

EVOLUTIVE INTERPRETATION WITH REFERENCE TO RECENT EUROPEAN COURT OF HUMAN RIGHTS CLIMATE CHANGE CASE LAW

Summary

Evolutionary interpretation is one of the most important principles of interpretation that has enabled the Court to interpret the Convention in the light of present-day conditions, expanding the scope of protection under the Convention, and at the same time, raising the question of the permissible limits of interpretation. In the recent climate change case law, the Court has found a violation due to the failure of the respondent state to develop and implement a normative framework that would mitigate the consequences of climate change. The Court has applied evolutionary interpretation considering that the Convention does not guarantee the right to a healthy environment or a similar right. The authors use the normative and casuistic methods to determine whether the Court's recent climate change case law provides clearer parameters for the application of the evolutionary interpretation. The research results indicate that judicial case law is not coherent with regard to these conditions, and consequently, the limits of the Convention's evolutionary potential remain unclear.

Keywords: evolutionary interpretation, European consensus, limits of evolutionary interpretation, climate change case law, the right to a healthy and clean environment.

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EVOLUTIVNO TUMAČENJE S OSVRTOM NA RECENTNU PRAKSU EVROPSKOG SUDA ZA LJUDSKA PRAVA U KLIMATSKIM PREDMETIMA

Sažetak

Evolutivno tumačenje jedno je od najvažnijih načela interpretacije koje je omogućilo Sudu da Konvenciju tumači u svjetlu današnjih uvjeta. Na takav način proširuje se opseg zaštite Konvencije, ali se istodobno otvara pitanje dopuštenih granica tumačenja. U recentnoj praksi Sud je utvrdio povredu Konvencije uslijed propusta odgovorne države da razvije i provede normativni okvir kojim bi se ublažile posljedice klimatskih promjena. U tim predmetima Sud je primijenio evolutivno tumačenje s obzirom na to da Konvencija ne jamči pravo na zdrav okoliš ili drugo slično pravo. Autori primjenom normativne i kazuističke metode ispituju je li Sud u svojoj recentnoj praksi u klimatskim predmetima dao jasnije kriterije za primjenu evolutivnog tumačenja. Rezultati istraživanja ukazuju da sudska praksa nije koherentna u pogledu ovih uvjeta pa su granice evolutivnog potencijala Konvencije ostale nejasne.

Ključne riječi: evolutivno tumačenje, europski konsenzus, granice evolutivnog tumačenja, klimatski predmeti, pravo na zdrav i čist okoliš.

1. Introduction

The European Court of Human Rights (hereinafter: the Court) has ruled recently in three cases related to the violation of human rights due to climate change. Although such violation was found in only one case, the Court's reasoning in all the three cases could have far-reaching consequences. The Court has applied evolutive interpretation and extended the scope of protection of the Convention, although the right to a healthy and clean environment is guaranteed by neither the European Convention on Human Rights (hereinafter: the Convention) nor the additional protocols to the Convention.

The Court formulated the evolutive interpretation in 1978, stating that the Convention should be interpreted in the light of present-day conditions. Such argumentation has enabled the Court to develop the convention rights and freedoms by adapting the original text to new conditions. Consequently, evolutive

interpretation is often qualified as judicial activism by which the Court creates new rights and freedoms against the will of the contracting parties. As such, the evolutive interpretation was strongly contested, even by the judges themselves.

Nowadays, evolutive interpretation is a generally accepted interpretative principle of the Convention. The focus of legal scholars and practitioners is directed towards establishing cleared boundaries of evolutive interpretation. In this paper, the authors will analyse three climate change cases in order to determine whether the Court, in its recent practice, has provided clearer parameters for the application of this method. A clear formulation of the conditions is in the interest of legal certainty, and it can contribute to the legitimacy of the Court. The authors will use the normative and casuistic methods to establish the relation between the original text of the Convention and the meaning of specific Convention standards developed in the Court case law when applying evolutive interpretation. Based on the established relation, conclusions will be drawn about the permissible limits of evolutive interpretation.

