Dynamic interpretation and judicial activism: Companions in the protection of Convention human rights

Miro Cerar and Jure Spruk***

ABSTRACT

The authors discuss the dynamic interpretation of the European Convention on Human Rights and the judicial activism of the European Court of Human Rights, which they describe as necessary companions in protecting convention rights. Dynamic interpretation and judicial activism allow the Court to respond to societal changes and appropriately develop judicial law. However, as such departures from a formalistic (static, conservative) understanding of convention provisions affect the stability and predictability of the convention legal system, dynamic interpretation and judicial activism must be applied reasonably and balanced with respect for the principles of judicial self-restraint and the rule of law. Furthermore, the Court must consider that its decisions and their implementation depend on the level of consensus and political will among the contracting states in certain areas of human rights protection. The European Convention on Human Rights and the European Court of Human Rights are discussed as two key foundations of the legal and political identity of broader European integration, based on the values of human dignity and the rule of law.

* Prof. Dr Miro Cerar, Faculty of Law, University of Ljubljana.
** Dr Jure Spruk, independent researcher.

Keywords: European Convention on Human Rights, European Court of Human Rights, human rights, dynamic interpretation, legal formalism, judicial activism, European integration.

Dinamična razlaga in sodniški aktivizem: sopotnika pri varovanju konvencijskih človekovih pravic

POVZETEK

Avtorja obravnavata dinamično razlago Evropske konvencije o človekovih pravicah in sodni aktivizem Evropskega sodišča za človekove pravice, ki ju opisujeta kot nujna spremljevalca pri varstvu konvencijskih pravic. Dinamična razlaga in sodni aktivizem omogočata Evropskemu sodišču, da se odziva na družbene spremembe in ustrezno razvija sodno pravo. Vendar pa takšni odkloni od formalističnega (statičnega, konservativnega) razumevanja konvencijskih določb vplivajo na stabilnost in predvidljivost konvencijskega pravnega sistema, zato morata biti dinamična razlaga in sodni aktivizem uporabljena razumno ter uravnotežena s spoštovanjem načel sodniškega samoomejevanja in pravne države. Poleg tega mora Evropsko sodišče upoštevati, da njegove odločitve in njihovo izvajanje na določenih področjih varstva človekovih pravic temeljijo na stopnji soglasja in politične volje med državami pogodbenicami. Evropska konvencija o človekovih pravicah in Evropsko sodišče za človekove pravice sta obravnavana kot dva ključna temelja pravne in politične identitete širše evropske integracije, ki temelji na vrednotah človekovega dostojanstva in pravne države.

Ključne besede: Evropska konvencija o človekovih pravicah, Evropsko sodišče za človekove pravice, človekove pravice, dinamična razlaga, pravni formalizem, sodni aktivizem, evropska integracija.

1. Introduction

The bitter experience of World War II fostered awareness in (Western) European society of the importance of peace and the positive effects of deepening political, legal and economic relations between countries that had until recently regarded each other as enemies. To prevent new conflicts and wars, far-reaching processes were initiated, leading to the creation of the European Union (EU) as we know it today.[1] The year 1950 marked at least two turning points: the Schuman Declaration, which laid the ideological foundations of European integration, and the signing of the European Convention on Human Rights (ECHR), a product of the supranational commitment to respect for fundamental human rights in the member states of the Council of Europe, which had been established the previous year with the London Agreement.[2]

While the Schuman Declaration signalled the emergence of a supranational political community, the Council of Europe and the European Court of Human Rights (ECtHR) in Strasbourg paved the way for the protection of liberally conceived human rights and freedoms,[3] which were clearly under attack by authoritarian and totalitarian regimes. Human dignity, autonomy and freedom became cornerstone values in post-war democratic states. The formation of constitutional courts with the authority to exercise direct legal control over the constitutionality of the legislative and executive branches fits into the broader process of building lib-

[1] The EU began operations in 1993, after the Maastricht Treaty was signed in 1992. Its predecessors are the European Coal and Steel Community (1952), the European Economic Community (1958), and the Euratom Community (1958).

[2] The Council of Europe was founded by nine European countries: France, the United Kingdom, Italy, the Netherlands, Belgium, Sweden, Denmark, Norway, and Luxembourg.

[3] Although liberalism is the fundamental conceptual basis and practical framework of the doctrine and practice of human rights, developments in this field have gradually supplemented this initial liberal political-ideological doctrine and practice with various other political-ideological approaches. Human rights, therefore, while fundamentally anchored in liberalism, also partly reflect various solidaristic, collectivist, feminist, environmentalist and other approaches and ideologies (see Cerar, 2024, 942 et seq.).

eral-democratic political systems, but the final phase of this process could not have been completed without the ECHR and the ECtHR, which can be described as symbols of dominance over collectivist ideologies, within which the value of the individual was subordinated to the unlimited power of political will. The essence of post-war constitutional development lies in the recognition of the limitations of the legislative and executive branches of state power in relation to the individual, who is now protected by constitutional and convention rights. The EU's adoption of the 2010 Charter of Fundamental Rights of the European Union thus follows the post-war development of human rights in Europe and maintains the liberal-inspired tradition of declarative definition of human rights and freedoms.[4]

