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THE ANALYSIS OF HUMAN RIGHTS ‘INFLATION’ IN THE CONTEXT OF EVOLVING INTERNATIONAL REGIME OF WOMEN’S RIGHTS

Abstract

Without a doubt, the concern about ‘human rights inflation’ reflects the modern world’s increasing ambition, breadth and complexity in developing the human rights regime. This rapidly expanding catalogue of rights has generated discussion about human rights proliferation, devaluation and too vast interpretation. Consequently, some critics perceive new generations of human rights as less relevant, which ultimately is supposed to alter their purpose, legitimacy, and effectiveness. This article seeks to disentangle the inflation objection from other concerns about rights expansionism and to critically assess it. Therefore, it will both analyze the phenomenon of rights inflation as well as evaluate its scope of implication based on the progressive development of women’s rights in the domain of gender-based violence and conflict-related sexual violence. The article will also analyze examples of possible regresses of women’s rights in the topic of reproductive rights based on constitutional court decisions in the United States and Poland.

To underline only a few examples, the most striking ones will be presented and they will relate to (i) the evolution of women’s rights invigorated by the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the interpretation of its provisions by the CEDAW Committee, (ii) the recognition of the crime of sexual violence in armed conflicts as well as a more accurate definition of

the crime of rape and lastly (iii) the exponential progress of second generation rights, which include social, economic and political emancipation of women.

The article will reach its conclusion by explaining the importance of generating a sense of closure in human rights interpretation through drawing strict boundaries around the corpus of ‘proper’ human rights without entitling to a suspicion of claims of too far-reaching cultural and political transformations within societal structure. Instead of calling it human rights devaluation, the author argues that it should be perceived as human rights evolution, which encompasses both a constant adjustment and reinterpretation of rights according to the rapidly changing world as well as the way people understand it.

KEYWORDS

human rights inflation, women’s rights, gender-based violence, conflict-related sexual violence, reproductive rights

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inflacja praw człowieka, prawa kobiet, przemoc ze względu na płeć, przemoc seksualna związana z konfliktem zbrojnym, prawa reprodukcyjne

1. INTRODUCTION

Without a doubt, the concern about ‘human rights inflation’ reflects the modern’s world increasing ambition, breadth, and complexity in developing international human rights regime.¹ Like with any process that aims at the progressive realization, questions on its methods to achieve worldwide recognition and enforceability appear naturally in academic circles. Thus, this quite rapidly increasing phenomena of expanding catalogues of rights have generated discussion about its validity, interpretation, and even possible proliferation in the eyes of policymakers, scholars, and government officials.²

To illustrate some common caveats in this domain, it is worth mentioning the arguments of Emilie Hafner-Burton,³ who calls for more effective strategies

¹ D. Petrasek, *Human rights “inflation”—what’s the problem?*, Open Global Rights, available at: <https://www.openglobalrights.org/human-rights-inflation-whats-the-problem/> (accessed 2 June 2023).

² See, e.g. J. T. Theilen, *The inflation of human rights: A deconstruction*, Cambridge 2021.

³ Emilie M. Hafner-Burton is a professor in the School of International Relations and Pacific Studies at the University of California, San Diego, and director of the Laboratory on International Law and Regulation. See: *Beyond the law - towards more effective strategies for protecting human*

for enforcing human rights mechanisms. Her main idea is to dismantle a bureaucratic and political deadlock of too many agreements and massive institutions of legal norms and procedures, which are packed with ‘human rights abusers’ whose “interests lie more in window dressing than in making the system actually work”.⁴ As a result, the legitimacy of the system is waning as it proves ineffective in protecting human rights in States, where such protection is mostly needed and leads towards a sort of rights proliferation instead of firm action plans. Thus, Hafner-Burton argues that much more attention should be given to the so called human rights ‘stewards’ as a group of States that have actually dedicated resources towards human rights protection which strategically prioritize and focus these resources on places where tangible progress could be achieved.⁵

Undoubtedly, the comparison of ‘window dressing’ brings a whimsical smirk of understanding as this is exactly what the policy of open doors proposes in its objectives. This policy aims at gathering as many stakeholders to the table – no matter how indifferent or cruel their policies towards human rights protection can be – in order to agree on some most basic values, which as dripping water will hollow out the stone in the future, either by becoming a part of customary law or codified treaty law. Critiques claim that this approach brings nothing but bureaucratic and political gridlock while silencing the real problem of the enforcement policies. Still, regardless of how naively idealistic such an approach may sound, it has brought positive results on several occasions as will be illustrated in the following paragraphs of this article.