2. Evolutive Interpretation Concept and Application in the European Court of Human Rights Case Law

There are three approaches to the interpretation of international treaties: textual, subjective and teleological (Dothan, 2019, p. 766). The Convention does not set any rules for interpretation, specifying only that the Court has jurisdiction in all issues concerning its interpretation and application (Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 32). The Court has developed special interpretative rules based on the general rule of interpretation under the UN Convention on the Law of Treaties (Vienna Convention on the Law of Treaties, Art. 31). The principle of evolutive interpretation is derived from the rules on subsequent practice since the Court used practice between states as a basis for evolutive interpretation (Marochini Zrinski, 2018, p. 427).

Evolutive interpretation is a method of interpretation that bridges the gap between the date of adoption and the date of application of the Convention. It implies the interpretation in the light of present-day conditions (Marochini, 2014, p. 77). Evolutive interpretation enables realization of its “*spiritus movens* - effective protection of human rights” (Hadži Stević, 2021, p. 75). The principle of effectiveness is the basis of the evolutive interpretation (Tulkens, 2011, p. 8). Due to the possibility of expanding the scope of protection (Lubura, 2021, p. 163), there are claims that evolutive interpretation represents a manifestation of judicial activism (Đajić, 2019, p. 376), and that in a certain sense it is not an interpretation, but a judicial

creation of law (Schabas, 2015, p. 48). This principle of interpretation enables overcoming the outdated concepts in the event of changed European public opinion (Greer, 2010, p. 6). In other words, evolutive interpretation enables the evolution of the Convention in accordance with the conditions that exist at the time of its application. Therefore, it can be claimed that this principle, although it is classified as a secondary principle of interpretation (Greer, 2006, p. 213), has had a key role in the development of the entire convention system (Hariri, 2022, p. 13).

Even the judges themselves have initially contested the evolutive interpretation (Mihelčić & Marochini Zrinski, 2018, p. 134). Nowadays, this principle is still subject to a strong and often justified criticism. The core of the criticism refers to the legitimacy of the Court to change the original text of the Convention against the will of the contracting states. Evolutive interpretation implies a certain change that may be contrary to the requirements of legal certainty and coherence, especially in cases where it is not based on the evolution that has taken place in the legislation and practice of the member states. Mihelčić & Marochini Zrinski (2018, p. 135) especially emphasize the importance of the coherence of case law for the Court's legitimacy. Dzehtsiarou (2011, p. 1730) believes that the European consensus is a key factor in achieving the Court's legitimacy. The European consensus can be seen as a tacit consent of the states to the evolutive interpretation (Dzehtsiarou, 2011, p. 1743). Letsas (2012, pp. 21-24) believes that the evolutive interpretation corresponds to a moral reading of the Convention, whereby the legitimacy derives primarily from the Convention itself, since the states undertook to abide by the final judgment of the Court. Therefore, the legitimacy of the Court derives from this obligation, whereby the Court has the duty to develop a morally coherent system of interpretation principles.

The Court formulated the evolutive interpretation for the first time in the *Tyrer* case,¹ referring to the fact that the Convention is a living instrument that must be interpreted in the light of present-day conditions based on the developments and commonly accepted standards in the contracting states (*Tyrer v The United Kingdom*, Application No. 5856/72, Judgment ECHR, 25 April 1978, para. 31). Although it would appear from the Court's wording that it invoked a well-established principle for the interpretation, it is the first case in which the Court has applied evolutive interpretation. Most criticisms of the application of this principle would be weaker if the Court explained what it means by this principle and when it can be applied. However, the Court set the conditions only implicitly. When evaluating whether

¹ Although the majority of authors cite the *Tyrer* case as the origin of the evolutive interpretation, Professor Helgesen (2011, p. 19) states that the evolutive interpretation began with the *Golder* case, in which the Court found that the right of access to the court is an integral part of the procedural guarantees under Article 6 of the Convention.

the punishment represented a humiliating behaviour, the Court referred to the developments and commonly accepted standards in the member states. This position of the Court represents the origin of the later developed standard for the application of evolutive interpretation, the European consensus. The European consensus in the *Tyrer* case was a clear given that corporal punishment had been abolished everywhere except on the island in question, which made it easier for the Court to formulate this principle (Djeffal, 2016, p. 303).

