

CURRENT PROGRESSIVE HUMAN RIGHTS STANDARDS BETWEEN UNWRITTEN AND WRITTEN LAWS?

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Abstract

The article examines the symbiotic and synergistic characteristics of human rights in light of their inherent normative and jurisprudential dynamism, questioning how systems of human rights protection can maintain stability while responding to evolving social and moral conditions. It highlights the central tension between legal certainty and normative development, while emphasizing the necessary balance between the limits of legal positivism and the growing importance of judicial interpretation in both domestic and international legal orders.

The first part analyses human rights as a dynamic and progressive legal concept grounded in the interaction between written and unwritten norms. Their legitimacy and adaptability do not depend solely on codified texts but on a broader interpretive framework shaped by moral reasoning, judicial conscience and principles that go beyond formal legal sources. Human rights characterized by a jurisprudential nature situated between abstraction and adaptation, requiring continuous interpretation to remain relevant are also framed as part of a continuous moral conversation between courts, legislatures and society, in which unwritten norms such as proportionality, fairness and human dignity play a crucial mediating role.

The analysis then highlights the symbiotic relationship between written and unwritten law. Written law provides structure, predictability and democratic legitimacy, while unwritten law contributes interpretive depth and moral coherence. Their interaction constitutes a condition of legal legitimacy and can be understood as a “moral ecology” of normative sources.

The core of the article is concentrated on judicial conscience as a foundation for the legitimacy of unwritten principles and as the ethical framework guiding judges in the interpretation of law. Particularly this adjudication requires more than textual fidelity and demands moral responsibility and reasoned justification. In the strict relation with judges’ ratio, the “living instrument” doctrine appears to be an expression of judicial creativity, enabling courts to adapt legal norms to evolving

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societal conditions. Judicial conscience is thus framed as a form of institutional morality that supports the principled development of human rights.

It concludes that the resilience of human rights law rests on the continuous interaction between written and unwritten norms, guided by judicial reasoning and moral principles.

Keywords: *human rights dynamism, living instrument doctrine, unwritten law, written law, judicial conscience, judicial dialogue*

Resumé

L'article examine les caractéristiques symbiotiques et synergiques des droits de l'homme à la lumière de leur dynamisme normatif et jurisprudentiel inhérent, en s'interrogeant sur la manière dont les systèmes de protection des droits de l'homme peuvent maintenir leur stabilité tout en répondant à l'évolution des conditions sociales et morales. Il met en évidence la tension centrale entre la sécurité juridique et l'évolution normative, tout en soulignant l'équilibre nécessaire entre les limites du positivisme juridique et l'importance croissante de l'interprétation judiciaire dans les ordres juridiques internes et internationaux.

La première partie analyse les droits de l'homme comme un concept juridique dynamique et progressif fondé sur l'interaction entre normes écrites et non écrites. Leur légitimité et leur adaptabilité ne reposent pas uniquement sur les textes codifiés mais sur un cadre interprétatif plus large façonné par le raisonnement moral, la conscience judiciaire et des principes qui dépassent les sources formelles du droit. Les droits de l'homme caractérisés par une nature jurisprudentielle située entre abstraction et adaptation, nécessitant une interprétation continue pour conserver leur pertinence s'inscrivent également dans une conversation morale permanente entre juridictions, législateurs et société, dans laquelle des normes non écrites telles que la proportionnalité, l'équité et la dignité humaine jouent un rôle médiateur essentiel.

La suite de l'analyse met en lumière la relation symbiotique entre droit écrit et droit non écrit. Le premier assure structure, prévisibilité et légitimité démocratique, tandis que le second apporte profondeur interprétative et cohérence morale. Leur interaction constitue une condition de la légitimité juridique et peut être comprise comme une « écologie morale » des sources normatives.

