and female genital mutilation. I believe that this considerable blindness to the much

more nuanced spectrum of reproductive rights issues is also tied to the harmful dichotomies of developed/developing and Western/other. Such depictions may result in a misleading image of a homogenic, progressive, and emancipatory Europe that hinders discussion about abortion beyond the “usual suspects” of Poland and Ireland. This is especially problematic for Estonia, which is left out from critical conversations since women in Estonia can access abortion legally and effectively.

Second, in addition to the “suspect bias,” white-cube syndrome means that the contemporary legal analysis of abortion is often funneled into specific inquiries (for example, the design of abortion laws, women's access to abortion in practice, or how different landmark abortion decisions have traveled between jurisdictions) and does not look at the much larger discussions on reproduction and power.<sup>7</sup> This second layer of white-cube syndrome is troublesome for Estonia as a country with a “good abortion law” that is well implemented in practice and to which many of the existing conversations from the Global North are not relevant or helpful due to its different history.

Thus, with this paper I draw attention to the need to find a cure for white-cube syndrome and, in the case of Estonia, to use a nuanced analytical frame that explicitly deconstructs abortion into broader questions about power, control, and gender narratives. With this approach, a regulation usually accepted as a “good abortion law” might actually be insufficient for meaningful and steadfast reproductive rights protection.

The following sections explain this alternative analytical frame and show the concerns that emerge when the frame is applied to Estonia.

### Alternative space for analysis: A reproductive rights-based approach

What is the alternative analytical frame that can push the Estonian abortion discussion out of its safe, white-walled gallery? When making general observations about the evolution of abortion laws, Rebecca J. Cook and Bernard M. Dickens propose distinguishing three phases: first, when abortion

is regulated within criminal law; second, when it passes through decriminalization and becomes a public health issue; and lastly, in the phase that is most desirable for human rights scholars and abortion rights advocates, when abortion is framed within constitutional law or as a human rights matter.<sup>8</sup> Indeed, there are many examples of domestic constitutional bodies or transnational human rights forums tackling abortion.<sup>9</sup> The specific legal framings and analyses suggested in these cases are somewhat different from one another, and there exists a considerable amount of varied legal scholarship on them.<sup>10</sup> I, together with Alicia Ely Yamin, have been focusing on the lack of a reproductive rights-based analysis.<sup>11</sup>

A reproductive rights-based approach is inspired by Yamin's work on understanding health within the human rights framework—an approach proposing that health concerns can, and indeed should, be explained by looking at broader societal power relations and (gender) stereotypes.<sup>12</sup> Thus, one cure for white-cube syndrome is the reproductive rights-based approach, which deconstructs abortion into broader questions about gender and power. Accordingly, I argue that in the case of Estonia, a critical legal analysis of abortion ought to be interested in the narratives in which the current abortion regulation is rooted and should thus ask whether there is a meaningful commitment to women's reproductive rights and gender equality that protects women from shaming, micro-aggressions, and harmful stereotypes.

### Applying a reproductive rights-based approach: Tracing the power and gender narratives

#### *The Estonian feminist movement*

As argued above, a reproductive rights-based approach to abortion requires an understanding of underlying gender and power narratives. This means that Estonia's abortion conversation needs to reflect on the general state of the feminist movement and on public and private engagement with gender research.

Helen Biin and Anneli Albi argue that “the

history of women's suffrage in Estonia is inseparable from the history of the Estonian national movement and the fight for the country's independence in general” and therefore that “the story of the women's suffrage movement began, and can only be told together with the story of the nationalist movement.”<sup>13</sup> Accordingly, the beginning of the women's movement in Estonia dates back to the last two decades of the nineteenth century, when the first voluntary women's groups were founded.<sup>14</sup> Initially, these groups were concerned primarily with issues of nationality, but deeper discussion of women's rights and suffrage also soon surfaced as the nationalist movement peaked during the Russian Revolutions of 1905 and 1917.<sup>15</sup> For example, in 1917, these women organized the First Women's Congress, where, for the first time, Estonian women's social status and civil rights were openly discussed in front of a large audience.<sup>16</sup> Delegates of the congress established the Union of Estonian Women's Organizations, which set the aim of “improving women's legal, economic, educational, and health status.”<sup>17</sup>