For Hafner-Burton, the most serious violations of human rights treaties arise when the incentives for protection are weak and the international legal system cannot guarantee much of the immediate impact.⁶ As a consequence, those critics perceive new generations of human rights as less relevant, which is ultimately supposed to alter its whole purpose, legitimacy and effectiveness.⁷ On the other hand, it is nearly impossible to enforce the law by threatening the States with a punishment as there are not enough coercive capacities to deter every act of defiance. In such cases, nothing but willingness of compliance of the State actors is required to achieve any goal. Therefore, even if some of the critical arguments seem to be well-grounded at first glance, they lack proper perspective and interpretation of the phenomenon that is actually taking place in the realm of human rights. Instead of talking about ‘rights inflation’, public opinion should rather understand that what

rights, E. Hafner-Burton, *Open Global Rights*, available at: <https://www.openglobalrights.org/beyond-law-towards-more-effective-strategies-for-protect/> (accessed 2 June 2023).

⁴ E. Hafner-Burton, *Making Human Rights a Reality*, Princeton 2013, pp. 1-4.

⁵ *Ibidem*, p. 5

⁶ *Ibidem*.

⁷ D. Petrasek, *Human rights “inflation”—what’s the problem?*, Open Global Rights, February 2020, available at: <https://www.openglobalrights.org/human-rights-inflation-whats-the-problem/> (accessed 2 June 2023).

we are witnessing is evolving interpretations that respond to new struggles for human dignity, which ultimately has been significantly carved in the domain of women's rights, and their evolutionary development of new generations of rights.

2. WOMEN'S RIGHTS IN THE CONTEXT OF 'RIGHTS EVOLUTION'

In 1993, the global women's movement came together to demand a public recognition that "Women's rights are human rights" at the Vienna World Conference on Human Rights.⁸ After more than two decades, this slogan seems an obvious statement, but the advocacy behind it was needed to bring perspective of the agenda of marginalized women's rights at that time. Thus, in this essay I will argue that naming the phenomena of the development of new generations of human rights as 'rights inflation' brings a false connotation and misinterpretation of its underpinning motivation envisioned for law in action. Still, it is important to underline the fact that it is not the aim of this essay to praise unconditionally the direction followed by the international human rights regime – it gives insight into how this development has actually consolidated firm grounds for ensuring fundamental rights for women.

Therefore, instead of calling it human rights inflation, one should perceive it as one of the streams of human rights evolution, which encompasses both elements of a constant adjustment and reinterpretation of rights according to the rapidly changing world as well as the way people understand it. Irreversibly, it corresponds to our sense of heightened social standards, which recognize new horizons and values we want to adhere to in our daily lives. The example of the evolution of women's rights recognized gradually as an important and distinctive sphere of human rights serves an important symbol of how we need the international human rights law to expand according to the ever-changing times of our culture, global society, and growing economics.

3. THE ARISING CONCEPT OF THE GENDER-BASED VIOLENCE (GBV)

To underline some crucial examples of the positive effects of rights development, it is worthwhile to mention the striking one that relates to the evolution of

⁸ *Women's Rights are Human Rights Report*, United Nations, UN Human Rights Office of the High Commissioner, HR/PUB/14/2, New York, 2014, p. 12.

women’s rights invigorated by the Convention on the Elimination of all Forms of Discrimination Against Women (*hereinafter* CEDAW) adopted in 1979 by the United Nations General Assembly, which entered into force two years later with 189 parties in total.⁹ It contains a number of specific obligations on governments ensuring that State parties take all appropriate steps, including legislation and temporary special measures, so that women can enjoy human rights and fundamental freedoms, also by targeting tradition, politics, public life and religion as influential incentives in shaping gender roles and family relations.

The so-called Bill of Women’s Rights has been known for its numerous (around 50) reservations, objections and declarations including 38 countries that rejected the enforcement of Article 29. This Article encompasses a clause conferring arbitration mechanisms and/or jurisdiction on the International Court of Justice with regard to the legal disputes relating to the interpretation or application of that very treaty¹⁰. Interestingly, the Convention allows for reservations even in the case of its fundamental provisions, such as non-discriminatory clauses in Article 2 and Article 16, which were used by countries referring to the supreme role of Islamic Shari’a in domestic policies, usually within the regions of the Middle East or North Africa. More distinctly, Saudi Arabia has entered a very generic reservation referring to the Islamic Shari’a. It stated: “*In case of contradiction between any term of the Convention and the norms of Islamic Law, the Kingdom [of Saudi Arabia] is not under the obligation to observe the contradictory terms of the Convention*”.¹¹ As the result, it is vague and uncertain how CEDAW’s provisions are expected to be effective in the domestic judicial settings of countries which are infamous for being human rights violators, such as Saudi Arabia.¹² Here, the argument of Hafner-Burton seems well-founded. Instead of focusing on firm mechanisms and human rights stewards, international community invites to the negotiation table abusers and allows them to compromise certain freedoms for the sake of finding a common ground under treaty settings. Therefore, a question arises whether there are any measurable benefits of the policy of open doors, or whether these actions bring no positive effects in the realm of the human rights of women.

