Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights

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The European Court of Human Rights (ECtHR) was established in 1959 by the Council of Europe. Since 1998, it is the only organ in charge of interpreting and applying the European Convention of Human Rights and Fundamental Freedoms (ECHR).[1] The European

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1. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as emended) (ECHR). At the beginning of its life, the Court worked on a part-time basis, together with the European Commission of Human Rights and the Committee of Ministers. The situation changed in 1998, when Protocol n. 11 gave to the enforcement mechanism its present form.

Court conceives the European Convention as a 'living instrument', which must be interpreted in the light of present-day conditions.[2] For this reason, it applies extensively the rights and freedoms guaranteed by the Convention, demonstrating a strong activism.[3]

The activism of the European Court of Human Rights has positive and negative implications, and virtually every study on the European Convention deals with it. However, nobody has ever asked: what is the *European Court*'s attitude toward judicial activism? In other words: how does the Court conceive its own role, and the role of domestic Courts, in the process of law-making?

The purpose of this Article is to answer this question, through an analysis of the European Court's case law. In order to provide the reader with the necessary tools to understand the Court's reasoning, the analysis is preceded by a survey of the original methods and principles of interpretation developed by the European Court.

The Article focuses, first, on the Court's *internal* attitude toward judicial activism, which is inferred by answering the following questions: what is exactly a lacuna in the law of the Convention? When and why does it occur? How does the Court react to it? Does this reaction say something about the Court's attitude toward judicial activism?

Then, the Court's *external* attitude is taken into consideration, by answering another set of questions: according to the European Court, do gaps in the national laws infringe any human right? Does the judicial gap-filling process infringe any human right? Does the Court express any opinion about the legitimacy of this process?

The conclusions thus reached enlighten the peculiar theory of the sources of law adopted by the European Court of Human Rights, as well as its tendency to promote the convergence of civil law and common law jurisdictions.

I. INTERPRETATION OF THE ECHR BY THE EUROPEAN COURT ON HUMAN RIGHTS

According to the European Convention on Human Rights, the European Court has jurisdiction on 'all matters concerning the

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2. *Tyrer v United Kingdom* (1978) Series A no 26, par 31; *Marckx v Belgium* (1979) Series A no 31, par 41.

3. *E.g.*, LG LOUCAIDES, THE EUROPEAN CONVENTION ON HUMAN RIGHTS. COLLECTED ESSAYS 13 (2007); A MOWBRAY, *The Creativity of the European Court of Human Rights*, HRLR 58 (2005).

interpretation and application of the Convention and the Protocols'.[4] However, no indication is given as to the instruments of that interpretation. Thus, since the earliest stages of the ECHR's life, it has been the European Court's task to solve the problems arising from the need to interpret and apply the Convention.[5]

The tools used by the Court to fulfil this task are classified, by a recent proposal, as interpretative methods or principles.[6] Interpretative methods are techniques justifying a particular line of reasoning or a particular outcome, on the basis of substantive arguments. Principles of interpretation are aims (objectives), helping to make a choice between the diverging outcomes deriving from the use of methods of interpretation. For instance, 'textual interpretation' is an interpretative method, grounded on the substantive argument of the 'ordinary meaning of words', whereas 'evolutive interpretation' is a principle, providing a general objective for the interpretative process: namely, that the interpretation should be in line with the evolution of society.

As the ECHR is an international agreement, it should be interpreted in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) 1969. As the same European Court declared in 1975, those Articles 'enunciate in essence generally accepted principles of international law' and thus apply to the interpretation of every international agreement.[7]

Article 31 VCLT states the 'general rule of interpretation', namely that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[8] The provision lists three interpretative methods: the textual (or literal) interpretation, relying on the 'ordinary meaning to be given to the terms of the treaty'; the systemic (or contextual) interpretation, relying on the 'context' of the

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4. ECHR art. 32. Under the old system of protection, the same was provided by former Article 45 ECHR.