However, due to a rapidly changing political situation, this newly established union could not properly pursue its goals: after the collapse of the Russian Empire in 1917, Estonia proclaimed its independence in February 1918, only to succumb to German occupation a day later. When the German occupation ended in November 1918, the Soviet Russian army invaded and the two-year Estonian War of Independence broke out. In the context of the history of the women's movement, women were granted political rights on equal terms with men through the Declaration of Independence that established the Republic of Estonia in 1918; these rights were further consolidated through the first Estonian Constitution, which came into force in 1920, after Estonia won the War of Independence.<sup>18</sup> However, women's actual participation in politics remained low during the short period of independence and peace between 1920 and 1939. Once World War II began, Estonia was occupied by Nazi Germany and then by the Soviet Union until 1991.

During the nearly 50-year-long Soviet occupation, there was neither rule of law nor a meaningful

feminist movement. Indeed, though the state organized a number of women's congresses and the laws stipulated a *de iure* equality of women and men, all initiatives or policies were controlled by the communist regime. Namely, as Biin and Albi explain, the socialist discourse tried to "create gender-neutral citizenship and to homogenize the male and female workforce, putting in place legislation on equal rights and a quota system to ensure a certain percentage of women in all positions."<sup>19</sup> This endeavor had nothing to do with women's human rights or treating people as equal. It was just a façade that subsequently managed to make people resentful of top-down gender policies during the post-communist years—a phenomenon that has been termed an "allergy to feminism."<sup>20</sup>

This allergy and distrust for feminism is strong in contemporary Estonia, where despite the formal commitment to equality and human rights, there is not enough state-level engagement with the country's huge gender-based pay gap, struggles with domestic violence, and gender imbalances in the legislative and executive branches.<sup>21</sup> Evelin Tamm has criticized how "local history recording is male dominated," which has forced research on and acknowledgment of the local feminist and women's movements to the periphery. Tamm has noted that such constant dismissal and disregard of women's achievements and contributions has "undermined and deleted most of local feminist history which could help to empower the current generation to claim their space."<sup>22</sup> In practice, this means that the contemporary Estonian feminist movement is fairly fragmented and often ridiculed by politicians, the mainstream media, and the public, and there are no strong nongovernmental organizations specifically focused on women's rights.

### *Reproduction and abortion in the Soviet Union*

I demonstrated above that the Estonian Abortion Act of 1998 was introduced and adopted as a law to protect women's reproductive autonomy. However, applying a reproductive rights-based approach forces us to open up a space for a conversation about the power dynamics between individuals and the state in the context of health and reproduction.

In the case of Estonia, this means going beyond the *travaux préparatoires* of 1998 and investigating how health and reproduction were framed during the very long Soviet occupation. In other words, in which narratives is Estonia's "good abortion law" rooted?

The Abortion Act of 1998 did not create an entirely new situation for women seeking abortion services but rather confirmed democratically the reality of what had been happening during Estonia's occupation, as abortion had been legal during the Soviet occupation. In November 1920, the Soviet Union became the first country in the world to legalize abortion "upon the woman's request" during the first trimester of pregnancy.<sup>23</sup> Abortion was prohibited in 1936 (except in cases of danger to the woman's life, a serious threat to her health, or the existence of a genetic disease), but the Soviet Union's legislative body repealed this prohibition in 1955, establishing that abortions could be performed freely during the first 12 weeks of pregnancy and, after that point, in situations when pregnancy or birth would harm the woman.<sup>24</sup>