Since the *Tyrer* case, the Court has applied the evolutive interpretation in numerous cases. However, judicial reasoning has not always been consistent. One of the examples of the inconsistent use of evolutive interpretation is the *Marckx* case. In this case, the Court referred to the need to interpret the Convention in the light of present-day conditions. Nevertheless, the problem lies in the way these conditions were determined. The Court determined such conditions not on the basis of practice or legislation in the member states, but on two conventions, regardless of the fact that only a few countries had acceded to these conventions. According to the Court, the mere existence of these two conventions implied the existence of a clear common basis among modern societies (*Marckx v Belgium*, Application no. 6833/74, Judgment ECHR, 13 June 1979, para. 41).²

Evolutive interpretation is a particularly suitable means of interpretation the Court has used in controversial cases, e.g. cases related to homosexuals. In the *Dudgeon* case, which concerned a domestic law that criminalized homosexual acts between men, the Court redefined consensus so that it was relevant for the existence of consensus that, compared to the time when the law was passed, now the majority of member states does not consider it necessary or appropriate to criminalize homosexual practices (*Dudgeon v The United Kingdom*, Application no. 7525/76, Judgment ECHR, 22 October 1981, para. 60).

The European consensus can lead to the opposite result, a static interpretation. (Sonnleitner, 2022, p. 30). If the European consensus is a condition for an evolutive interpretation, by concluding an *argumentum a contrario*, it is justified to claim that the absence of consensus makes an evolutive interpretation

² This interpretation was strongly opposed, among others, by Judge Fitzmaurice. Fitzmaurice specifically emphasized his disagreement with the claim that the distinction between legitimate and illegitimate children is vanishing. Judge Fitzmaurice also emphasized the need to allow a certain margin of appreciation to the states, which, according to the established case law, should be wider if there was no European consensus on the matter. Finally, the remarks of Judge Fitzmaurice, in which he denounces the Court for abuse of power to hold domestic authorities guilty of a breach of the Convention merely by virtue of the existence or application of a law which is not itself unreasonable or manifestly unjust, are also significant (*Marckx v Belgium*, Application no. 6833/74, Judgment ECHR, 13 June 1979, Dissenting opinion of Judge Gerald Fitzmaurice, para. 31).

impossible. Such a conclusion was also confirmed in the case of *Sheffield and Horsham*. The Court found that there was still no common approach on how to deal with the consequences which legal recognition of gender reassignment may have had for other areas of law. For this reason, the Court refused to apply the evolutive interpretation and change the existing case law (*Sheffield and Horsham v The United Kingdom*, Application nos. 22985/93 23390/94, Judgment ECHR, 30 July 1998, paras. 57- 58).

The application of the evolutive interpretation raises another legal question. Although the Court does not apply the doctrine of precedent, as a rule, it refers to the earlier cases (Omejec, 2014, p. 1285). In the *Christine Goodwin* case, the Court pointed out that it should not depart from the case law without good reason. However, in the same case, the Court made it clear that it must take into account changing conditions within the Contracting States and respond to “any evolving convergence as to the standards to be achieved” (*Christine Goodwin v The United Kingdom*, Application no. 28957/95, Judgment ECHR, 11 July 2002, para. 74). Therefore, although the Court generally follows its own case law, it is not an obstacle to evolutive interpretation if there has been a change in conditions within the member states. The *Christine Goodwin* case is significant for another reason. As in the *Marckx* case, the Court has determined the existence of consensus based on a continuous international trend that compensated for the lack of a common approach in the member states.