Le cœur de l'article est centré sur la conscience judiciaire en tant que fondement de la légitimité des principes non écrits et en tant que cadre éthique guidant les juges dans l'interprétation du droit. En particulier, l'acte de juger exige davantage qu'une fidélité au texte et requiert une responsabilité morale ainsi qu'une justification raisonnée. En étroite relation avec le ratio des juges, la doctrine de « l'instrument vivant » apparaît comme une expression de la créativité judiciaire, permettant aux juridictions d'adapter les normes juridiques à l'évolution des conditions sociales. La conscience judiciaire est ainsi présentée comme une forme de moralité institutionnelle qui soutient le développement principal des droits de l'homme.

Il conclut que la résilience du droit des droits de l'homme repose sur l'interaction continue entre normes écrites et non écrites, guidée par le raisonnement judiciaire et les principes moraux.

Mots-clés: *dynamisme des droits de l'homme, doctrine de l'instrument vivant, droit non écrit, droit écrit, conscience judiciaire, dialogue judiciaire*

1. Introduction

The contemporary human rights order as an intricate construction, simultaneously *written* and *unwritten*, demonstrates that its foundational instruments – the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Social, Economic and Cultural Rights* – are representing codified commitments that define the rights and obligations of States¹ and their interpretive dimension depends on principles, values, and moral convictions not themselves written.² As a direct consequence, human rights law exhibits a profound

¹ Carla Ferstman, Tony Gray (eds.), *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and its Continuing Relevance*, 1st Ed. (London: Routledge, 2018), <https://doi.org/10.4324/9781351107136>, available at https://www.taylorfrancis.com/books/edit/10.4324/9781351107136/contemporary-human-rights-challenges-carla-ferstman-tony-gray?utm_source=researchgate.net&utm_medium=article; Philip Alston, Quinn Gerard, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, in (1987) 9:2 *Human Rights Quarterly*, pp. 156-229, <https://doi.org/10.2307/762295>, available at <https://www.jstor.org/stable/762295>; Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford Monographs in International Law (Oxford: Oxford University Press, 2000), <https://doi.org/10.1093/acprof:oso/9780198298700.001.0001>, available at <https://academic.oup.com/book/3265>.

² Ludovic Hennebel, Hélène Tigroudja, *International Human Rights Law: A Treatise*, (Cambridge: Cambridge University Press, 2025), pp. 439-1066, DOI: <https://doi.org/10.1017/9781108618830>,

symbiotic and *synergistic* character, its codified form being continuously animated by the moral and jurisprudential vitality of the unwritten law.³

Although the concept of human rights is admittedly “highly abstract and general,⁴ it obtains a concrete meaning by using the technique of “shifting or changing conceptions”⁵ of justice, dignity, and equality that evolve alongside social transformation. This versatility reflects the *living instrument* character of human rights texts – a doctrine most famously articulated by the European Court of Human Rights, according to which the Convention “is a living instrument that must be interpreted in the light of present-day conditions”⁶ and encapsulates the idea that legal norms cannot remain static if they have to preserve their moral relevance, written human rights texts remaining open to reinterpretation in light of unwritten moral progress.⁷

The *rights revolution* of the mid-twentieth century reflected not only a proliferation of bills of rights but also an emerging global consensus that the moral legitimacy of state power rests upon a reciprocal balance.⁸ A reciprocal moral architecture stemming from the normative core of human rights law includes the allegiance to the state by the citizen and the respect by the state for certain uncompromisable rights of the citizen.⁹

available at <https://www.cambridge.org/core/books/abs/international-human-rights-law/interpretation-of-international-human-rights-law/E5A10F7CF7354DF89DA078499BE9542D>.

³ Lon L. Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1964), pp. 96-100. Available at <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3571&context=ilj>.

⁴ Ronald Dworkin, *Taking Rights Seriously*, (Cambridge, MA: Harvard University Press, 1977), p. 191. Available at <https://scholarship.law.edu/cgi/viewcontent.cgi?article=2438&context=lawreview>.

⁵ Jeremy Waldron, *The Concept and the Rule of Law*, in (2008) 43 *Georgia Law Review*, pp. 11-14. Available at <https://academic.oup.com/icon/article/7/1/2/665858>.