It is important to note, however, that the Soviet Union's permissive abortion regulation was not rooted in respect for women's individual life plans and commitment to their reproductive rights. Instead, it was motivated by the state's wish to exercise control over women's health in order to guarantee the quality of the workforce. Barbara Havelkova has explained this situation, arguing that the state's incentive to legalize abortion was not respect for women's reproductive autonomy but rather public health in the social planning context. Thus, abortion was allowed "in order to further care for healthy development of the family, endangered by damage caused to health and life of women by interruptions done by unconscientious persons outside of health establishments."<sup>25</sup>

The general approach to health and medicine in the Soviet Union has been described as "social medicine" which "emphasizes public health and hygiene, prevention and control of communicable diseases, and universal health services."<sup>26</sup> Such an understanding was neither a communist invention nor unique to the Soviet Union—the idea that "the



health or sickness of individuals can represent a threat to the whole country” can be traced back to the writings of ancient Greek philosophers and gained momentum throughout Europe in the late nineteenth and early twentieth centuries.<sup>27</sup>

Viewing all individuals in society as a single body is problematic, however, because such an approach reduces people to “a passive aggregate” and consequently justifies “normative assessments of people’s work habits, sexual behavior, and personal hygiene.”<sup>28</sup> This normative assessment and control of all aspects of people’s lives was also fundamental in the Soviet Union. Particularly, Libor Stloukal has described how in socialist regimes, “social policy was always seen as an important instrument for social planning and control.”<sup>29</sup> Stloukal explains that while everyone was indeed entitled to certain rights (for example, to work and to health care), these “rights” were not rooted in the notions of individual autonomy or human dignity, as the task of social policy was to “regulate the ways in which these rights were implemented while retaining a productive and loyal workforce.”<sup>30</sup> For example, in order to ensure an expanding labor reserve, some governments were convinced that “family planning was not a human or legal right, but rather a part of socioeconomic planning for which all individuals shared responsibility.”<sup>31</sup>

Framing health through the lens of socioeconomic planning therefore naturally affected women’s reproductive rights in the Soviet Union and thus also in occupied Estonia. Susan Gal and Gail Kligman have explained how women’s reproductive bodies were seen by the totalitarian state regime as tools for population growth:

*Thus, women are blamed for demographic decline, and for being too “selfish” to have children ... The control of women thus becomes a logical project of nationalism. A classic means of such control is the regulation of women’s reproductive capacity, whether by forcing unwanted births or restricting wanted ones.*<sup>32</sup>

This state control was expressed by allowing abortion but prohibiting contraception. Estonian gynecologist and scholar Kai Haldre has explained

how since there was no universal sex education in schools, and since contraception was not available behind the Iron Curtain, abortion was the *one available legal method* for family planning.<sup>33</sup> This phenomenon has been termed the “abortion culture.”<sup>34</sup> Additionally, women’s reproductive abilities were monitored via employment guidelines (which kept women away from jobs requiring heavy lifting) and by regular medical consultations at schools and mandatory gynecological examinations for adult women.<sup>35</sup>

All in all, this shows that a permissive abortion regulation does not equal a reproductive rights-based approach to reproductive health. For Estonia, this meant that after the restoration of independence in 1991, the number of abortions remained high and both the reproductive health care system and the state’s fundamental understanding of health were in need of transformation.

#### *Reproductive health in Estonia after the end of the Soviet occupation*

The Abortion Act in 1998 was just one part of the desired transformation. Additionally, with the lobbying and advocacy efforts of Estonian gynecologists and other relevant legislation, the changes were much broader, as explained by Made Laanpere et al.:

*During the last 20 years Estonia has embarked on a radical transformation of its social and health care system, including education and sexual health services. Sexuality education has been a mandatory part of the Estonian school curriculum since 1996 ... More than 90% of citizens are covered by social health insurance. Affordable contraceptive methods are available: hormonal contraceptive methods are subsidized by Estonian Health Insurance Fund, which covers 50%; copper IUDs have reimbursement of 100% during one year after delivery. Emergency contraception has been available over-the-counter since 2000.*<sup>36</sup>