Today, we can rightly claim that the ECHR is an indispensable part of the broader European legal and political identity, as the jurisdiction of the ECtHR extends to 46 member states of the Council of Europe.[5] The Court in Strasbourg decides some of the most pressing current legal issues, from environmental matters to so-called political rights (e.g. the right to vote, freedom of expression and association), which result in far-reaching political and legal changes. For this reason, the culture of trial at the ECtHR, that is, the way in which judges understand the nature of the Convention and its interpretation, is identified as a primary legal and political issue. It is a fundamental question, the answers to which reveal the legal theoretical and philosophical elements of the ECtHR's operation. These elements indicate the understanding of law and its role in the political community, or more precisely, they reveal the value orientation in determining the relationship between the static and

[4] Historically, this tradition dates back to the French and American bourgeois revolutions of the 18th century. The Virginia Declaration of Rights (1776) and the French Declaration of the Rights of Man and of the Citizen (1789) are considered central documents of these bourgeois revolutions.

[5] The observer states of the Council of Europe are the United States of America, Canada, Japan, Mexico, Israel, and the Vatican.

dynamic dimensions of the human rights defined by the Convention.

Do judges interpret the Convention as a so-called living document or as a historical artefact? Do they approach human rights formally or instrumentally (pragmatically)? Are the values of legal predictability and stability prioritised over the need to adapt human rights law to current social challenges? Finally, does loyalty to the Convention or judicial self-restraint necessarily entail a rejection of judicial activism? These are all questions worth exploring, as they help clarify the functioning of the most influential supranational court in the world.

It should be emphasised that the ECtHR is not an all-powerful judicial institution capable of resolving the most pressing problems in member states on its own. A realistic assessment of the court's actual influence shows that it remains subordinate to the political power of the Council of Europe's member states. The implementation of court decisions depends on the political will of these states, as the court itself lacks executive capacity. In countries with a higher political and legal culture, the implementation rate is higher, while it is lower in countries where democracy and the rule of law are less developed or under greater threat.

In this article, we aim to show that a considered dynamic (evolutive) interpretation of the ECHR and reasonably limited judicial activism are prerequisites for maintaining the Convention as an effective legal source for resolving current social challenges. A dynamic approach to legal interpretation and judicial creativity may weaken legal predictability and stability, but with appropriate self-restraint by the court and a reasonable, well-considered assessment of the Convention's principles and rules in the contemporary context, they can ensure that the existence of the ECHR and the ECtHR brings far more positive than negative effects in the field of human rights.

2. Dynamic interpretation at the ECtHR

The theory of legal interpretation and argumentation is highly diverse and addresses numerous interpretative approaches (methods) and legal arguments. For the purposes of this paper, only two fundamental approaches to legal interpretation are discussed: the concepts of static and dynamic interpretation.

Static interpretation is based on the requirement of fidelity to the legal text being interpreted. This fidelity may refer either to the possible linguistic meanings of the text or to the intentions of its author.[6] In the United States of America, the static approach to interpreting legal texts is known as originalism, which includes two approaches: interpretation of the original meaning and interpretation of the original purpose (intention). Antonin Scalia, still the most recognisable advocate of originalism, regarded originalism as the only effective interpretative approach that removes politics from the law and keeps judges, as holders of judicial power, within the limits of the principle of separation of powers, according to which only parliament has legislative authority (Scalia, 2018). The rule of law, from this perspective, is reduced to the rule of rules, which alone prevent discretionary decision-making and arbitrariness by judges (Scalia, 1989). The originalist approach to interpretation tends to freeze legal texts in terms of meaning and purpose. This means that the interpreter should not add anything to the meaning or purpose of legal norms that could jeopardise their original message. The mes-

[6] In these two respects, within the framework of continental legal theory, static interpretation can also be understood as either a subjectivist or objectivist historical interpretation of legal acts. Subjectivist-static historical interpretation is based on the understanding of the text of a legal act as attributed to this act (e.g. a constitution, law, or international convention) at the time of its adoption by the author of this act (legislator, etc.). Objectivist-static historical interpretation is based on the linguistic meaning or purpose of the text of the legal act as it could be objectively discerned from the legal text at the time of the act's adoption, taking into account all objective social circumstances and factors of that period (cf. Pavčnik, 2013, pp. 93–97). If the interpretation of a legal act considers the linguistic meanings of the text in the contemporary (rather than historical) semantic and social context, it is no longer a historical interpretation, but an ordinary linguistic interpretation of a legal act.

sage of a legal text should therefore not be created by the interpreter, but rather discovered.