⁶ ECtHR, *Tyler v. United Kingdom*, Application no. 5856/72, judgment of 25 April 1978, §31, <https://hudoc.echr.coe.int/fre?i=001-57587>.

⁷ Sonja C. Grover, *Judicial Activism, the ‘Living Instrument’ Doctrine and the European Court of Human Rights*, in *Judicial Activism and the Democratic Rule of Law*, (Springer, 2020), pp. 191-231, https://doi.org/10.1007/978-3-030-35085-7_4. Available at https://link.springer.com/chapter/10.1007/978-3-030-35085-7_4#citeas.

⁸ Mark Tushnet, *The Rights Revolution in the Twentieth Century*, in Michael Grossberg, Christopher Tomlins (eds.), *The Cambridge History of Law in America*, (Cambridge: Cambridge University Press, 2008), pp. 377-402. Available at <https://www.cambridge.org/core/books/abs/cambridge-history-of-law-in-america/rights-revolution-in-the-twentieth-century/BE1DDDE04A9AFEAD6C48972A392BF9CD>.

⁹ Louis Henkin, *The Age of Rights*, (New York: Columbia University Press, 1990), pp. 5-6. Available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2298&context=mlr>.

The dynamism of human rights protection, thus, depends on what might be called its *dual constitutionalism*: a written constitution of formal rights and an unwritten constitution of moral norms.¹⁰ The unwritten dimension includes the principles of justice and fairness that courts have long invoked as sources of law, even when not explicitly codified.¹¹ Judicial reasoning continues this tradition by interpreting human rights through implicit moral and historical understandings.¹²

Taking into account the inextricable relationship between written and unwritten law, the judge's role appears not to be confined to unconscious application of statutes but involves revelation and articulation of unwritten principles implicit in the system of judicial authority¹³ and raises perennial questions: What legitimises the judge's reliance on conscience and moral reasoning in determining law?¹⁴ Can the "judicial conscience" provide a sufficient guarantee of objectivity and restraint?¹⁵

¹⁰ Thomas Kleinlein, Dominik Steiger, *The State of the International Human Rights System—Normativity and Compliance: Introduction*, in (2022) 14 *Journal of Human Rights Practice*, pp. 1-16, <https://doi.org/10.1093/jhuman/huac014>. Available at <https://academic.oup.com/jhrp/article-abstract/14/1/1/6717595?redirectedFrom=fulltext>.

¹¹ Vanessa A. Mac Donnell, *Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making*, in (2019) 65 *McGill Law Journal*, pp. 177-204. Available at <https://lawjournal.mcgill.ca/article/rethinking-the-invisible-constitution-how-unwritten-constitutional-principles-shape-political-decision-making/>.

¹² Peter D. Lauwers, *Human Rights and the Modes of Judicial Responsibility*, in Tom Angier, Iain T. Benson, Mark D. Retter (eds.), *The Cambridge Handbook of Natural Law and Human Rights*, (Cambridge: Cambridge University Press, 2022), pp. 402-417. Available at <https://www.cambridge.org/core/books/abs/cambridge-handbook-of-natural-law-and-human-rights/human-rights-and-the-modes-of-judicial-responsibility/8B6CB6B1770119218A1A6B179217BA1B>.

¹³ Leslie Green, *The Role of a Judge*, in *The Germ of Justice: Essays in General Jurisprudence*, (Oxford: Oxford University Press, 2023), <https://doi.org/10.1093/oso/9780192886941.003.0010>. Available at <https://academic.oup.com/book/51686/chapter-abstract/419732226?redirectedFrom=fulltext>.

¹⁴ Jeremy Waldron, *Judges as moral reasoners*, in (2009) 7 *International Journal of Constitutional Law*, pp. 2-24, <https://doi.org/10.1093/icon/mon035>.