These developments are also in sync with the steadily declining abortion rates during 1992–2015: while in 1992 the number of induced abortions per 1,000 women of childbearing age was 69.9, it dropped to 16.9 in 2015.<sup>37</sup> Furthermore, a 2014 study on Esto-

nian women's health indicated that most women were satisfied with reproductive health services and that better health literacy and a higher quality of health care had made sexual behavior safer, increased the usage of effective contraception, and decreased the age difference between partners at first sexual intercourse.<sup>38</sup>

Making such progress within 25 years is impressive, but again I would argue that white-cube syndrome covers the remaining problems with deeper socio-legal narratives about reproductive health. Accordingly, applying a reproductive rights-based approach forces us to look beyond the described success and explore whether these indicators are supported by new narratives about women's bodies, reproduction, and health that reject the Soviet Union's population control and instrumentalist approaches to women. Is the mandatory sex education at schools, increased access to effective contraception, and guaranteed access to abortion reflecting a firm societal and political understanding of women's power over their bodies?

Unfortunately, the answer is no. Although a 2014 research article on abortion trends in Estonia claims that "[t]he issue of abortion is perceived, in Estonian society, as a sexual and reproductive right of women," I would have to disagree with such a statement.<sup>39</sup> As emphasized in this paper, women can indeed effectively access abortion and contraception, but this access has neither eliminated the frequent micro-aggressions toward women exercising their reproductive rights nor banished the stereotypical ideals about women's "societal reproductive duties." For example, in 2007, the then minister of population planned an awareness-raising campaign to reduce the number of abortions, which, according to her, would help reverse the country's declining birth rate. The minister explained, "I want the pregnant woman to be very seriously aware and consider that there is actually a human being inside of her belly."<sup>40</sup> And in 2014, there was a high-level conference entitled "Why Don't Estonian Women Give Birth?," organized by the publicly funded foundation Valuing Life. Furthermore, an MP from the Conservative People's Party expressed during an interview to a

mainstream newspaper that a 27-year-old woman without children is "a harmful element for society and part of the birth rate problem."<sup>41</sup> Another MP argued during a parliamentary hearing how "irresponsible women who have children with men who then do not pay maintenance should be sterilized."<sup>42</sup>

These state-level micro-aggressions are just a few examples, but they demonstrate a persistent disconnect between available health care services and the deeper sociopolitical understandings around why reproductive health matters. While these examples pale in comparison to the communist state rhetoric, such naming and shaming of women, their sexuality, and their reproductive health needs is neither something that women should have to accept nor in line with the concept of reproductive rights. Therefore, despite the "radical transformation" in reproductive health services over the past 25 years, harmful narratives about the need to monitor women's reproducing bodies persist.

#### *Estonian legal scholarship and human rights approaches to abortion*

A reproductive rights-based approach also encourages a more traditional inquiry into abortion and legal culture. The creation of new, transformative reproductive health narratives and sociopolitical progress is hindered both by the general lack of state-level support for feminism and gender research and by the Estonian legal community's limited understanding of how gender and human rights intersect in reproductive health.

The Estonian chancellor of justice, who exercises constitutional review and ombudsperson functions, has analyzed the issue of abortion three times.

First, in 2002, the Estonian Council of Churches inquired whether the Abortion Act was constitutional.<sup>43</sup> The chancellor's opinion issued in response centered on the proportionality of the abortion regulation and placed a heavy emphasis on the counseling requirement, explaining that such a system was chosen over a punitive penal system in the hope of encouraging women to make the "right and responsible choice." The opinion referred to

women's right to life and bodily autonomy and to the harmful consequences of criminalizing abortion, and it concluded that a balance between different interests had been struck with the Abortion Act.

However, despite its generally commendable approach, the opinion was sprinkled with statements that revealed a limited understanding of reproductive rights. For example, it stated that "abortion is a risky and complicated operation which can have dangerous complications, and no reasonable person would choose the most dangerous choice out of all the choices"; that abortion is a question of "society's moral judgment"; and that "counseling should entail information about not only the medical but also the ethical meaning of abortion since termination of pregnancy also means destroying developing life and thus needs a high ethical awareness." Consequently, although the chancellor pushed back on the unconstitutionality concern, the overall analysis rang as somewhat apologetic and did not emphasize a human rights perspective, instead treating abortion as a social-moral issue.