⁹ Convention on the Elimination of All Forms of Discrimination against Women, New York, UN GA Res. 34/80, 18 December 1979, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en (accessed 2 June 2023). Hereinafter cited as the CEDAW Convention.

¹⁰ Article 29 of the CEDAW Convention.

¹¹ United Nations Treaty Collection and Depositary, Convention on the Elimination of All Forms of Discrimination against Women, Section on Reservations available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en (accessed 2 June 2023).

¹² Human Rights Watch, Saudi Arabia - Events of 2019, available at: <https://www.hrw.org/world-report/2020/country-chapters/saudi-arabia>.

Despite critiques' opinions, it was worth underlying human rights instruments and their impact on developing the scope of women's rights and freedoms. The following examples will prove that despite many structural and legal flaws, mechanisms of human rights regime may bring significant changes in the society and domestic legal systems. The crux of this concern will focus on the interpretation of its discriminatory provisions by the CEDAW Committee. The implementation of CEDAW also requires that State parties respect the general and specific comments and recommendations of the CEDAW Committee. It means that while ratifying the treaty, they accept the authority of the CEDAW Committee to issue general recommendations interpreting the Convention. The competence to issue and adopt General Recommendations (GR) is found in Article 21 para. 1 of the CEDAW and states that the Committee will "*report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties*".¹³ Therefore, the CEDAW Committee may adopt proposed concluding observations and General Recommendations based on its analysis of the implementation problems of the Convention that it identifies in the reporting process by State parties and in the procedures under the Optional Protocol. The GRs serve the role of an authoritative guidance – but not a direct legal obligation – to State parties and other stakeholders of the Convention, on how to understand, interpret and implement its provisions. The aim of such an instrument is to harmonize the national legislation of State parties as a means of understanding the nature of States parties' obligations under the Convention, both in relation to the specific countries and in general terms.¹⁴

3.1. GENERAL RECOMMENDATION NO. 19

As a result, the CEDAW Committee may positively influence the direction of interpretation and enlarge the scope of particular obligations which State parties agreed to take on their shoulders in the first place. More distinctively, in its General Recommendation (GR) No. 19, the Committee recognized gender-based violence (GBV) as a form of discrimination, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under the international law and human rights conventions.¹⁵ GR No. 19 also clarified that provisions of

¹³ Article 21 of the CEDAW Convention.

¹⁴ Committee on the elimination of all forms of discrimination against women, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, Report by the Secretariat*, UN Doc. CEDAW/C/1997/4, 12 November 1996, available online: https://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch_IV_8p.pdf (accessed 2 June 2023).

¹⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, p. 7, 1992, available at: <https://www.refworld.org/docid/52d920c54.html> (accessed 2 June 2023).

CEDAW shall be applied to both state and non-state actors as Article 2(e) of the Convention calls on the State parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.¹⁶ The Committee used here a concept of positive obligation of a State under general international law and specific human rights covenants,¹⁷ which maintains that a State is responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation, as interpreted by the Inter-American Commission of Human Rights (IACtHR) in the *Velásquez Rodríguez* case.¹⁸ In the context of GBV, it imposes an obligation on the States – a sort of guarantee to its citizens – to ensure that national laws against gender-based violence give adequate protection to all women, and respect their integrity and dignity.

3.2. *A.T. V. HUNGARY*, CEDAW COMMITTEE

By illustrating the aforementioned concepts, the CEDAW Committee expands and redefines the treaty’s obligations by evaluating its provisions within the context of violence against women and reminding the States of their positive commitments. A real-life example of how important the Committee’s recognition of due diligence in GBV is related to the *A.T. v. Hungary* case, in which the Committee recognized that failure to protect women from domestic violence is a form of discrimination and human rights violation based on its GR No. 19.¹⁹ Based on the facts of the case,²⁰ in its recommendations for Hungary, the Committee once again

¹⁶ Article 2(e) of the CEDAW Convention.

¹⁷ This concept was first developed in other areas of international law, including right to life, and was introduced to human rights law in the late 1970s in connection to cases of forced disappearances in Latin America. The Inter-American Court of Human Rights (IACtHR) was the first human rights body to examine the content of positive obligations and the due diligence standard in its landmark case of *Velásquez Rodríguez v. Honduras*. See J. Bourke-Martignoni, *The History and Development of the Due Diligence Standard in International Law and its Role in Protecting Women Against Violence*, (in:) C. Benninger-Budel (ed.), *Due Diligence and Its Application to Protect Women from Violence*, Nijhoff 2009, p. 50.