¹⁵ Alexander Nikolaevich Shytov, *Theories of Legal Reasoning and Types of Judicial Conscience*, in *Conscience and Love in Making Judicial Decisions*, (Dordrecht: Springer, 2001), pp. 54-73, https://doi.org/10.1007/978-94-015-9745-6_4. Available at https://link.springer.com/chapter/10.1007/978-94-015-9745-6_4#citeas; David Dyzenhaus, *Conscience and the Law: Liberal and Democratic Approaches*, in I. Shapiro, R. Adams (eds.), *Integrity and Conscience: Nomos XL*, (New York: New York University Press, 1998), pp. 187-217. Available at <http://www.jstor.org/stable/24219959>.

The debates over the legitimacy of judicial review,¹⁶ the boundaries of legal interpretation,¹⁷ and the moral foundations of positive law¹⁸ underline in the modern human rights context that the judge's duty to uphold unwritten principles is to operate as both a constraint and an empowerment.¹⁹ The constraint is justified by the preventive, arbitrary or subjective adjudication.²⁰ The empowerment is motivated because it allows the law to respond to circumstances unforeseen by its framers.²¹ Adopting this approach, judges transform the abstract moral aspirations of human rights into concrete jurisprudence²²—recognising new rights such as privacy in the digital

¹⁶ Tom Hickey, *Legitimacy—not Justice—and the Case for Judicial Review*, in (2022) 42 *Oxford Journal of Legal Studies*, pp. 893-917, <https://doi.org/10.1093/ojls/gqac009>. Available at <https://academic.oup.com/ojls/article/42/3/893/6591511>.

¹⁷ William Baude, Stephen E. Sachs, *The Law of Interpretation*, in (2017) 130 *Harvard Law Review*, pp. 1082-1147; Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, in (2017) 130 *Harvard Law Review*, pp. 105-126.

¹⁸ James Bernard Murphy, *The Philosophy of Positive Law: Foundations of Jurisprudence*, (New Haven: Yale University Press, 2005). Available at <http://www.jstor.org/stable/j.ctt1n1nbcj>.

¹⁹ Kate Glover Berger, *The Structural and Administrative Demands of Unwritten Constitutional Principles*, in (2019) 65 *McGill Law Journal*, pp. 307-339. Available at <https://lawjournal.mcgill.ca/article/the-structural-and-administrative-demands-of-unwritten-constitutional-principles/>.

²⁰ Christopher J. Peters, *Legal Formalism, Procedural Principles, and Judicial Constraint in American Adjudication*, in L. Pineschi (ed.), *General Principles of Law - The Role of the Judiciary*, (Springer, 2015), pp. 23-44, https://doi.org/10.1007/978-3-319-19180-5_2. Available at https://link.springer.com/chapter/10.1007/978-3-319-19180-5_2#citeas; Tyler B. Lindley, *Interpretive Lawmaking*, in (2025) 111 *Virginia Law Review*, pp. 255-323; Michael Gvozdenovic, *Statute, Common Law, and Analogical Reasoning: Pouring Oil on Troubled Waters*, in (2022) 43:3 *Statute Law Review*, pp. 315-340, <https://doi.org/10.1093/slr/hmac010>. Available at <https://virginialawreview.org/articles/interpretive-lawmaking/>.

²¹ Lindley, *op. cit.*, *supra*, note 20, p. 297; Gvozdenovic, *op. cit.*, *supra*, note 20, p. 325; Jean Leclair, *Unwritten Constitutional Principles: The Challenge of Reconciling Political and Legal Constitutionalisms*, in (2019) 65:2 *McGill Law Journal*, pp. 153-171. Available at <https://lawjournal.mcgill.ca/article/unwritten-constitutional-principles-the-challenge-of-reconciling-political-and-legal-constitutionalisms/>.