The Court also used the so-called virtual consensus for justifying the evolutive interpretation. The Court referred to this type of consensus in the *Soering* case, where it established the existence of consensus because the death penalty was not *de facto* executed even if it existed in the legislation. In addition, as evidence of the European consensus, the Court cited Protocol no. 6, which at that time was not signed by the respondent state (*Soering v The United Kingdom*, Application no. 14038/88, Judgment ECHR, 7 July 1989, para. 102). That is why some authors label this type of consensus as emerging consensus (Sonnleitner, 2022, p. 31). When determining this type of consensus, the Court tends to rely on specialized international instruments in a certain area. The Court sometimes does not elaborate in detail the evidence of the existence of such a consensus, but refers to the general formulation that the Convention must be interpreted in the light of the ideas that prevail in democratic states (*Bayatyan v Armenia*, Application no. 23459/03, Judgment ECHR, 7 July 2011, para. 102).

The coherence of the Court case law is particularly questionable in cases where the Court did not apply the evolutive interpretation despite the existence of consensus, and in cases where the Court applied the living instrument doctrine despite the lack of consensus. In the case of *A, B and C v Ireland*, the Court found

that there was a consensus among a substantial majority of the member states to allow abortion on broader grounds than those allowed by the Irish law. However, the Court did not apply an evolutive interpretation (*A, B and C v Ireland*, Application no. 25579/05, Judgment ECHR, 16 December 2010, para. 235-236). Marochini (2014, p. 78) states that this particular case proves that the Court refrains from using this method of interpretation in sensitive cases. According to Etinski (2022, p. 25), this case indicates that there may be certain special interests that nullify the effect of the European consensus. While restraint in using the living instrument doctrine in sensitive cases can be justified, the use of this doctrine when there is an obvious lack of consensus brings evolutive interpretation closer to judicial lawmaking. For example, in the case related to the legal recognition of gender change in the birth certificate, the Court applied an evolutive interpretation by referring to the very essence of the Convention - respect for human dignity and human freedom, although there was no European consensus (*I. v The United Kingdom*, Application no. 25680/94, Judgment ECHR, 11 July 2002, para. 70). Sonnleitner (2022, p. 35) considers that this avoidance of the relevance of the European consensus reduces the persuasiveness of the judicial approach to evolutive interpretation.

3. Limits of Evolutive Interpretation

Evolutive interpretation can undermine the fundamental legal values, such as foreseeability, coherence, and legal certainty. This is why both academia and practitioners focus on determining the limits of evolutive interpretation. The authors start from the limits of evolutive interpretation established by Judge Sicilianos because the criteria determined by him essentially summarize the criteria stated by the majority of authors who researched this topic.³ In addition to the limits set by Judge Sicilianos, the different criteria proposed by other authors will also be analysed.

According to Sicilianos, evolutive interpretation has three limits: it must not be *contra legem*, it must be in accordance with the object and purpose of the Convention in general and with the purpose of a specific provision, and it must reflect present-day conditions (*Magyar Helsinki Bizottság v Hungary*, Application no. 18030/11, Judgment ECHR, 8.11.2016, Concurring Opinion of Judge Sicilianos, para. 10).

³ Sicilianos was a judge of the European Court of Human Rights in respect of Greece between 2011 and 2020. Having been elected as a judge of the European Court of Human Rights as from 18 May 2011, Linos-Alexandre Sicilianos served as Section President from 1 February 2017 to 4 May 2019. and Vice-President of the Court from 1 May 2017 to 4 May 2019. He has been President of the Court since 5 May 2019.