¹⁸ IACtHR, Case of *Velásquez-Rodríguez v. Honduras*, Merits, Judgement of 29 July 1988, Series C No. 4.

¹⁹ Views Communication No.: 2/2003, Views of the Committee on the Elimination of Discrimination against Women under Article 7, paragraph 3, of the Optional Protocol to the CEDAW Convention, Ms. A. T. v. Hungary, adopted January 2005, para. 9.1, available at: <https://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf> (accessed 2 June 2023).

²⁰ In *A.T. v. Hungary*, for over four years A.T. suffered severe domestic violence at the hands of her husband resulting in her hospitalization and ten medical certificates documenting separate incidents of abuse. Hungarian law did not provide a mechanism for A.T. to obtain a protection order against her husband. The husband moved out, but has continued visiting her and their children, also by breaking in and severely beating A.T. on several occasions. Despite the provided evidence,

underlined the State's role in assuring victims of domestic violence the maximum protection of the law, also from non-state actors, by acting with due diligence to prevent and respond to such violence against women.²¹ It also requires the State to create effective domestic remedies for victims.²² As a result, the Committee's interpretation, supported alongside with other institutions' reasoning, has reinforced the legal value of human rights standards on gender equality.

3.3. MARIA DA PENHA V. BRAZIL, IACTHR

This reasoning, which includes a positive obligation of the States to protect against GBV, was also confirmed in the jurisprudence of other international and regional bodies. The landmark example could be illustrated by the *Maria da Penha v. Brazil* case decided by the Inter-American Commission of Human Rights (hereinafter IACTHR) in 2001.²³ The importance of this decision lies in the fact that it confirms that the principles on State responsibility for private acts – established in the *Velásquez Rodríguez* case and codified in the Convention of Belém do Pará – apply also to domestic gender-based violence. In a nutshell, Maria, a plaintiff in this case, was shot in the head by her husband after enduring years of domestic violence. She survived the attempt on her life and became paraplegic, but after returning home, her husband attempted to murder her again, this time by electrocuting her.²⁴ Afterwards, Maria tried to seek justice through Brazilian courts – despite vast evidence against him, the domestic justice system re-victimized Maria by taking more than 15 years to arrest and incarcerate her husband.²⁵

The general pattern of negligence and lack of effective action by the State led the Commission to conclude, “*that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices*”.²⁶ It sends a pivotal message – as the public cannot see any evidence of effective actions to punish such violence and the willing-

the Budapest Regional Court denied A.T.'s motion for injunctive relief for her exclusive right to the family apartment and A.T.'s husband had a right to return to the apartment, stating that A.T.'s battery claims against him lacked substantiation & the court could not infringe on her husband's right to property. For further details see para. 2.1 - 2.7 of the Views Communication No.: 2/2003, CEDAW Committee, *Ms. A. T. v. Hungary*, *op. cit.*

²¹ Views Communication No.: 2/2003, CEDAW Committee, *Ms. A. T. v. Hungary*, *op. cit.*, para. 9.4 -9.6.

²² *Ibidem*, para. 9.3.

²³ *Maria da Penha Maia Fernandes v Brazil*, Inter-American Commission on Human Rights Case 12.051, Report No. 54/01, 16 April 2001, available at: <http://hrlibrary.umn.edu/cases/54-01.html> (accessed 2 June 2023).

²⁴ *Maria da Penha Maia Fernandes v Brazil* case, IACTHR, *op. cit.*, para. 8-12.

²⁵ *Ibidem*, para. 13-19.

²⁶ *Ibidem*, para. 56.

ness of the State to prevent it, this domestic judicial inefficiency creates a sense of permissible impunity and climate that is conducive to gender-based violence. The Commission underlined this fact by stating that this case serves the role of a symbol stipulating “the tip of an iceberg” of the situation for women subjected to violence in Brazil,²⁷ where domestic violence was perceived as acts reserved to the private sphere and not as a public issue or a violation of human rights. The *Maria da Penha* case constituted important progress towards an interpretation of GBV, especially in Brazil – for the first time, it was decided that the States may be held responsible for not taking action to condemn violence in the most private of spheres – at home.²⁸ As a result of the Commission’s decision, the “Maria da Penha Law on Domestic and Family Violence” was enacted in 2006 in Brasil which aimed at the establishment of specific instruments for the prevention and relief of domestic violence by introducing special courts, increased sentences for perpetrators and larger numbers of police stations and shelters for women in big cities.²⁹