Six years later, in 2008, the Young Conservatives, the Institute of Culture of Life (a conservative think-tank that runs an anti-abortion website), and the Society of Parents in Estonia asked the chancellor to review the constitutionality of funding abortion through universal health care and to determine whether this violated the right to life.<sup>44</sup> The chancellor concluded that such funding was not unconstitutional. This opinion was different from the 2002 opinion because it entailed more emphasis on women's right to self-realization as guaranteed by the Constitution; however, the lack of references to reproductive rights and gender-based power dynamics remained. The chancellor affirmed the idea that the right to life of the fetus was under the protection of the Constitution but noted that there was a "moral conflict" between that protection and a woman's right to self-realization—and in this situation, a woman must not be forced to give birth. The opinion noted that it was important to cover abortion with universal health care to avoid situations where access to abortion services becomes dependent on one's economic status.

Finally, in 2014, the chancellor recommended that Parliament amend the Abortion Act so that women under 18 years would not need parental consent for an abortion.<sup>45</sup> The need for this consent was added to the act in 2009 through malign legislative practices, without the involvement of important stakeholders.

The chancellor, referring to paragraphs 19 (right to free self-realization), 26 (right to private and family life), and 28 (right to health) of the Constitution, deemed the restriction unconstitutional. Additionally, since the provision specifically concerned minors, the chancellor explained how a minor was also a holder of fundamental (that is, constitutional) rights and that if she was receiving a health care service with her consent, patient-doctor confidentiality protected her privacy, including from her legal guardian. Thus, the chancellor concluded that a minor could not be "stripped from her right to decide over issues concerning health and bodily autonomy just because she is under 18 years old."

The transcripts of the parliamentary hearings covering the chancellor's proposal show a contrast with the ones from 1998 described above. For example, one MP commented, "We have prohibited a minor from buying a pack of cigars and a bottle of cider, how come we see an infringement of rights when she cannot make the abortion decision herself?"<sup>46</sup> He continued this line of argument during the following session over a month later:

*You need to understand that not having an abortion is never a tragedy, because the outcome of that is the birth of a little child—the birth of a little tender child! ... We were all once these tiny humans, whose right to life today's decision seriously impacts. Thank god we were allowed to be born!*<sup>47</sup>

Nevertheless, Parliament agreed with the proposal and changed the law in January 2015.

There are no landmark Supreme Court cases dealing with abortion, but the Civil Chamber of the Supreme Court handed down a decision in 2011 in which it reviewed a district court's resolution to not force a woman with restricted active legal capacity to terminate her pregnancy against her will, as requested by her legal guardian.<sup>48</sup> Because the case



dealt with a delicate personal matter, public access to the case's full factual circumstances is restricted and only extracts of the analysis and the resolution are available. Also, as explained above, the abortion regulation regarding minors and adults with restricted active legal capacity has changed since 2011. Nonetheless, the parts of the judgment that are publicly available serve as a snapshot of how the highest court in Estonia approached abortion just six years ago.

The Supreme Court's decision focused on understanding abortion and restricted active legal capacity within civil law and the law of obligations. The three judges behind the decision referred to termination of pregnancy as a "health care service" regulated by the Abortion Act and treated abortion conceptually as a legal transaction. Therefore, the court was concerned mainly with whether the district court had correctly evaluated the limits of the woman's active legal capacity. The Supreme Court argued that for this, the district court did not need the medical opinions of doctors but instead needed only to establish whether the woman understood the meaning of becoming a parent and forming a family. There are no explicit references to human rights in the decision (at least in the available excerpts), and although the judgment refers to the Constitution's paragraph 20 (right to liberty and security of person), it links the right to civil proceedings. The court argued that, hypothetically, it could allow an abortion against a person's will but that the law "does not provide how this health service could be applied mandatorily," and even if the Code of Enforcement Procedure (which provides for the rights and obligations of debtors, claimants, and bailiffs and the procedure for the execution of enforcement instruments) did apply, mandatory abortion could not be possible as part of "enforcement procedure."<sup>49</sup> The Supreme Court concluded that although the district court's analysis had shortcomings, the final resolution (that is, not forcing the woman to terminate the pregnancy) stood.