²² Francesco Viola, *Legal Interpretation, Human Rights, and a New Jurisprudence*, in (2009) *Association of European Administrative Judges - Meetings and seminars, Palermo November 2009, Access to Administrative Justice in order to seek fundamental rights*, https://www.academia.edu/199623/Legal_Interpretation_Human_Rights_and_a_New_Jurisprudence?sm=b&rhid=38383282060; Claudio Corradetti, *The Legal Dimensions of Human Rights*, in *Relativism and Human Rights*, (Dordrecht: Springer, 2022), pp. 139-185; Janneke Gerards, *The Court's Overall Argumentative Approach – Mediating Between the Abstract and the Concrete*, in *General Principles of the European Convention on Human Rights*, (Cambridge: Cambridge University Press, 2023), pp. 77-99, https://doi.org/10.1007/978-94-024-2130-9_4. Available at <https://www.cambridge.org/core/books/abs/general-principles-of-the-european-convention-on-human-rights/courts->

context,²³ reproductive autonomy,²⁴ or environmental protection as an aspect of the right to private life.²⁵

A complex topic such as the current progressive human rights standards can be elaborated only using a qualitative and interpretive methodology, centred on how unwritten law influences the legitimacy, effectiveness, and evolution of human rights. A comparative analysis of international and domestic legal systems is appropriate to examine how courts, legislators, and communities invoke unwritten principles to expand the scope of human dignity and justice. The study reaches the conclusion that unwritten law remains the indispensable moral conductor that transforms human rights from a collection of written guarantees into a living and evolving system of justice.

2. The General Theoretical Framework: Human Rights as A Dynamic and Progressive Concept

Human rights, as a legal concept²⁶ and moral concept,²⁷ are not static prerogatives derived from written regulations but rather evolving principles navigating between moral philosophy, positive law, and changing social

overall-argumentative-approach-mediating-between-the-abstract-and-the-concrete/246F2E45FD5424D29A14CC29D10FFFC3.

²³ ECtHR, *Podchasov V. Russia*, application no. 33696/19, judgment of 13 May 2024, <https://hudoc.echr.coe.int/eng?i=001-230854>.

²⁴ ECtHR, *A.R. v. Poland*, application no. 6030/21, judgment 13 February 2026, <https://hudoc.echr.coe.int/eng?i=001-245820>

²⁵ ECtHR, *Greenpeace Nordic and others v. Norway*, application no. 34068/21, judgment of 28 January 2026, <https://hudoc.echr.coe.int/eng?i=001-245561>.

²⁶ Matthias Mahlmann, *The Concept of Human Rights*, in *Mind and Rights: The History, Ethics, Law and Psychology of Human Rights*, (Cambridge: Cambridge University Press, 2023), pp. 43-67; Boris Krivokapic, *Human rights: term, concept, legal and other aspects*, in (2023) 9:3 *Juridical Journal of Samara University*, pp. 91-98, DOI:10.18287/2542-047X-2023-9-3-91-98. Available at https://www.researchgate.net/publication/374644689_Human_rights_term_concept_legal_and_other_aspects.

²⁷ Adam Etinson (ed.), *Human Rights: Moral or Political?*, (Oxford: Oxford University Press, 2018), <https://doi.org/10.1093/oso/9780198713258.001.0001>. Available at <https://academic.oup.com/book/4816>; Reidar Maliks, Johan Karlsson Schaffer (eds.), *Moral and Political Conceptions of Human Rights. Implications for Theory and Practice*, (Cambridge: Cambridge University Press, 2017). Available at <https://www.cambridge.org/ro/universitypress/subjects/law/human-rights/moral-and-political-conceptions-human-rights-implications-theory-and-practice?format=HB&isbn=9781107153974#contents>.

realities.²⁸ Their *inherent dynamism*²⁹ reflects a central paradox that makes references to the idea that although human rights are universally proclaimed as “inalienable,”³⁰ their interpretation and application are historically contingent, shaped by the moral progress of societies and by the interpretive conscience of legal institutions.³¹

The contemporary human rights framework thus embodies a *juridical dialectic* between stability and change.³² The written texts provide formal recognition of rights,³³ and their meaning is constantly renewed through interpretive engagement with unwritten moral standards.³⁴ This dynamic interplay preserves “the minimum content of natural law,” which implies a recognition that the survival and moral legitimacy of any legal order depend upon certain fundamental norms of justice.³⁵ Consequently, human rights

²⁸ David Lyons, *Rights: Legal and Moral*, in M. Sellers, S. Kirste (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy*, (Dordrecht: Springer, 2023), pp. 3113-3120, https://doi.org/10.1007/978-94-007-6519-1_370. Available at https://link.springer.com/rwe/10.1007/978-94-007-6519-1_370#citeas.