4. THE EVOLUTIONARY PROGRESS IN DEFINING CONFLICT-RELATED SEXUAL VIOLENCE (CRSV)

More distinctively, the recent examples of ‘evolution’ rather than ‘devaluation’ of human rights in international criminal law relate also to the recognition of the crime of sexual violence in armed conflict as well as a more accurate definition of the crime of rape. It must be underlined that sexual violence in conflict is not merely a gross violation of human rights – it is also a security challenge that has impacted conflicts in different regions, from the Democratic Republic of Congo (DRC) to Syria, as well as proliferated among extremist groups such as Boko Haram in Nigeria and the self-proclaimed Islamic State in Iraq.³⁰ Wartime rape fuels displacement, increases the costs of armed conflict, encourages mis-

²⁷ *Ibidem*, para. 57.

²⁸ For a detailed evaluation of the impact of the case, see P. Spieler, *The Maria da Penha Case and the Inter- American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil*, “Indiana Journal of Global Legal Studies” 2011, Vol. 18, pp. 121–143.

²⁹ Centre for Women, Peace and Security, LSE Blogs, *Case of Maria Da Penha Maia Fernandes v. Brazil (2001)*, available at: <https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/maria-de-penha-v-brazil/> (accessed 2 June 2023).

³⁰ *Countering Sexual Violence in Conflict Report*, J. Bigio, R. Vogelstein, Council on Foreign Relations, Oct 2017, pp. I, available at: https://cdn.cfr.org/sites/default/files/report_pdf/Discussion_Paper_Bigio_Vogelstein_Sexual_Violence_Conflict_OR_1.pdf (accessed 2 June 2023).

management and destabilizes communities permanently, thereby compromising the facilitation of post-conflict stability and policies of transitional justice.³¹

4.1. EVOLUTIONARY APPROACH OF INTERNATIONAL *AD HOC* TRIBUNALS

Therefore, combating conflict-related sexual violence has become not only high on the political agenda but also as a legal priority of international courts.³² Since the 1990s onwards, through the work of various international courts, which includes the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), sexual violence has started to be indicted as a war crime, crime against humanity and/or an act of genocide.

4.2. PROGRESSIVE DEFINITION OF SEXUAL VIOLENCE: *PROSECUTOR V. AKAYESU*, ICTR

To mention only one important example, it should be illustrated by the groundbreaking *Prosecutor v. Akayesu* decision of the ICTR, in which the Court defined sexual violence and rape in a much broader sense than any traditional national definition at that time.³³ In this case, the Trial Chamber held that sexual violence is “any act of a sexual nature which is committed on a person under circumstances which are coercive”.³⁴ It is worth underlying the broad meaning of coercion, which is not only limited to a physical force but also “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation”.³⁵ The extended meaning of sexual violence, which encompasses and is broader than the definition of rape, was indicated by the Tribunal, which stated that its interpretation “is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact”.³⁶

³¹ *Ibidem*, pp. I-II.

³² On the phenomenon of sexual violence, see ICRC, *Sexual Violence: Questions and Answers*, 10 November 2013, available at: www.icrc.org/eng/resources/documents/faq/sexual-violence-questions-and-answers.htm (accessed 2 June 2023).

³³ *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at: <https://www.refworld.org/cases,ICTR,40278fbb4.html> (accessed 2 June 2023).

³⁴ ICTR, *Akayesu* case, (Trial Judgement), *op. cit.*, para. 688.

³⁵ *Ibidem*.

³⁶ *The Prosecutor v. Jean-Paul Akayesu (Appeal Judgment)*, ICTR-96-4-A, International Criminal Tribunal for Rwanda (ICTR), 1 June 2001, available at: <https://www.refworld.org/cases,ICTR,4084f42f4.html> (accessed 2 June 2023).

In terms of the definition of rape, it was also defined by both the Trial and Appeals Chamber very generically – the ICTR simply held that rape is “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” and did not focus on traditional definition of “non-consensual sexual intercourse”, which was limiting significantly the actual scope of this crime.³⁷ In addition, *Akayesu* case underscored that rape and sexual violence can constitute crimes against humanity like genocide, in the same way as any other violent act, as long as they indicate the specific intent to destroy, in whole or in part, a particular group.³⁸ By recognizing rape as an act of genocide, the ICTR stopped the culture of silencing wartime rape and violence against women and recognized its victims as well as their rights to individual and collective remedies.³⁹

4.3. DIFFERING PATHS OF INTERPRETATION: *FURUNDŽIJA* AND *KUNARAC* UNDER ICTY ASSESSMENT

Despite being widely recognized by international courts and codified in international law, prosecuting CRSV in domestic courts has remained difficult due to the different interpretations of sexual violence and rape, which has complicated the access to justice for victims with the existence of various legal definitions and expectations for rape and proof of consent.⁴⁰ In fact, the definition of rape proposed by the ICTR was later on altered by the ICTY, which shifted to a more precise definition of rape in the *Furundžija* case⁴¹ by providing details to its constituent elements, which was again clarified in the *Kunarac* case that brought a compromise between those two definitions.⁴²

³⁷ *Ibidem*, para. 596–598, 686–688.