The first limit, the prohibition of interpretation contrary to the Convention, has been repeatedly confirmed in case law, and it is often considered to be an aspect of the prohibition of judicial legislation (Etinski, 2022). The prohibition implies that the Court may not, by interpretation, create a new right. Judge Myer points out that, although the Convention is a living instrument, the Court cannot create rights that are not set out in the Convention, however expedient or even desirable those rights may be (*Muñoz Díaz v Spain*, Application no. 49151/07, Judgment ECHR, 8 December 2009, Dissenting Opinion of Judge Myer). For example, the Court found that the right to marry does not include the right to divorce (*Johnston and Others v Ireland*, Application no. 9697/82, Judgment 18 December 1986, para. 52) and that Article 2 does not include the right to die (*Pretty v The United Kingdom*, Application no. 2346/02, Judgment ECHR, 29 April 2002, para. 39). Contrary to this, Djeffal (2016, p. 313) believes that the formula of new rights gives hardly any guidance with regard to the conflicting requirements between the prohibition of the creation of a new right and an unjustified restriction of the rights. It is paradoxical that the *Magyar Helsinki Bizottság case*, in which Judge Sicilianos defined the prohibition of interpretation *contra legem* as the limit of evolutive interpretation, is also cited as an example of judicial legislation, i.e., as the creation of a new right that is not specified in the Convention (Etinski, 2022, p. 8). The problematic nature of this criterion is reflected in its vagueness and dependence on the judge's subjective interpretation. While in the *Magyar Helsinki Bizottság case*, Judge Sicilianos held that Article 10 also included the freedom to seek information (*Magyar Helsinki Bizottság v Hungary*, Application no. 18030/11, Judgment ECHR, 8 November 2016, Concurring Opinion of Judge Sicilianos, para. 13), Judges Spano and Kjølbro maintained that Article 10 did not, and had not meant to encompass the right to access information held by public authorities that they were not willing to impart or were obliged to disclose under domestic law (*Magyar Helsinki Bizottság v Hungary*, Application no. 18030/11, Judgment ECHR, 8 November 2016, Dissenting Opinion of Judge Spano Joined by Judge Kjølbro, para. 12).

Another limit of evolutive interpretation refers to the object and purpose of the Convention. Sicilianos states that an interpretation contrary to the object and purpose of the Convention would be tantamount to betraying the party's intentions and undermining the Convention system (*Magyar Helsinki Bizottság v Hungary*, Application no. 18030/11, Judgment ECHR, 8 November 2016, Concurring Opinion of Judge Sicilianos, Joined by Judge Raimondi, para. 14). However, it is relatively easy for the Court to justify the application of an evolutive interpretation in accordance with the generally proclaimed object and purpose of the Convention, since the preamble explicitly states that the goal of the Convention is

not only the maintenance, but also “further realization of human rights and fundamental freedoms” (European Convention of Human Rights and Fundamental Freedoms, Preamble). Despite this, as Sonnleitner (2022, p. 50) states, the Court has never used this purpose to legitimize the use of evolutive interpretation in its case law. The Court did not even establish a direct connection between this part of the preamble and evolutive interpretation. The only judges that did so were Sicilianos and Raimondi when in their concurring opinion in *Magyar Helsinki Bizottság* case they claimed that the general purpose can also have that function (Sonnleitner, 2022, p. 51). In addition, the Court itself stated in the case law that the subsequent practice of the parties may exceed the object and purpose of the Convention (*Soering v The United Kingdom*, Application no. 14038/88, Judgment ECHR, 7 July 1989, para. 103). Bureš (2017, p. 25) believes that the object and purpose of the Convention cannot be the limit of evolutive interpretation at all, as they apply to any type of interpretation. Moreover, it is precisely the purpose of the Convention that has been seen as constituting the basis for the application of evolutive interpretation.

Present-day conditions, as the third limit of evolutive interpretation, were already determined in the case of *X and others against Austria*. In a joint dissenting opinion, seven judges emphasized that the point of the evolutive interpretation is to accompany and even channel the change, and not to anticipate it, or even less so to try to impose it (*X and Others v Austria*, Application no. 19010/07, Judgment ECHR, 19 February 2013, Joint Partly Dissenting Opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos, para. 23). Interpretation in light of present-day conditions is the most fluid limitation to evolutive interpretation. Its fluidity stems from the different methodology used by the Court to determine the present-day conditions. While the approach of the Court was based initially on the legislation and practice of the member states, later it was based on the methodology evolved toward including the international practice, and finally, on the trends observed at the international level. It is precisely from this methodology that the significance of this limit emerges. There is no doubt that an international trend is a weaker form of consensus compared to the practice and legislation of the member states. However, this form of consensus enables the Court to move more easily from the preservation of human rights to their further elaboration in order to keep the pace with the changes in the circumstances in which they are to be realized. That is why the new methodology of writing the Court’s decisions, where the relevant legal framework is analysed in a separate section of the decision, comes very useful (Sicilianos, 2020, p. 5). An insight into the legal framework that the Court considers when determining present-day conditions enables control of judicial reasoning and prevents rulings

based on conditions that could possibly arise in the future but do not exist at the moment of the Court's ruling. Bureš (2017, p. 25) believes that interpretation in light of present-day conditions is not the limit of evolutive interpretation but "rather a consequential description of adjudicator activity of the court."