²⁹ Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration*, (University of Pennsylvania Press, 2009). Available at <https://www.jstor.org/stable/j.ctt3fhgfn>.

³⁰ Gregory Kasembeli, *Human Rights and Their Universal Application*, in (2021, March 24) SSRN. Available at SSRN: <https://ssrn.com/abstract=4108064> or <http://dx.doi.org/10.2139/ssrn.4108064>.

³¹ Niklas Luhmann, Nico Buitendag, *The paradox of human rights and three forms for its unfolding*, in (2022) 49 *Journal of Law and Society*, pp. 567-576, <https://doi.org/10.1111/jols.12296>. Available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/jols.12296?msocid=1f0476d53c936af3249f6669389364bd>; Morsink, *op. cit.*, *supra*, note 29.

³² Mykhailo Baimuratov, Boris Kofman, Ruslan Chornolutsky, Denys Bobrovnyk, Ruslan Hvan, *Evolution of Legal Frameworks for Human Rights Protection: From Early Foundations to Contemporary Norms*, in (2024) 3 *Salud Ciencia y Tecnología - Serie de Conferencias*, DOI:10.56294/sctconf2024.1460.

³³ Kerstin von der Decken, Nikolaus Koch, *Recognition of New Human Rights: Phases, Techniques and the Approach of “Differentiated Traditionalism”*, in Andreas von Arnould, Kerstin von der Decken, Mart Susi (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, (Cambridge: Cambridge University Press, 2020), pp. 7-20. Available at <https://www.cambridge.org/core/books/abs/cambridge-handbook-of-new-human-rights/recognition-of-new-human-rights/653356CA54C4A1BFE2293AB54C6AA6AD>.

³⁴ Steven Wheatley, *Interpreting the ECHR in Light of the Increasingly High Standards Being Required by Human Rights: Insights from Social Ontology*, in (2024) 24:1 *Human Rights Law Review*, <https://doi.org/10.1093/hrlr/ngad031>. Available at <https://academic.oup.com/hrlr/article/24/1/ngad031/7456740>.

³⁵ Stuart M. Brown, *The Concept of Law by H. L. A. Hart*, in (1963) 72:2 *The Philosophical Review*, pp. 250-253, <https://doi.org/10.2307/2183110>. Available at <https://www.jstor.org/stable/2183110>.

instruments codify norms, but they do not exhaust them.³⁶ While the written law is the vessel, the unwritten law is its animating spirit.³⁷

A. *The Progressive Morality of Human Rights*

From their inception, human rights were conceived as both *moral ideals* and *legal commitments*.³⁸ As it was observed, the post-war “rights revolution” was less a triumph of textual lawmaking than a transformation in political morality.³⁹ “The essence of human rights lies not in written texts but in a moral revolution that placed human dignity at the centre of state legitimacy.”⁴⁰ In this sense, human rights law provides a “moral reading of the constitution”, in which judges interpret legal rights by reference to moral principles that justify the political structure as a whole.⁴¹

This technique of *moral reading* is essential to human rights’ capacity for development.⁴² The concept of human rights functions as a *framework of moral accountability* to which positive law must conform.⁴³ Written law acquires its legitimacy by reflecting the moral premises that justify its authority.⁴⁴ When

³⁶ Hennebel, Tigroudja, *The Place of Soft Law Standards in International Human Rights Law*, in *op. cit.*, *supra*, note 2, pp. 92-110.