³⁸ *Ibidem*, para. 417, 446–447.

³⁹ L. J. Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Martinus Nijhoff Publishers 2005, pp. 174–76.

⁴⁰ N. Mattea, *Conflict-Related Sexual Assault—Historic Barriers to International Recognition*, “Research Working Paper. The Chicago Council on Global Affairs”, June 2020, available at: <https://www.thechicagocouncil.org/research/working-paper/conflict-related-sexual-assault-historic-barriers-international-recognition> (accessed 2 June 2023).

⁴¹ *Prosecutor v. Anto Furundžija (Trial Judgment)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para. 185, available at: <https://www.refworld.org/cases,ICTY,40276a8a4.html> (accessed 2 June 2023).

⁴² *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, para. 438, available at: <https://www.refworld.org/cases,ICTY,3ae6b7560.html> (accessed 2 June 2023).

4.4. STATUS QUO IN DEFINING CRSV BY IC

Lastly, the ICC adopted an even more tailored and refined definition of rape⁴³ in the *Elements of Crimes*⁴⁴ in order to integrate the aforementioned case-law evolutions of CRCV. The ICC definition has been generally accepted by the international community as the most authoritative one⁴⁵ and, more importantly, incorporated into a number of national legislations including Australia, Belgium, Canada, Georgia, New Zealand, the Republic of Korea, South Africa and the United Kingdom.⁴⁶

The aforementioned examples show that the international legal framework in terms of international criminal law has been substantially developed through the interpretation of case law – in an evolutionary way – which gave very strong foundations in defining sexual violence in armed conflicts and that has become translated into domestic laws. Still, despite these achievements, the reality seems much less enthusiastic. At the national level, proper implementation would require sometimes large institutional reforms and improvement of compliance mechanisms to ensure respect for the law.⁴⁷

4.5. EVOLUTIONARY MECHANISMS MAY ALSO CAUSE PUSHBACKS

The emerged concepts of gender-based violence and conflict-related sexual violence are only two distinctive examples in the sphere of international criminal law of how the evolution of women's rights encouraged a better understanding

⁴³ According to the ICC (Elements of Crimes, 2011, Art. 8(2)(b)(xxii)-1, an act is considered rape if: (1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. Then, the definition mentions that the conduct took place in the context of and was associated with an international armed conflict and the perpetrator was aware of its factual establishing circumstances.

⁴⁴ ICC, Elements of Crimes, 2011, Art. 8(2)(b)(xxii)-1, available at: <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (accessed 2 June 2023).

⁴⁵ G. Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law*, "International Review of the Red Cross" 2014, Vol. 96, p. 509.

⁴⁶ See e.g. *Practice related to Rule 93*, J. M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. 1: Rules, ICRC, Cambridge 2005 (ICRC Customary Law Study).

⁴⁷ *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law*, op. cit., pp. 537-538.

and positive development of human rights. Nevertheless, a modern understanding of women's rights is progressing exponentially and includes not only examples of first generation rights, but also second generation rights, which pertains to the social, economic and political emancipation of women. It corresponds to the equal rights to vote, to be educated, to own property and to earn an equal wage but it also includes the enjoyment of the highest attainable standard of physical and mental health, in which reproductive rights take an important step forward on recent public debates across Europe and the United States.

One of the striking examples of regression in ensuring reproductive rights for women included the decision of the Constitutional Tribunal in the Republic of Poland (October 2020),⁴⁸ which was already known for one of the most restrictive abortion laws in the European Union. The decision refuted a long-lasting compromise on three exceptions, when abortion could be performed legally⁴⁹ by restricting it only to the possibility of performing the procedure when the mother's health was at risk and the pregnancy resulted from rape or incest.⁵⁰ The court's decision halted pregnancy terminations for severe fetal abnormalities, which occurred to be the most common type of abortion currently performed in Poland.⁵¹ Despite large-scale demonstrations by Poles in the 'black protests' amid a surge in coronavirus cases in Poland, and notwithstanding proposed legislative acts to amend the regulation, neither the government nor the parliament enacted directives or laws to alter the situation..