Justice Scalia has committed himself to textualism, an interpretive approach that considers only the ordinary meanings of legal texts at the time of their creation as relevant. Textualism is a form of formalism characterised by the rejection of pragmatic or instrumental elements in determining the meaning of legal texts. The originalist critique of pragmatism and instrumentalism is, in fact, a critique of introducing political criteria into the determination of legal texts' meanings. The interpreter can discover the genuine meaning of a legal text only by abandoning the search for its consequences or the (political) goals that the author might have had in mind. For originalism, which aims to discover the original meaning of a legal text, establishing the original intention or purpose is too uncertain, as political elements can easily interfere, transforming the law from a neutral system of principles and rules into a tool for social engineering. The rejection of this transformation is the root of formalist approaches to legal interpretation, which are often encompassed in the concept of legal science as a refuge of objectivity and neutrality.

The established doctrine of legal interpretation at the ECtHR rejects the static or originalist approach to ECHR interpretation described above. As early as 1978, in *Tyrer v. UK*, the ECtHR explicitly rejected originalism and stated that the ECHR is a living instrument[7] that must be interpreted in light of current circumstances.[8] The theory of dynamic in-

[7] In American constitutional theory, the term "living constitution" has become synonymous with "living instrument." William Rehnquist (1976) recognised the advantages of a living constitution in the generality of its language, which allowed for more flexible interpretation. "The framers of the Constitution wisely spoke in general language to the unceasingly changing environment in which they would live".

[8] *Tyrer v. UK* (1978). In this case, the ECtHR ruled on the case of Anthony Tyrer, who was sentenced by a juvenile court in the Isle of Man to three strokes of the cane on the buttocks for physically assaulting an older schoolmate. Tyrer admitted in court to assaulting his classmate, but appealed against the sentence. The appeal was denied and the sentence was carried out. Six years later, in the *Tyrer case*, the ECtHR held that there had been a violation of Article 3 of the Convention, which prohibits torture and inhuman or degrading treatment or punishment. Paragraph 31 of the judgment's reasoning states that the Court found a violation of Article 3 of the Convention based on the development and generally accepted standards

terpretation emphasises an evolutionary perspective, which prevails when the legal text is unclear and the expectations of the text's author have been superseded by changing circumstances in society and law. The most difficult cases arise when the legal text and/or its history are clear but conflict with prevailing contemporary values or policies (Eskridge, 1987, p. 1484).

In general, when determining the normative meaning of a legal text, the static theory requires attributing to the legal text the normative meaning it had at the time of its creation, while the dynamic theory requires attributing the normative meaning as it results from the moment of interpretation itself (Spaić, 2023).[9] In the *Tyrer case*, the court could not have found a violation of Article 3 of the Convention if it had strictly adhered to a static interpretation. By emphasising the understanding of the Convention as a living instrument, the court opened the way to a comparison of penal policies in other states party to the Convention that had already abandoned corporal punishment. The designation of corporal punishment as degrading at the end of the 1970s reflected a progressive penal policy based on the humanistic value of human dignity. In this case, the judges were clearly interpreting Article 3 of the Convention according to the standards of penal policy at the time, and not the standards that prevailed approximately three decades earlier.

Progressiveness does not simply mean keeping up with the times, but also striving to stay ahead of them. Dynamic interpretation in law embodies this principle: adapting the

of penal policy in the other member states of the Council of Europe, which had abolished corporal punishment.

[9] Dynamic interpretation therefore takes into account the development of the legal institution under interpretation, i.e. its current meaning and, where possible, its future development. In addition, this interpretation often aligns with the objectivist concept of teleological interpretation, according to which a legal act is interpreted not in terms of the will or intention of the historical or current legislator, but in terms of the *ratio legis*, as discerned from the legal act itself, given the current normative and actual social context (cf. Pavčnik, 2013, pp. 94–95). Of course, such an interpretation allows for considerable judicial discretion. Thus, by using dynamic interpretation, ECtHR judges often introduce their own subjective views and value choices into their decisions (Zupančič, 2020, p. 60).

law to the present and seeking to capture the creative spirit which would ensure a particular area is regulated in a way that future generations would endorse. However, pursuing this ideal can quickly encounter a significant obstacle—historical interpretation, which places the legal text in its historical context and reminds the present interpreter of the different historical meanings and purposes of the written rules and principles. To maintain the primacy of dynamic interpretation, the ECtHR, a few years after the *Tyrer case*, declined to refer to the so-called *travaux préparatoires*, a set of preparatory documents from the time of the Convention's creation, thereby avoiding the search for the original purpose of the Convention's provisions. In the case of *Young, James and Webster v. UK* (1981), the Court recognised the applicants' negative right to trade union membership, even though the preparatory documents for the Convention included the deliberate exclusion of Article 20 of the Universal Declaration of Human Rights, which in point 2 states that no one may be compelled to join any association.[10]

In its reasoning, the Court referred, among other things, to the principles of a democratic society: pluralism, tolerance and broad-mindedness.[11] This case could be considered one of the more difficult cases, as the historical meaning of the relevant legal norms (*travaux préparatoires*) was quite clear, yet ultimately the modern understanding of a democratic society and its liberal elements prevailed.