5. Before 1998, this was also the European Commission's task (n 1).

6. The reference is to H SENDEN, INTERPRETATION OF FUNDAMENTAL RIGHTS IN A MULTILEVEL LEGAL SYSTEM. AN ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION (2011).

7. *Golder v United Kingdom*, (1975) Series A no 18, par 34.

8. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Art. 31 par 1. Article 32 VCLT 1969 allows the use of 'supplementary means of interpretation' (including the *travaux préparatoires* to the treaty and the circumstances of its conclusion) whenever the interpretation grounded on Article 31 leaves the meaning ambiguous or obscure, leads to a result which is manifestly absurd or unreasonable, or simply needs to be confirmed (VCLT 1969, Art. 32). Article 33 regulates the 'Interpretation of treaties authenticated in two or more languages' (VCLT 1969, Art. 33 par 1).

terms to be interpreted; the purposive (or teleological) interpretation, relying on the 'object and purpose' of the international agreement.[9] The 'contractual' nature of international law implies that the utmost respect should be paid to the will of the contracting parties. Accordingly, even if the Vienna Convention does not give a hierarchical order to the methods listed by Article 31, the supremacy of the literal interpretation can be theorized,[10] because the text is the 'least contestable manifestation of the common intention of the parties'.[11]

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In the ECtHR case law, references to the interpretative tools of the Vienna Convention on the Law of Treaties are frequent: however, the Court pays only 'lip-service' to them.[14] The literal interpretation is frequently overcome by other interpretative methods and/or principles, and the Court attaches the greatest importance to the interpretation 'according to the object and purpose' of the Convention.

The purposive interpretation is an interpretative method, which does not express a choice of principle. Thus, it does not answer the question of *which* aim and purpose should be followed: the subjective aim historically pursued by the authors of the text, or their objective will as expressed by the text? (Which, in the case of the European Convention, means: the concrete and historical will of the ten 'founding fathers', or their abstract intention to protect human rights?)[15]

The answer lies in a choice of principle. In order to determine the 'object and aim' of the European Convention, the European Court

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9. Paragraphs 2, 3 and 4 of Art. 31 VCLT 1969 clarify which elements should be taken into account when interpreting a provision through the 'contextual' method.

10. *See* H SENDEN, INTERPRETATION 47-48 (2011).

11. F OST, *The Original Canons of Interpretation of the European Court of Human Rights*, *in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS (M. Delmar Marty ed., Dordrecht 1992). 288 {year?}.

12. VCLT 1969, Art. 32.

13. VCLT 1969, Art. 33 para 1.

14. I SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 140 (Manchester, 2d ed., MUP 1984).

15. G LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 70 (OUP 2007).

favours two principles: the 'practical and effective rights' (or principle of effective interpretation), and the 'living instrument' (or principle of evolutive interpretation). According to the 'practical and effective rights' principle, 'the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights'.[16] Thus, 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[17] According to the 'living instrument' principle, 'the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions'.[18] For this reason, 'the Court cannot overlook the marked changes [occurring] in the domestic law of the member States'[19] and may accordingly vary its evaluation as to the infringement of 'new' human rights.

These principles of interpretation clarify the attitude of the European Court towards the choice mentioned above: the Court does not interpret the Convention according to the historical will of the Contracting Parties, but according to their 'objective' will, expressed by the Convention provisions and potentially affected by the need to adapt the Convention to the unavoidable changes occurring into the society. It might seem to be paradoxical reasoning, but in the Court's opinion this is the best way to respect the original intention of 'securing the universal and effective recognition and observance of the Rights' declared in the Convention: after all, the Contracting Parties aimed at 'achieving greater unity' and at pursuing 'the maintenance and further realisation of human rights and fundamental freedoms'.20 The Court does not want to let the efforts made in 'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration' be wasted. This overview of the Court's interpretative methods and principles is essential to understand the following case law analysis.

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16. *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium* (1968) Series A no 6 (also known as Belgian Linguistic Case), par 5.