The more restrictive policies on reproductive rights also crossed the Atlantic. In the United States, for almost 50 years the judicial interpretation of the Constitution regarding abortion followed the Supreme Court 1973 landmark decision in the *Roe v. Wade* case, which guaranteed federal constitutional protection of abortion rights till the moment when the fetus is able to survive outside woman's womb, and with subsequent companion decisions constituted that abortion is legal but may be restricted by the States to varying degrees.⁵²

The uncertain future of the beforementioned interpretation came with the shift of the US highest court to a solid 6-3 conservative majority since the nom-

⁴⁸ Judgment of the Constitutional Court of the Republic of Poland of 22 October 2020 r., K 1/20, available at: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210000175/O/D20210175.pdf> (accessed 2 June 2023).

⁴⁹ Before the Tribunal's decision, under Act from 7 January 1993 (Journal of Laws of 1993, No. 17, item 78), the procedure was only permitted if the mother's health was at risk, there was a fetal abnormality, or the pregnancy resulted from rape or incest.

⁵⁰ Judgment of the Constitutional Court of the Republic of Poland of 22 October 2020, *op. cit.*

⁵¹ *Aborcja w Polsce. MZ podał statystyki. Wady płodu przyczyną większości zabiegów*, Polish Press Agency (PAP), Rynek zdrowia, August 2021, available at: <https://www.rynekzdrowia.pl/Polityka-zdrowotna/Aborcja-w-Polsce-MZ-podal-statystyki-Wady-plodu-przyczyna-wiekszosci-zabiegow,224075,14.html> (accessed 2 June 2023).

⁵² *Roe v. Wade*, 410 U.S. 113 (1973).

ination of Judge Amy Coney Barrett in 2020.⁵³ The wind of change came with the unexpected shift demonstrated by the results of the Court's decision in the *Dobbs v. Jackson Women's Health Organization* case, in which on 24 June 2022, Justice Samuel Alito in the majority opinion repudiated unflinchingly the *Roe v. Wade* (1973) decision and a subsequent – *Planned Parenthood v. Casey* decision (1992).⁵⁴ One of the main arguments presented by the majority implicates that both the *Roe* and *Casey* case must be overruled as “[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision”⁵⁵ and that it is wrong to rely on the Due Process Clause (DPC) of the 14th Amendment as abortion rights should be not categorized as „deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty”;⁵⁶ which represents elements constituting DPC as exemplified in the *Washington v. Glucksberg* case.⁵⁷

The majority opinion does not lead directly to the total ban of abortion but allows one to decide more freely on a State level on its restrictions. The crux of the matter is that it refutes the concept of imposing minimum freedoms related to the right to abortion on a federal level.⁵⁸ Definitely, the decision has dismantled nearly 50 years of precedent of federal legal standards for reproductive rights and left the decision on the legal status of abortion to individual states, whose policies on reproductive rights vary significantly.⁵⁹

In the context of the established reasoning in the *Dobbs v. Jackson Women's Health Organization* case, one may wonder what possible legal repercussions it

⁵³ Amy Coney Barrett, President Donald Trump's candidate for a U.S. Supreme Court vacancy, said she “will rule based on the law, not her personal views”, in prepared remarks issued on Sunday ahead of her Senate confirmation hearing in October 2020. Source: *U.S. Supreme Court nominee Barrett pledges to follow law, not personal views*, S. Holland, L. Hurley, Reuters World News, October 2020, available at: <https://www.reuters.com/article/uk-usa-court-barrett-statement-idUKKBN26W0MZ> (accessed 2 June 2023).

⁵⁴ *Dobbs v. Jackson Women's Health Organization*, 597 U. S. (2022),

⁵⁵ Draft majority opinion of the US Supreme Court by Justice Alito, pp. 5-6, available at: <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> (accessed 2 June 2023).

⁵⁶ *Ibidem*.

⁵⁷ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022), available at: https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf (accessed 2 June 2023).

⁵⁸ As explained by Justice Alito „[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion... *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.”, *Dobbs v. Jackson Women's Health Organization*, *op. cit.*

⁵⁹ For example, from 2021 more than 30 states have enacted additional abortion restrictions, whereas 8 states have enacted protective abortion measures. Read more: *2022 State Legislative Sessions: Abortion Bans and Restrictions on Medication Abortion Dominate*, Policy Analysis, E. Nash, L. Cross, J. Dreweke, Guttmacher Institute, March 2022, available at: <https://www.guttmacher.org/article/2022/03/2022-state-legislative-sessions-abortion-bans-and-restrictions-medication-abortion> (accessed 2 June 2023).

may have on the other human rights related to the decisions based on the Due Process Clause of the 14th Amendment. More distinctively, it might encourage the Supreme Court to reconsider cases of same-sex marriages and relationships, especially in terms of the famous *Obergefell v. Hodges* case⁶⁰ (2015), with the same line of reasoning stating that same-sex marriages are neither *implicitly protected by any constitutional provision* nor *deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty*.