As already briefly mentioned, dynamic interpretation also has its shortcomings, which are certainly not insignificant. These are particularly evident in relation to the predictability

[10] The applicants applied to the ECtHR after losing their jobs in 1976 with British Railways, which had reached an agreement with three trade union federations the previous year which included compulsory membership of one of the three unions. In a 1981 judgment, the Court found a violation of Article 11 of the Convention, which concerns freedom of assembly and association.

[11] In point 63 of the reasoning, the court writes: »Although individual interests must on occasion be subordinate to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.«

and stability of law. These are important elements of the rule of law, reflecting the inherently conservative nature of law. Furthermore, the shortcomings of dynamic interpretation are also apparent in relation to the principle of separation of powers, especially regarding the relationship between the legislative and judicial branches. Of course, the argument concerning the separation of powers is to some extent questionable in the context of human rights protection within the Council of Europe as an international organisation, but it nevertheless highlights a particular aspect of dynamic interpretation relevant to the present article. The classical interpretation of the principle of separation of powers presupposes a functional separation between legislative and judicial jurisdiction, where judges merely interpret rather than create laws. The legislator is oriented towards the future and creates abstract and general rules on the basis of which future disputes before the courts should be resolved, while the judge is oriented towards the past, seeking to discover the legal rules as they existed at the time the dispute arose (D'Amato, 1996, p. 2). The logic of the classical interpretation of the principle of separation of powers in the case of the ECtHR dictates that judges refrain from creating new legal rules and remain faithful to the original meanings and intentions of the authors of the ECHR.

As mentioned, judicial law-making also has significant consequences for the predictability and stability of the law. The system of precedent (*stare decisis*) helps to strengthen both, but it is not formally binding on the court.[12] It is binding only insofar as the court seeks to convince the states parties to the Convention of the legitimacy and legal correctness of its decisions, as the court lacks its own enforcement capacities and jurisdiction. It is clear that the dynamic interpretation of the Convention relativises and weakens predictability and stability, since otherwise it would not be possible

[12] The ECtHR explicitly stated in *Cossey v. UK* (1990) that prior judgments are not binding on the court.

to adapt the interpretation of the Convention's provisions to current social conditions and needs. In the reasoning of *Stafford v. UK (2002)*, the court adopted a position in favour of a dynamic or evolutionary interpretation of the Convention, explaining that without such an approach, improvements and changes cannot be achieved. In this way, the court has repeatedly departed from its own case law to determine the rights of complainants more comprehensively (Guillaume, 2011, p. 13).

Dynamic interpretation, therefore, if we summarise the findings so far, in its aim of adapting to given social circumstances, represents an effective approach to realising convention rights, with a significantly broader effect than originalism. The latter requires loyalty to the past, while dynamic interpretation is more responsive to the present. The consequence of dynamic interpretation is a lower level of legal certainty in terms of predictability and stability of the law, and an increase in the legal power of the court (ECHR), especially in relation to the member states of the Council of Europe, which must legally respect and implement its decisions.

3. Judicial activism of the ECtHR

Dynamic interpretation of legal texts can be distinguished from judicial activism, at least for analytical purposes, although they are usually closely related. Both involve a departure from strict formalistic fidelity to the text to introduce substantive changes into case law. While the opposite of dynamic interpretation is formalistic-static (objectivist- or subjectivist-static) interpretation, judicial activism is contrasted with judicial self-restraint. Judicial self-restraint can be understood as a psychological state of judges, reflecting their conscious subjective judgment regarding what they are obliged to do as judges and what they actually do when ruling on specific cases. More specifically, self-limitation consists of

the belief that a judge is obliged to consider only legal criteria as the basis for judgment in specific cases without taking into account, for example, moral principles or public policy choices.

Of course, we also understand the formalistic-static approach to legal interpretation as the central form of judicial self-restraint, which, with its characteristics, best encompasses the judge's psychological loyalty to the original or literal meaning of the legal text. Judicial activism, on the other hand, indicates the psychological state of judges who are aware of their own interpretative discretion and exercise it in practice. Activist judges value creativity more than rigid legal logic. They see creativity as a necessary condition for the development of law and its adaptation to new circumstances. The "mechanical application" of legal rules does not require a high level of creativity from an individual judge, whereas the creation of judge-made law requires it to a greater extent. Critics of judicial activism often argue that it is an improper creation of law by judges (Popović, 2009, p. 364), which is particularly controversial from the perspective of the division of power between the legislative and judicial branches.[13]

Richard Posner (1983, p. 10) highlights the argument of separation of powers as one of the main reasons for judicial self-restraint, where the judge seeks to limit the power of the court in relation to the other branches of government. Judicial activism is said to undermine the traditional (Montesquieuian) image of the judge, who neither adds to nor creates the law, but merely discovers and passively applies it.[14] The judge's creativity is seen here as an unwelcome usurpation of the law-making function, which is the prerogative

[13] In the case of the ECHR, this is primarily a matter of the relationship between the historical drafters of the convention and the ECtHR.