To conclude, the chancellor's three opinions from 2002–2014 and the Supreme Court's case show a persistently limited understanding of abortion as a human rights issue in Estonia. There are

references neither to reproductive rights nor to the obvious gender dimensions of abortion. This gap is in line with Estonian legal education, which is defined by masculine norms; indeed, no law school offers a specialized course on gender and law or on women's rights. Raili Põldsaar Marling has analyzed feminism and gender studies in Estonia, concluding that "gender studies in Estonia are shaped by the unspoken presence of the forty-year Soviet annexation that removed Estonian society from the international exchange of ideas during the time when gender became, first, a political issue and, second, an object of academic study."<sup>50</sup> She continues, "According to Soviet ideology, gender was irrelevant in the Soviet Union as the equality of men and women had supposedly been achieved."<sup>51</sup>

As a result, Põldsaar Marling argues, "in the 1990s, Estonia sought to turn its back on all that was assumed to be Soviet, including the Soviet ideology of gender equality," which is why it became very difficult to establish a strong, institutionally supported community of scholars doing gender research.<sup>52</sup> She lists a number of scholars who, despite the backlash, have engaged with gender studies and provided excellent scholarship; but importantly, there are no legal scholars on this list.<sup>53</sup>

### *Human rights-based approaches and neoliberalism*

Through different examples, I have demonstrated how focusing on power and gender narratives reveals a considerable lack of wider political and legal understandings in Estonia that acknowledge abortion services as an issue of human rights. In this last part, I draw attention to an additional dimension.

Although communist narratives on disciplining women's bodies continue to have a considerable impact in 2017, I would argue that the problem is not that too little time has passed since the restoration of independence. Rather, in addition to the "allergy of feminism" and the lack of understanding of women's rights within the legal community, in the 1990s the newly elected government substituted the Soviet Union's communism with neoliberalism that entailed commitments to human rights treaties but that also praised free markets and free

individuals operating in the marketplace. However, this substitution did not create new human rights-based health narratives that could have provided a solid foundation for broader reproductive rights protection beyond the progressive and informed medical community.

The new human rights agenda, coupled with neoliberalism, focused on a particular set of rights. As Audrey Chapman has explained, neoliberalism does not deny the existence of rights per se: neoliberal thinkers are, for example, particularly supportive of a set of political and civil rights—such as the right to property—that they perceive as “negative” rights which do not entail positive actions by the state.<sup>54</sup> Social and economic rights, on the other hand, are not perceived as legitimate human rights or genuine entitlements, since the market-based approach promoted by neoliberalism sees the state’s role as minimal: “neoliberal policies also envision health to be an economic commodity rather than the social good conceptualized by human rights law.”<sup>55</sup> The desire to minimize interference by the new democratic government was indeed a natural reaction to the communist regime that had regulated every aspect of a person’s life. However, neglecting the human rights dimension of health also meant that the creation of new reproductive and health narratives remained the sole responsibility of the active and progressive community of Estonian gynecologists.

## Conclusion

If there were a section called “World’s Abortion Laws” in the same white-cube gallery that sparked O’Doherty’s post-war critique in the 1970s, then the exhibit of Estonia would be comfortably labeled “Good Abortion Law,” since it guarantees women timely and safe access to abortion. However, just as O’Doherty called out the white-walled galleries for constructing a distorted version of reality for the viewer, I have explained here that there is much more to the case of Estonia. Namely, I have adopted a reproductive rights-based approach, which explicitly moves beyond a single-issue approach, and have deconstructed abortion into broader re-

fections on power and gender dynamics in Estonia.