Still, it must be underlined that the global trend in abortion law has been oriented at liberalization. Since 2000, thirty-eight countries have changed their abortion laws, and all but one – Nicaragua – expanded the legal grounds on which women can access abortion services, for example, in 2020, Argentina and Thailand legalized abortions (with certain gestational limits) and Mexico decriminalized abortion, as did South Korea.⁶¹

The beforementioned examples do not stand in contrast with the proposed thesis, but rather prove that the same mechanisms of legislative proposals and judicial interpretations may be a tool to both progress and regress in the process of evolving women's rights. As long as the women's rights regime is a fragile and unstable concept of contradicting views between conservative and liberal chessboard, it will remain susceptible to constant shifts in political power, traditions and developing social standards. Without a constant reminder of its core values and freedoms ensured by properly functioning constitutional enforcement mechanisms, it will remain a subject of political manipulation and public dispute.

5. CONCLUSIONS

It would be a serious understatement to conclude that the international human rights regime is a well-functioning system without any substantial flaws. It requires constant maintenance, universal recognition of its fundamental backbone as well as improvement of institutional and enforcement mechanisms. Still, even if the status quo seems not satisfactory, it is far better to have an honest debate about the content of human rights, than be distracted by a “rights’ inflation problem”, which does not resonate adequately with the current state of affairs.

Based on the aforementioned discussion, it seems that the international human rights system has two main tracks. The first one focuses on effectively implementing and defining core human rights, whereas the second one looks forward

⁶⁰ *Obergefell v. Hodges*, 576 U.S. (2015), available at: https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (accessed 2 June 2023).

⁶¹ *Abortion law: global comparisons*, Council on Foreign Relations, available at: <https://www.cfr.org/article/abortion-law-global-comparisons> (accessed 2 June 2023).

to the recognition of “brand new” rights discovered during the process of constant progress in digitalized and technologically expanding world.

It is fair to say that speeding up the process of the second stream should not be treated as a priority. Expanding the range of rights excessively in various aspects of daily life, such as cultural, economic, and social domains, is not essential or practical. This is particularly true given the lack of global consensus and universally acknowledged, binding agreements on basic rights and freedoms, notably in areas like women’s rights. The effort put into making new and often superfluous standards distracts us from the urgent task of more fully implementing the existing, core human rights – such as the rules against torture, rights to life as well as discrimination against women or the LGBTQ community. Adding more laws will mean that more of them could be ignored and the legitimacy of the system itself will be further eroded due to a greater number of cases of noncompliance.

Nevertheless, it does not mean that pursuing the second stream should be abandoned by practitioners and policymakers completely – it is necessary to recognize and pursue better guarantees of rights protection as we progressively reach a new level of moral and social standards in daily life. In spite of that fact, prioritization should be given to the first track in maintaining and nurturing foundations, which also develops new standards of interpretation of traditional laws. Notwithstanding, it is a simple generalization to call all tracks of the development of human rights as its degradation or inflation, when in fact it shall be perceived as its constant evolution, a flexible mechanism of adjustment and the articulation of the updated interpretations of the rights to respond to new struggles for human dignity.

Taking all this into consideration, one of the simplest answers to the question of why human rights are constantly expanding would be that our morality triggers changes. Expansion of most rights, including women’s rights, arises from the process of reinterpreting and applying the already existing rights to new real-life situations. Modern humanity wants to incorporate our new principles into the human rights regime as a response to the emerging developments, which include economic changes that have shaped our modern society and the way of living. It also brings a positive conclusion – human rights are developing when a sense of human dignity and morality is expanding too. As a result, this technological, economic, and social progress has enabled us to raise awareness of violations that had never been spoken about out loud before, including among many issues, better apprehension and protection of women’s rights.

What could be recommended and emphasized more seriously is setting priorities based on the probable consequences of successful enforcement, rather than overambitious endeavors placed in the spotlight of mass media. The human rights promotion system could be more strategic in how it allocates resources and media attention by leaving behind stakeholders interested only in ‘window dressing’ and focusing on smaller but long-lasting projects, as exemplified by the interpre-

tational changes of an international body in the *Maria da Penha v. Brazil* case. Thus, we should be looking for more evolutionary and practical solutions while focusing on actions, where attention will last long enough to actually facilitate the massive domestic transformation. This would be the most effective way to facilitate a firm ground for enforcement mechanisms in the women's rights regime so that one day they can be secured for good.

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