Determining the limits of evolutive interpretation is also important for one more reason. The Convention is an international agreement concluded by the contracting states. Excessive use of the living instrument doctrine can lead to a situation where the contracting states and the Court could have different views on the degree of evolution of the Convention. Although we do not think that the Court should refrain from evolutive interpretation just because its reasoning might not please the respondent state, the Court must take into account the degree of legitimacy of its rulings. The legitimacy of the Court appears to be a kind of extra-legal limit of evolutive interpretation. Dzehtsiarou (2011, p. 1730) believes that the European consensus can provide a sufficient response to the objections to the Court's legitimacy. The existence of the European consensus can mitigate objection about the foreseeability of changes, which appears as another limit of evolutive interpretation (Djeffal, 2016, p. 308). Foreseeability and legal certainty, according to Sonnleitner (2022, p. 79), can even be improved by an evolutive interpretation if priority is given to the protection of individual rights and human dignity over the formal concept of the rule of law.

Certainly, one of the indicators of the degree of the state parties' support for the Court is the percentage of implemented decisions in the area of responsibility of the contracting states. Helgesen (2011, p. 25) warns that the effect of the expansive evolution of the Convention is reflected in the decreased lack of trust between states and international supervisory bodies.

4. Evolutive Interpretation - Recent Climate Cases

On April 9, 2024, the Court announced the rulings in three cases related to climate change. In one case, the Court found a violation of the Convention, while the complaints in the remaining two cases were declared inadmissible. In each of these cases, the Court used or refrained from using the evolutive interpretation.

In *Verein KlimaSeniorinnen Schweiz and Others applicants*, four women and an association claimed that their rights had been violated because the responsible state had not taken sufficient action to mitigate the effects of climate change. In the analysis of the relevant legal framework, the Court took into account numerous legal acts and related practice within the framework of the UN, the Council of Europe, EU, and the American and African human rights systems. The Court

analysed comparative law and found that in the vast majority of the member states (38 states), non-governmental associations can initiate cases for environmental protection and/or in the interest of their members. However, the Court also found that in most countries there was no definitive case law or no case law at all in this field. The Court presented the practice of domestic courts in climate cases in a total of 8 member states.

This case is also notable for a large number of intervenors. Other governments (8) have argued that the principles of harmonious and evolutive interpretation should not be used to interpret the Convention as a mechanism for protection against climate change. On the other hand, the other intervenors pointed out different arguments: the narrow margin of appreciation of the state in climate cases due to a broad scientific and international consensus, the importance of an evolutive interpretation and flexible interpretation of the victim status, the urgency of reducing harmful emissions, and the principle of harmonious interpretation of the Convention with other international instruments.

In assessing the merits of the case, the Court simply departed from the previous case law and applied evolutive interpretation by stating that this case represented an unprecedented issue before the Court. The Court determined that there was a scientific, social, political and legal evolution in the field of environmental protection and directly referred to the living instrument doctrine (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, Application no. 53600/20, Judgment ECHR, 9 April 2024, para. 434). The Court also noted that its failure to “maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement” (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, para. 455). The Court used the consensus arising from the international law mechanisms to which the member states voluntarily acceded as a basis for such approach. In addition, the Court used evolutive interpretation when assessing the victim status and warned that any “excessively formalistic interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory” (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, para. 461). The Court found that, as a result of this development, the existing consensus, and the nature and severity of the threats arising from climate change, the state’s margin of appreciation has narrowed. After that, the Court easily concluded that the state had exceeded the margin and failed to fulfil the positive obligations under Article 8 of the Convention.