[14] It must be noted that the so- called discovery of law and the mechanical application of law are, by their very nature, also creative interpretative activities. However, their creativity is at the minimum level, as they are mainly based on an uncritical, mechanical, and simplified summary of what is written in legal texts.

of the legislator, whose authority was reinforced by the ideas of codification from Justinian through Frederick II the Great to Napoleon in continental Europe, and by Blackstone's declaratory theory of law in England. Defending the legislature's competence in practice means defending the so-called political branches of government—the legislative and the executive—from judicial influence. Political power relations are at play here, which, in the case of the ECHR, are particularly evident in the relationship between the ECtHR and the states that are signatories to the Convention (see Chapter 4 for further discussion). The role of the judge changes significantly when viewed from the perspective of judicial activism. In this context, judicial law is regarded as an additional layer of legal text and a natural consequence of the judge's role in interpreting and applying the law (Bošnjak, Zajac, 2023, p. 3). Judicial activism results in more judicial law, as the existing provisions of the Convention are extended to cases that its drafters certainly did not anticipate. The interpretation of the Convention's provisions is highly dynamic, as cases are brought under individual articles of the Convention that, according to a linguistic interpretation of the provisions, are not covered by them.

A clear example of this is the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (2024),[15] in which the ECtHR found a violation of Article 8 of the Convention, which guarantees the right to respect for private and family life. However, the Court found that in this case, Article 8 was violated by Switzerland's insufficient measures in climate change management and inadequate action on the state's positive obligations to protect citizens from the consequences of climate change. The Court finds that Article 8 of the Convention guarantees individuals the right to effective protection by the State against the serious adverse

[15] The lawsuit was filed by a Swiss association of senior female citizens with more than 2,000 members, most of whom are over 70, and was joined by four other senior female citizens (all over 80) who reported health problems due to increasingly frequent heatwaves.

consequences of climate change on their life, health, well-being, and quality of life. The article, originally added to the Convention primarily to protect individuals from oppressive forms of state control, has thus been transformed into a provision that also offers protection to individuals against the state's inaction in responding to climate change. Such a departure from the intentions of the drafters of the Convention and from the linguistic interpretation of the provision could only have occurred through judicial activism and the associated dynamic interpretation of the Convention.

The above example recalls the observations of legal realists, who recognised the significant influence of desirable public policy criteria in judicial decision-making.[16] A realistic insight into the work of the ECtHR shows that judges have a fairly wide scope of discretionary decision-making, which is expanded not only by the dynamic interpretation of the Convention, but also by the creation of so-called autonomous concepts, innovative interpretation, and the aforementioned disregard for the intentions of the Convention's drafters themselves (Popović, 2009, p. 375). In addition, it is necessary to highlight the importance of the concept of positive obligations, through which judicial law has noticeably expanded, as it allows for the recognition of rights that did not previously exist and the imposition of responsibilities on states that could not previously be determined (Bošnjak, Zajac, 2023, p. 7). The operation of the concept of positive obligations in this way clearly undermines the principles of predictability and stability of law, which are among the constitutive principles of the rule of law (German *Rechtsstaat*). Over the decades, a judicial culture has clearly developed at the ECtHR, which is prepared to partially sacrifice these principles in the name of harmonising European human rights law with current social challenges. The positive aspect of this

[16] Empirical research on the voting (decision-making) patterns of individual US Supreme Court justices has shown that the policy preferences of individual justices are a dominant factor in their decision-making (Lindquist, Smith, Cross, 2007, p. 125).

judicial culture is, as mentioned, the ability to adapt the Convention to current circumstances and needs, while its negative aspect lies in reducing the predictability and stability of Convention law. Therefore, it is important that the judges of the ECtHR, and the Court as an institution, constantly exercise appropriate self-restraint in the dynamic interpretation of the Convention and do not allow such interpretation to lead to a degree of judicial discretion that would devalue the principle of the rule of law and result in the dominance of policies and politics over the law.

The Court must therefore continually ensure a balance between judicial activism and judicial self-restraint. This balance must affirm the role of the ECtHR in building a broader European area where human rights law is developing as the instrument that preserves, at the supranational level, the relationship between the principles of justice, freedom, equality, legal certainty and, last but not least, solidarity, which have emerged in the modern era as key elements of the substantive-formal concept of the rule of law in the broader sense. Judicial activism at the ECtHR can be attributed at least in part to the legal-political vision of Europe shared by many judges. There is indeed a range of differences among them, but similarities, for example in education and social status, allow for the existence of a similar legal-political vision on the basis of which they interpret the Convention. This vision includes integrative processes that build a legal and political identity of Europe extending beyond the framework of the European Union, within which an equally important integrative role belongs to the Court of Justice of the European Union. The latter is characterised by the fact that, in cases where the consequences are significant for further integration of the Union, it gives priority to pro-union arguments and, through expansive interpretation, recognises broader competences for the institutions of the European Union (Beck, 2017, p. 353). Successful integrative processes require at least two things: political will and legal rationality, which

work towards a common goal. History provides numerous examples demonstrating the enormous contribution of lawyers to the success of such processes – from the emergence of the first modern states to supranational integrations such as the European Union.