17. *Airey v Ireland* (1979) series A no 32, par 24.

18. *Tyrer v United Kingdom* (1978), Series A no 26, par 31; *Marckx v Belgium* (1979), Series A no 31, par 41.

19. *Dudgeon v United Kingdom* (1981), Series A no 45, par 23.

20. All quotations are from the Preamble to the European Convention of Human Rights and Fundamental Freedoms (italic added by the Author).

II. THE INTERNAL PERSPECTIVE

A. Lacunae in the Law of the Convention

What is a lacuna in the law of the Convention? In order to answer this question, it must be clarified that this Article takes into consideration only gaps in the substantive provisions of the Convention, and not, for instance, gaps in the procedural rules governing the functioning of the Convention organs.[21] Accordingly, we can use the words of Judge A. Favre to describe a lacuna as a situation which would deserve to benefit from the protection afforded by the Convention, but which is not expressly contemplated by the Convention's substantive provisions.[22]

How does the Court react to lacunae in the law of the Convention? Sometimes the Court, faced with a request to extend the protection afforded by the Convention, covers *ex abrupto* the lacuna. In other cases, a long set of judgments 'clear the ground' for the final recognition of the need to fill the gap. Sometimes, the Court refuses to recognize a lacuna in the law of the Convention, rejecting the applicant's claim for an extension of the provision. Examples of all these attitudes are provided by the following samples of the Court's case law.

B. Case Law

The European Court was confronted with the problem of lacunae in the law of the Convention as early as 1975, in the famous *Golder* case.[23] Golder was a British prisoner who had been denied the possibility of contacting a solicitor in order to sue his warders for defamation. He had applied the Convention organs and complained of the alleged denial of his 'right to access to the Court', which he argued was protected by Article 6, paragraph 1, ECHR. The provision grants the right to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' and does not expressly recognize a right to have access to Courts.

The European Court did not deny that 'the only provision that could have any relevance' did not 'directly or in terms give expression to such a right'.[24] The judges were knowingly facing the question of 'whether a right or freedom which is not even mentioned, indicated or specified . . .

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21. For a lacuna in the procedural provisions, e.g., *Chorherr v Austria* (1993) A266-B (Judge Valticos) 4.

22. *Wemhoff v Germany* (1968) Series A no 7 (Judge A. Favre).

23. *Golder v United Kingdom* (1975) Series A no 18.

24. *Golder* 18 (Judge Sir Gerald Fitzmaurice).

can be said to be one that is "defined" by the Convention'.[25] However, as the object and purpose of the Convention express the importance of the rule of law, the European Court concluded that 'in civil matters one can scarcely conceive the rule of law without there being a possibility of having access to the courts'.[26] In addition, the Court highlighted that, were Article 6, paragraph 1, ECHR, to be understood as concerning exclusively an existing proceeding, a contracting state 'could, without acting in breach of that text, do away with its courts, or take away their jurisdiction'. Such assumption 'would have serious consequences which are repugnant . . . and which the Court cannot overlook'.[27] Thus, notwithstanding the clear literal indication, the judgment ended with the conclusion that 'the right of access constitutes an element which is inherent in the right stated by Article 6 par. 1' ECHR.[28]

The judgment represented a shocking novelty in the tradition of international law, by virtue of its lack of consideration for the textual method.[29] The same court tried to hide its breaking force, by expressly pointing out that it did not amount to an extensive interpretation forcing new obligations on the contracting states.[30] The road to the extension of the Convention provisions to human rights which are not expressly protected was nevertheless open.