Judge Eicke criticized the application of evolutive interpretation in this case. According to him, the majority exceeded the permissible limits of evolutive interpretation, especially in relation to the victim status, and by creating a new convention right and/or a new primary obligation (*Verein KlimaSeniorinnen Schweiz*

and *Others v Switzerland*, Partly Concurring Partly Dissenting Opinion of Judge Eicke, para. 4).⁴ A particularly strong argument from the dissenting opinion refers to the fact that the contracting states refused to respond positively to the adoption of an additional protocol to the Convention that would guarantee the right to a healthy and clean environment. In addition, Judge Eicke warned that the Court did not act cautiously enough considering that the proposed law to reduce harmful emissions was rejected in the referendum. In this way, the Court annulled the democratic will of the Swiss citizens.

Unlike this case, the Court did not apply an evolutive interpretation in the other two recent climate cases. In the *Carême case*, a former mayor and former resident of a municipality in France argued that the state had not taken sufficient measures to prevent climate change. Although the intervenor in this case indicated the possibility of recognizing the victim status of the applicant, the Court declared the complaint inadmissible based on its previous case law (*Carême v France*, Application no. 7189/21, Decision ECHR, 9 April 2024).

In *Duarte Agostinho and Others v Portugal and 32 others*, the applicants, nationals and residents of Portugal, claimed that there was an infringement of the Convention due to the existing and serious future effects of climate change. The responsible states in the joint submission argued that the Court should not develop the concept of jurisdiction without the consent of the states, and in an inconsistent, unpredictable, and unprincipled way, because that would be incompatible with the principle of legal certainty. In this context, the governments pointed out that the Court has never extended the living instrument doctrine to Article 1, nor should it do so (*Duarte Agostinho and Others v Portugal and 32 Others*, Application no. 39371/20, Decision ECHR, 9 April 2024, para. 83). The intervenors, implicitly, called for an evolutive interpretation of Article 1 of the Convention considering that climate change impact is a transnational problem and that the special characteristics of climate change could justify the extension of jurisdiction. The Court refused to apply an evolutive interpretation and change its existing case law regarding the extraterritorial jurisdiction. In relation to Portugal, which had territorial jurisdiction, the Court declared the complaint inadmissible due to the applicants' failure to exhaust all domestic remedies. It can be concluded that in this case, which has been described as revolutionary (Tintor, 2021, p. 258), the Court applied the logic of judicial restraint instead of judicial activism.

⁴ According to Judge Eicke, it is the right to "effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change" and/or new primary duty "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change."

5. Conclusion

Evolutionary interpretation is a method of interpretation developed in the Court case law that enables the interpretation of the Convention in the light of present-day conditions. By applying this principle of interpretation, the Court has made it possible for the Convention to be a living instrument that has the capacity to establish, but also to develop, an effective human rights protection system.

The living instrument doctrine was established by the Court almost a half a century ago and has been continuously developed. However, its development was not always linear, and often it was even incoherent. The Court failed to determine the conditions for the application of evolutionary interpretation, and consequently, the limits of the Convention's evolutionary potential remain unclear. Implicitly, from the earlier case law it can be concluded that the condition for the application of this principle is the existence of the European consensus, established on the basis of the legislation and practice of the member states. However, the Court reformulated this standard so that in certain cases an international consensus was sufficient – in some cases that was an international trend, and in others not even that – and referred to abstract formulations about the need to ensure human rights and human dignity. On the other hand, there are also cases in which the Court did not apply an evolutionary interpretation despite the existence of a clear European consensus. Such inconsistency of the Court leads to legal uncertainty, weakening the legitimacy of the Court and strengthening the distrust of the contracting states, which can result in retrogression in this area.

The vagueness of the limits of evolutionary interpretation is particularly visible in the recent climate cases. In the case of *Verein KlimaSeniorinnen Schweiz and Others*, the Court essentially established a new Convention right. A large number of contracting states have intervened, warning about the limits of evolutionary interpretation, which clearly signals their intention. Although it would be illusory to expect that the states will accept new obligations without hesitation, determining clear conditions for the application of evolutionary interpretation is necessary, not only to neutralize criticism, but also for the sake of the Court's legitimacy and the further development of human rights.

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