³⁷ Samuel Williston, *Written and Unwritten Law*, in (1931) 17:1 *American Bar Association Journal*, pp. 39-41, <http://www.jstor.org/stable/25708136>.

³⁸ Mahlmann, *op. cit.*, *supra*, note 26, pp. 43-67; Riccardo Pisillo Mazzeschi, *The Foundation and Historical Development of International Human Rights*, in *International Human Rights Law*, (Springer, 2021), pp. 3-16, https://doi.org/10.1007/978-3-030-77032-7_1. Available at <https://dokumen.pub/international-human-rights-law-theory-and-practice-1nbsped-9783030770310-9783030770327.html>.

³⁹ Roger Buckley, *Transformation: The Post-War Rise of Human Rights*, in *US-Japan Human Rights Diplomacy Post 1945: Trafficking, Debates, Outcomes and Documents*, (Amsterdam University Press, 2021), pp. 3-18. Available at <https://www.cambridge.org/core/books/abs/us-japan-human-rights-diplomacy-post-1945/transformation-the-postwar-rise-of-human-rights/2C7B90D7FB03E83FFD145998E10F47EC>.

⁴⁰ Henkin, *op. cit.*, *supra*, note 9, p. 12.

⁴¹ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution*, (Cambridge, MA: Harvard University Press, 1996), pp. 2-4. Available at https://archive.org/details/freedom_slawmoral00dwor.

⁴² Charles Larmore, *The Ethics of Reading*, in *Morality and Metaphysics*, (Cambridge: Cambridge University Press, 2021), pp. 72-91. Available at <https://www.cambridge.org/core/books/abs/morality-and-metaphysics/ethics-of-reading/957FD81980349D4EE11AC4C81A95E2D0>.

⁴³ Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, in (2010) 41 *Metaphilosophy*, pp. 465-480.

⁴⁴ Tara Smith, *The Moral Authority Beneath the Law*, in *Judicial Review in an Objective Legal System*, (Cambridge: Cambridge University Press, 2015), pp. 88-111.

statutes, policies, or judicial decisions deviate from these premises, they lose their moral claim to obedience.⁴⁵ Thus, the *raison d'être* of human rights is to harmonise positive law with moral reason, ensuring that the legal order remains aligned with universal principles of dignity, equality, and justice.⁴⁶

This framework keeps the equilibrium between antagonist values, such as stability and change, order and justice, authority and conscience.⁴⁷ Consequently, the *normative centrality* of human rights lies in the idea that the legitimacy of state power depends on “a reciprocal balance between the allegiance of the citizen and the respect of the state for certain uncompromisable rights”.⁴⁸ This reciprocal relationship supports the democratic rule of law, providing as a rationale not the procedural regularity but the substantive moral legitimacy.⁴⁹

B. The Jurisprudential Character of Human Rights: Between Abstraction and Adaptation

Human rights acquire content through what can be described as *jurisprudential evolution*.⁵⁰ This process involves both moral reinterpretation and legal adaptation. The “living instrument” doctrine developed by the European Court of Human Rights encapsulates the idea that the Convention is interpreted in light of “present-day conditions,” allowing it to evolve in

⁴⁵ Jeffrey Brand-Ballard, *Legal Duty and Political Obligation*, in *Limits of Legality: The Ethics of Lawless Judging*, (New York: Oxford University Press, 2010), <https://doi.org/10.1093/acprof:oso/9780195342291.003.0010>.

⁴⁶ Hennebel, Tigroudja, *op. cit.*, *supra*, note 2, pp. 439-1066.

⁴⁷ Limin Gong, Shisong Jiang, Xin Liang, *Competing value framework-based culture transformation*, in (2022) 145 *Journal of Business Research*, pp. 853-863, <https://doi.org/10.1016/j.jbusres.2022.03.019>. Available at <https://www.sciencedirect.com/science/article/abs/pii/S0148296322002478>.