Regarding the need to achieve an appropriate balance between judicial activism and judicial self-restraint, two further aspects should be briefly noted. First, from a broader perspective, it is sensible for this balance to be established within the framework of a legal and political consensus among the member states of the Council of Europe. This framework should not be seen as a rigid structure that leaves no room for judicial creativity, nor as a call for any form of direct political pressure on the work of the ECtHR. Legal and political consensus are highly dynamic concepts that allow for substantive transformation if changing socio-political circumstances require it. The balance between judicial activism and judicial self-restraint is important precisely to ensure that the law is appropriately adapted to prevailing socio-political circumstances. This adaptation must be gradual, not abrupt or revolutionary. If (judicial) law does not follow the logic of balancing activism and restraint, the consequences for the political community are more destructive than constructive, as this introduces a lack of coordination between the institutions of power. It is important to recognise that the ECtHR does not operate in a political vacuum, where the consequences of its judgments are irrelevant to the wider community. Uncritically succumbing to judicial activism can initiate the breakdown of the political consensus that was necessary for the creation of the ECHR and the ECtHR. For example, in the United Kingdom, public debates about a possible withdrawal from the Council of Europe are becoming increasingly frequent. Therefore, it is important for judges to recognise and be aware of the existing consensus, to understand it and, in their autonomous judgment, to follow it to the extent they consider appropriate. This is also

the best way to avoid a scenario in which the ECtHR's jurisdiction is reduced.

Secondly, from a narrower legal perspective, it is logical that the ECtHR seeks the above-mentioned balance in interpreting ECHR provisions, primarily by appropriately balancing different methods of legal argumentation. In this context, the fundamental starting point of interpretation must remain linguistic, logical, and systematic approaches, which should initially be considered alongside a static historical interpretation and the court's established precedential decisions. Only when the court reliably and convincingly determines in a specific case that a predominantly static approach deviates excessively from the needs and values required by current social circumstances and relatively predictable social trends, should a dynamic interpretation of convention provisions be applied, in which socio-contextual and teleological elements usually play an important role.

4. The political will of states as the *raison d'être* of the ECHR

When discussing the institutional structures of individual states, we cannot avoid the concept of the division or separation of powers among the legislative, executive, and judicial branches of government. Montesquieu assigned the judiciary a place in the shadow of the great legislator, from which it should faithfully follow his words. The courts are considered the weakest and therefore the least dangerous branch of state power, lacking executive powers and capacities.[17] From this perspective, the judiciary, being the least politically biased and least motivated to gain political power, is the most reliable part of state power for enforcing the rights of the individual in relation to the state—a view rooted mainly in the political doctrine of classical liberalism. It is

[17] This is the main message of Alexander Bickel's book *The Least Dangerous Branch* (1962), in which he analyses the doctrine of constitutional review.

from liberalism that the idea of fundamental human rights and freedoms develops, politically manifested primarily in the demand for individual liberty, the protection of political rights, and the protection of private property (Cerar, 2024, p. 942).

If we consider Europe as a broader legal and political entity—one that extends beyond formally established legal and political associations such as the European Union—the ECtHR can be seen as its judicial authority in the field of human rights protection. Both the ECHR and its institutional counterpart, the ECtHR, were historically created on the basis of the clearly expressed political will of the national member states of the Council of Europe, who aimed to establish a supranational judicial body that would, at least within the framework of European states,[18] oversee respect for universally conceived human rights and freedoms. Historically, it was not possible to establish an autonomous legislative or executive authority within the Council of Europe, but it was possible to establish a court whose jurisdiction over time significantly exceeded the borders of individual national states or the European community. The emergence of the ECHR and the ECtHR was driven by the ideological and political consensus after World War II among exhausted (Western) countries, which sought in this way a normative basis for broader European integration. Consequently, we can say that the ECtHR, in addition to its fundamental legal mission, also plays an important political role in Europe by working towards the unification of human rights law. The very content of human rights (protection of life, property, privacy, environment, work, freedom of expression, movement and association, etc.) depends to a large extent on politics (see Cerar 2024, p. 944), which gives substance to the concept

[18] In Western Europe, when the Council of Europe and the ECtHR were founded, it was clear that the universal achievement of peace and the protection of human rights was an illusion or at least a very distant reality. Therefore, the founding states of the Council of Europe decided to pursue this goal at least within the framework of that part of Europe committed to human rights because of its shared civilisational heritage and values (Perenič, 2004, p. 49).

of human rights on the basis of fundamental ideological assumptions. The Council of Europe is considered to promote human rights and freedoms on the basis of a predominantly liberal-democratic political doctrine, which is the leading political doctrine within the modern Western democratic legal-political tradition. The political role of the ECtHR is therefore reflected in the consolidation of human rights law in the wider European area, in harmony with the fundamental values of liberalism, such as freedom, human dignity and (legal) equality.