Shortly after the *Golder* case, Young, James and Webster, British nationals and former employees of the British Railways Board, applied to the Court. In 1975, the British Railways Board concluded a 'closed shop' agreements with three trade unions. From that moment on, membership in one of those unions had become a condition of employment. The applicants, having refused to join one of the designated trade unions, were dismissed. They alleged that being forced to choose between a 'compulsory' participation and the dismissal gave rise to violations of various Convention provisions, among them Article 11 ECHR.[31]

Article 11 ECHR protects the freedom of association, stating that '[e]veryone has the right to . . . freedom of association with others, including the right to form and to join trade unions for the protection of his interests'.[32] A strict literal interpretation of the provision runs counter

25. *Golder* 26 (Judge Sir Gerald Fitzmaurice).
26. *Golder*, par 34.
27. *Id.*
28. *Golder*, par 36.
29. As the individual opinion of Judge A. Favre clearly demonstrates.
30. *Golder v United Kingdom*, par 36.
31. *Young, James & Webster v United Kingdom*, (1981), Series A no 44.
32. ECHR, Art. 11 par 1.

to the applicants' claims, because the Article makes express reference only to a 'positive' freedom of association, as the freedom to join whichever association or trade union one prefers. A historical interpretation of the provision runs counter to the applicants' claims, too, because the contracting parties to the European Convention had consciously chosen to exclude a 'right not to be compelled to belong to an association', because of 'the difficulties raised by the "closed-shop" system in certain countries'.[33]

However, in its judgment on the case, the European Court demonstrated once again its tendency to rely on purposive considerations, dismissing literal or historical arguments. The Court was well aware that the negative aspect of the freedom of association 'was deliberately omitted from, and so cannot be regarded as itself enshrined in, the Convention'.[34] However, in the Court's eyes, the applicants' treatment was blatantly contrary to the *ratio* of Article 11 ECHR, because the compulsion to choose between joining a trade union and losing a job 'strikes at the very substance of the freedom guaranteed by Article 11'.[35] For this reason, the Court concluded that there had been a violation of that provision.[36]

The judgment was accompanied by a dissenting opinion pointing out that 'no canon of interpretation can be adduced in support of extending the scope of the Article to a matter which deliberately has been left out and reserved for regulation according to national law and traditions of each State Party to the Convention'.[37] However, the Court did not 'repent': a few years later, the Icelandic system of closed-shop agreements was also declared to infringe Article 11 ECHR.[38]

In 2003, Scoppola, an Italian citizen sentenced to life imprisonment for murder, applied to the European Court of Human Rights, contesting numerous violations of the Convention provisions, including a violation of Article 7 ECHR. The provision embodies the *nullum crimen sine lege* principle, protecting two of its most important facets: the prohibition of retrospective application of the criminal law to an accused's disadvantage, and the principle that only the law can define a crime and

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33. COUNCIL OF EUROPE, COLLECTED EDITION OF THE TRAVAUX PRÉPARATOIRE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 262 (The Hague, Martinus Nijhoff 1975) IV.

34. *Young, James & Webster v United Kingdom*, par 52.

35. *Young, James & Webster*, par 55.

36. *Id.*

37. *Young, James & Webster*, (1981), Series A no 44 (Judge Sørensen, Judge Thór Vilhjálmsson, & Judge Lagergren), 5.

38. *Sigurdur A. Sigurjónsson v Iceland*, (1993) Series A no 264.

prescribe a penalty.[39] In his application to the European Court, Scoppola submitted that Article 7 ECHR should be interpreted as granting also the *lex mitior* principle, according to which 'in the event of a difference between the law in force at the time of the commission of an offence and later law, the law to be applied [is] the law most favourable to the accused'.[40]

In 1978, the European Commission for Human Rights had denied that the right to the retrospective application of a more lenient penalty could be included in Article 7 ECHR.[41] However, in the case of Scoppola, the European Court held the following:

> [S]ince the Convention is first and foremost a system for the protection of human rights, the Court must (. . .) have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved.