⁴⁸ John Finnis, *Natural Law and Natural Rights*, 2nd Ed. (Oxford: Clarendon Press, 2011), p. 256. Available at https://archive.org/stream/NaturalLawAndNaturalRightsClarendonLaw2011/John%20Finnis%20Natural%20Law%20and%20Natural%20Rights%20Clarendon%20Law%20%202011_djvu.txt.

⁴⁹ Cristina Hermida del Llano, *Democracy and Rule of Law*, in J. Cremades, C. Hermida (eds.), *Encyclopedia of Contemporary Constitutionalism*, (Springer, 2023), pp. 1-13, https://doi.org/10.1007/978-3-319-31739-7_47-1. Available at https://link.springer.com/rwe/10.1007/978-3-319-31739-7_47-1.

⁵⁰ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, in (2008) 19:4 *European Journal of International Law*, pp. 655-724, <https://doi.org/10.1093/ejil/chn043>. Available at <https://academic.oup.com/ejil/article/19/4/655/349356>.

harmony with societal progress,⁵¹ as the interpretation of the racial segregation according to the contemporary understandings of equality and human dignity.⁵²

This jurisprudential flexibility exemplifies the *moral coherence of law* according to what the law must remain consistent with the evolving moral consciousness of its community.⁵³ The flexibility ensures that human rights remain responsive to social transformation without losing their normative integrity.⁵⁴ The balance between stability and adaptability is maintained using the judicial interpretation, which has the role of transforming written provisions into living expressions of justice.⁵⁵

The reconciliation of flexibility with legal certainty constitutes a continuous theoretical challenge.⁵⁶ Critics of dynamic interpretation argue that excessive judicial creativity risks undermining democratic legitimacy by allowing judges to impose moral judgments beyond the political will of the legislators,⁵⁷ although judicial interpretation, being guided by principles, preserves rather than unsettles legality.⁵⁸ The judicial conscience, properly

⁵¹ ECtHR, *Tyler v. United Kingdom*, Application no. 5856/72, judgment of 25 April 1978, §31, <https://hudoc.echr.coe.int/fre?i=001-57587>.

⁵² ECtHR, *D.H. and others v. THE Czech Republic*, Application no. 57325/00, judgment of 13 November 2007, <https://hudoc.echr.coe.int/eng?i=001-72317>.

⁵³ Jeremy Waldron, *Law and Disagreement*, (Oxford: Oxford University Press, 1999), pp. 233-238. Available at <https://archive.org/details/lawdisagreement0000wald>.

⁵⁴ Denin Omondi, *Re-Conceptualizing Human Rights Accountability to Address Societal Change, Crisis Response, and Mobilisation from Below Effectively*, in (2025) SSRN, <https://ssrn.com/abstract=6268618> or <http://dx.doi.org/10.2139/ssrn.6268618>.

⁵⁵ European Law Institute, *ELI-Mount Scopus European Standards of Judicial Independence*, (European Law Institute, 2024), pp. 20-22. Available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI-Mount_Scopus_European_Standards_of_Judicial_Independence.pdf.

⁵⁶ Elina Paunio, *Beyond Predictability, Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order*, in (2009) 10:11 *German Law Journal*, DOI:10.1017/S2071832200018332; Lucy Vickers, *The Fragility of Proportionality Review: Egenberger Revisited*, in (2025) *VerfBlog*, DOI: 10.59704/d59729239a627f1f. Available at <https://verfassungsblog.de/the-fragility-of-proportionality-review/>.

⁵⁷ Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, in (2019) 42:1 *Harvard Journal of Law and Public Policy*, George Mason Legal Studies Research Paper No. LS 19-06. Available at SSRN: <https://ssrn.com/abstract=3333299> or <http://dx.doi.org/10.2139/ssrn.3333299>.

⁵⁸ Ronald Dworkin, *Taking Rights Seriously*, *De Paul University Law Review*, Volume 27, Issue 2, Article 14, 1978, pp. 567-570. Available at <https://scispace.com/pdf/taking-rights-seriously-5ubntj2nmt.pdf>.