The ECtHR is not supported by an effective state authority to guarantee the enforcement of its judgments. The Court's judgments are legally binding on the Member States involved in the proceedings, but the States themselves are responsible for their enforcement. This highlights the importance of the rule of law, which requires consistent compliance with court decisions. Understanding and complying with the decisions of the ECtHR reflects the level of political and legal culture in individual member states of the Council of Europe. Their political culture is demonstrated by their understanding of the role, meaning and functioning of the ECtHR, while the legal culture of individual states is reflected in their consistency in enforcing the Court's decisions.

Human rights are, in terms of content, an essential part of the modern (material-formal) concept of the rule of law in the broader (integral) sense of the word (Cerar, 1996, p. 143 *et seq.*); therefore, the enforcement of ECtHR judgments also indicates the level of development of this fundamentally legal-political ideal. A realistic insight into the operation of the ECtHR shows that the actual influence of this court depends primarily on the willingness of individual member states of the Council of Europe to follow the decisions of the judges in Strasbourg. The ECtHR has established a certain authority over decades of operation,[19] but the lack of effec-

[19] The authority of the ECtHR primarily stems from the legal persuasiveness of its judgments. Excessive judicial activism could lead to a decline in trust in the court, which would also

tive mechanisms for directly ensuring the enforcement of its judgments nevertheless maintains the ECtHR's strong dependence on the political and legal culture and the level of the rule of law in individual countries. These countries can also decide to withdraw from the Council of Europe at any time if their political will no longer reflects a commitment to this integration.[20]

There is a constant, though largely well-concealed, tension between individual states and the ECtHR regarding control over the legal sources of European human rights law. This is essentially a matter of establishing power relations between individual states and the ECtHR, with states often striving to maintain as much sovereignty and autonomy as possible in the operation of all three national branches of power. It is notable that, at least in countries moving away from the principles of liberal democracy, the ECtHR's decisions are most loudly criticised, as they are perceived as an attack on their democratic decision-making systems. The ECtHR appears in certain respects as a kind of European constitutional court for the protection of human rights, although its limited powers—especially its inability to act as a so-called negative legislator and the absence of the *erga omnes* effect of its judgments (cf. Zupančič 2020, pp. 26–27)—do not entirely allow for such comparisons. In any case, in terms of human rights, it is a court of last resort within the sphere of the Council of Europe, above which there is only blue sky, to use a somewhat worn-out phrase. However, since the court was established and is maintained on the basis of the political will expressed in individual member states of the Council of Europe, it is crucial that the judicial activism of the ECtHR

endanger its authority.

[20] In recent years, public debate on leaving the Council of Europe has intensified, especially in the United Kingdom. This debate should be understood in the context of Brexit and the strengthening of the traditional decision-making autonomy of British courts and the legislature. In 2022, the Russian Federation was expelled from the Council of Europe due to the invasion of Ukraine and the resulting war. With Russia's expulsion, the Council of Europe lost influence in the largest country in the world, against which a large number of cases had previously been brought before the ECtHR.

and the margin of appreciation allowed to states remain in constant and reasonable balance.

5. Conclusion

The development of law must keep pace with societal development—social, economic, and political. When the law fails to match the speed of social change, moderation in society and politics is replaced by ardent extremism, which can lead to social disintegration. In this article, the integration potential of the ECtHR in the wider European context was repeatedly emphasised. Realising this potential depends particularly on the court's ability to adequately respond to social change. The dynamic interpretation of the ECHR aims precisely at this goal: to ensure that the case law of the ECtHR remains aligned with contemporary challenges. The phenomenon of judicial activism, which is closely linked to the dynamic interpretation of the Convention, is not confined to the present but also seeks to derive solutions from the provisions of the Convention that would support far-reaching changes.

Judicial activism cannot function without incorporating public policy criteria into judicial decision-making. Instead of relying solely on legal correctness, judicial activism emphasises the intended consequences of individual judgments, making its nature distinctly instrumental. The case of *Verein KlimaSeniorinnen Schweiz*, mentioned in the discussion, best exemplifies judicial activism by the ECtHR, which in this instance responds to public policy concerns regarding the management of climate change consequences.[21] We will not comment on the positive or negative outcomes of

[21] The mission of the ECtHR is certainly not limited to prescribing measures to address the consequences of climate change. The reasoning in the case in question also indicates that governments and legislators in individual countries are required to take such action. However, judicial assessment of the adequacy of measures in this area, which is sometimes unavoidable, often requires a dynamic judicial interpretation of general legal acts and therefore a greater or lesser departure from strictly formal legal decision-making criteria.

this landmark decision here. For the purposes of this discussion, the case serves only as an example of considering public policy criteria in judicial reasoning.