With the help of this more nuanced analytical model, I have traced gender and power narratives in Estonia, reconsidering the post-Soviet commitment to human rights, lingering post-communist attitudes, and the new conservative powers. I have demonstrated how despite the “good abortion law” adopted in 1998, as well as a progressive community of obstetrician-gynecologists spearheading many transformations, the other important pillars supporting a steadfast reproductive rights protection remain missing. In particular, the local feminist movement is fragmented and often publicly ridiculed, gender research is neither understood nor prioritized by the state, the reproductive rights discourse is completely overlooked by the legal community, and the Soviet-era narratives defining women through their reproductive bodies is still present, thus providing new material for contemporary micro-aggressions against women.

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4. *Raseduse katkestamise ja steriliseerimise seaduse eelnõu (900 SE) teine lugemine ja teise lugemise jätkamine* (1998) (Termination of Pregnancy and Sterilization Act (900 SE) the second reading and continuation of the second reading).
5. Correspondence with Tiiu Aro (on file with the author).
6. B. O’Doherty, *Inside the white cube: The ideology of the gallery space* (Berkeley: University of California Press, 1976).
7. Consider the vast literature on abortion (R. Rebouche, “Comparative pragmatism,” *Maryland Law Review* 72/1 (2012), pp. 85–155; R. Cook, J. Erdman, and B. Dickens (eds), *Abortion law in transnational perspective: Cases and controversies* (Philadelphia: University of Pennsylvania Press, 2014)) and the reproductive justice and black feminist critique of such a narrow focus (for example, D. Roberts,

*Killing the black body: Race, reproduction, and the meaning of liberty* (New York: Vintage, 1997)).

8. R. Cook and B. Dickens, "Human rights dynamics of abortion law reform," *Human Rights Quarterly* 25/1 (2003), pp. 1–59.

9. For example, European Court of Human Rights cases *Tysiack v. Poland* (2007), *R.R. v. Poland* (2011), and *P. and S. v. Poland* (2013); UN CEDAW Committee case *L.C. v. Peru* (2011); UN Human Rights Committee cases *K.L v. Peru* (2005) and *Mellet v. Ireland* (2016).

10. J. Westeson, "Reproductive health information and abortion services: Standards developed by the European Court of Human Rights," *International Journal of Gynecology and Obstetrics* 122/2 (2013), pp. 173–176; J. Erdman, "The procedural turn: Abortion at the European Court of Human Rights," in R. Cook, J. Erdman, and B. Dickens (eds), *Abortion law in transnational perspective: Cases and controversies* (Philadelphia: University of Pennsylvania Press, 2014); C. Cosentino, "Safe and legal abortion: An emerging human right? The long-lasting dispute with state sovereignty in ECHR jurisprudence," *Human Rights Law Review* 15/4 (2015), pp. 569–589.

11. L. Oja and A. Yamin, "'Woman' in the European human rights system: How is the reproductive rights jurisprudence of the European Court of Human Rights constructing narratives of women's citizenship?" *Columbia Journal of Gender and Law* 32/1 (2016).

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13. H. Biin and A. Albi, "Suffrage and the nation: Women's vote in Estonia," in B. Rodriguez-Ruiz and R. Rubio-Marin (eds), *The struggle for female suffrage in Europe* (Leiden: Brill, 2012), p. 113.

14. *Ibid.*, p. 114.

15. Biin and Albi (see note 13), pp. 114–119; H. Mäelo, *Eesti Naine Läbi Aegade*, 2nd ed. (Tallinn: Varrak, 1999).

16. Biin and Albi (see note 13), pp. 119–120.

17. *Ibid.*, p. 120; Mäelo (see note 15).

18. Biin and Albi (see note 13), pp. 120–121; Mäelo (see note 15).

19. Biin and Albi (see note 13), p. 123.

20. *Ibid.*, p. 123. On "allergy to feminism," see further B. Einhorn, *Cinderella goes to market: Citizenship, gender, and women's movements in East Central Europe* (London: Verso, 1993).

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naisajaloo taastulek," *Vikerkaar* 7–8 (2016), p. 138.

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