Regarding judicial activism, which is based on dynamic judicial interpretation and allows judges a broader interpretative and argumentative scope, it is important that, according to the principle of judicial self-restraint, the judges of the ECtHR exercise this power only to a limited and reasonable extent, particularly in cases where there is consensus on the desired solutions among at least the majority of states, and where such consensus can be reflected in the court's decisions within the framework of the rule of law. Of course, there are and will be cases where the ECtHR may justifiably deviate from such consensus in an activist manner to make principled judicial decisions that protect human dignity and other fundamental values and goods safeguarded by human rights. However, consideration of consensus is necessary in light of the power relations between the ECtHR and individual states. The latter are responsible for executing the judgments issued, which significantly limits the actual power of the court. The political will of the states created the ECtHR, and only through political will can the ECtHR maintain its status as a supranational European court of human rights. The emergence of the ECHR was the result of the political and ideological consolidation of the founding members, which eventually spread east and south across Europe. The ECHR represents a symbol of the commitment of European democracies to predominantly liberal conceptions of human rights and freedoms, and the closely related ideals of the rule of law. To ensure democratic values and, in particular, peace, security and prosperity, Europe will continue to require integration processes, to which the ECtHR can and must contribute significantly.

LITERATURE AND SOURCES:

Beck, G. (2017). Judicial Activism in the Court of Justice of the EU. University of Queensland Law Journal 36 (2), pp. 333-353.
Bickel, A. (1962). The Least Dangerous Branch. The Supreme Court at the Bar of Politics. New Haven: Yale University Press.
Bošnjak, M., Zajac, K. (2023). Judicial Activism and Judge-Made Law at the ECtHR. Human Rights Law Review 23, pp. 1-15.
Cerar, M. (1996). Večrazsežnost človekovih pravic in dolžnosti [Multidimensionality of Human Rights and Duties]. Ljubljana: Založba Sophia.
Cerar, M. (2024). Človekove pravice med politiko in pravom [Human Rights between Politics and Law]. Teorija in praksa 61 (4), pp. 931-960.
D'Amato, A. (1996). The Injustice of Dynamic Statutory Interpretation. Northwestern University School of Law Public Law and Legal Theory Research Paper Series No. 10.
ECtHR *Cossey v. UK*, European Court of Human Rights, No. 10843/84, 27 September 1999, ECLI:CE:ECHR:1990:0927JUD001084384.
ECtHR *Stafford v. UK*, European Court of Human Rights, No. 46295/99, 28 May 2002, ECLI:CE:ECHR:2002:0528JUD004629599.
ECtHR *Tyrer v. UK*, European Court of Human Rights, No. 5856/72, 25 April 1978, ECLI:CE:ECHR:1978:0425JUD000585672.
ECtHR *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, European Court of Human Rights, No. 53600/20, 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020.
ECtHR *Young, James and Webster v. UK*, European Court of Human Rights, Nos. 7601/76, 7806/77, 13 August 1981, ECLI:CE:ECHR:1981:0813JUD000760176.
Eskridge, W. N. (1987). Dynamic Statutory Interpretation. University of Pennsylvania Law Review 135, pp. 1479-1555.
Guillaume, G. (2011). The Use of Precedent by International Judges and Arbitrators. Journal of International Dispute Settlement 2 (1), pp. 5-23.
Lindquist, S., Smith, J., Cross, F. (2007). The Rhetoric of Restraint and the Ideology of Activism. Constitutional Commentary 24, pp. 103-125.
Pavčnik, M. (2013). Argumentacija v pravu. Od življenjskega primera do pravne odločitve [Argumentation in Law: From a Concrete Case to Legal Decision]. Ljubljana: Lexpera, GV Založba.
Perenič, A. (2004). Svet Evrope in človekove pravice [The Council of Europe and Human Rights]. In: Dokumenti človekovih pravic z uvodnimi pojasnili. Ljubljana: Amnesty International Slovenije, Mirovni Inštitut, pp. 49-58.
Popović, D. (2009). Prevailing of judicial activism over self-restraint in the jurisprudence of the European Court of human rights. Creighton Law Review 42, pp. 361-396.
Posner, R. (1983). The Meaning of Judicial Self-Restraint. Indiana Law Journal 59, pp. 1-24.
Rehnquist, W. (1976). The Notion of a Living Constitution. Texas Law Review 54, pp. 693-706.
Scalia, A. (1989). The Rule of Law as a Rule of Rules. The University of Chicago Law Review 66 (4), pp. 1175-1188.
Scalia, A. (2018). A Matter of Interpretation: Federal Courts and the Law. Princeton and Oxford: Princeton University Press.
Spaić, B. (2023). Evolutionary and Static Interpretation. In: Research Handbook on Legal Evolution / Załuski W., Bourgeios-Geronde, S., Dyrda, A. (eds.). Cheltenham: Edward Elgar Publishing.
Zupančič, B. M. (2020), O Evropskem sodišču za človekove pravice. Kritična retrospektiva (1998–2019) [On the European Court of Human Rights. An Insider's Retrospective (1998–2019)]. Ljubljana: Lexpera, GV Založba.