The statement was motivated as follows:

> [I]t is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.[42]

On this basis, the Court considered that, since 1978, a consensus had gradually emerged in Europe, and internationally, around the view that the lex mitior principle 'has become a fundamental principle of criminal law'. Thus, the mere literal argument (which, admittedly, did not allow the inclusion of such a principle in Article 7 ECHR) was deemed not to be decisive.[43] On the contrary, a purposive interpretation of the Article, supported by the 'living instrument' and by the 'practical and effective rights' principles, led to the conclusion that 'Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law'.[44]

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39. *E.g.*, *Kokkinakis v Grece*, (1993) Series A no 260-A, par 52; *S.W. v United Kingdom*, (1995) Series A no 335-B, par 35; *C.R. v United Kingdom*, (1995) Series A no 335-C, par 33; *Cantoni v France*, ECHR 1996-V, par 29; *Başkaya & Okçuoğlu v Turkey [GC]*, ECHR 1999-IV, par 36; *K.-H.W. v Germany*, ECHR 2001-II, par 45; *E.K. v Turkey*, App no 28496/95 (ECtHR, 7 Jan. 2002) par 52.

40. *Scoppola v Italy*, (no 2) App no 10249/03 (ECtHR, 17 Sept. 2009), par 86.

41. *X. v Germany*, (1978) DR 13, at 70-72.

42. *Scoppola*, (no 2), par 104.

43. *Scoppola*, (no 2), par 107.

44. *Id.*

III. EVOLUTIVE INTERPRETATION

The principle of evolutive interpretation played (and still plays) an important role in the Court's case law relating to the rights of transsexuals and to environmental pollution. One of the very first cases in which the Court was faced with a request to protect the rights of transsexuals was that of Rees, a British citizen who had undergone a female-to-male operation.[45] He complained that no provision, under the British law, allowed transsexuals to obtain a modification of their birth certificate in accordance with their new sex. This implied relevant consequences, e.g., for their right to marriage and for their pension rights. Therefore, in the applicant's opinion, the lacuna in the British law had infringed his right to respect for private life, protected by Article 8 ECHR.

The Court pointed out that the notion of 'respect' for private life was not 'clear-cut' and that there was little common ground between the Contracting States with regard to the rights of transsexuals, since the law was still 'in a transitional stage'.[46] As a consequence, the Court held that Article 8 ECHR could not be extended so far as to require the United Kingdom to adopt a 'detailed legislation as to the effects of the change in various contexts and as to the circumstances in which secrecy should yield to the public interest', at least 'for the time being'.[47] At the same time, the Court pointed out that the Convention 'has always to be interpreted and applied in the light of current circumstances'. On this basis, the Court declared the need for appropriate legal measures to 'be kept under review, having regard particularly to scientific and societal developments'.[48]

In the subsequent case of Cossey (a male-to-female transsexual, complaining about the same lacuna in the British law), the Court noted that there had been no significant developments since the Rees case. There was still the same 'diversity of practice' among Member States, and a departure from the Court's earlier decision was not justified by a correspondent change in the 'present-day conditions'.[49] This conclusion, however, was followed by many dissenting opinions, pointing out the 'clear developments' undergone by the law of some Member States, or expressing a desire for a stronger activism by the Court.[50]

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45. *Rees v United Kingdom* (1986) Series A no 106.
46. *Rees*, par 37.
47. *Rees*, par 44.
48. *Rees*, par 47.
49. *Cossey v United Kingdom* (1990) Series A no 184, par 40.
50. *Cossey*, (1990) Series A no 184 (Judges Macdonald & Spielmann) (Judge Martens).

In the following *Sheffield & Horshman* case of 1998, the Court recognized an increased social acceptance of transsexualism, and an increased recognition of the problems which postoperative transsexuals encounter.[51] However, the majority of the Court's judges was still not convinced that the legislative trends were sufficient to establish the existence of any common European approach to the problems created by the recognition in law of postoperative gender status.[52] The rejection of the applicants' claim was followed, again, by many dissenting opinions.

The slow, but evident, evolution in the Court's attitude towards the rights of transsexuals culminated in 2002, with its judgment in the *Goodwin* case.[53] The Court recognized 'the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of postoperative transsexuals'. The consequence was that the unsatisfactory situation in which postoperative transsexuals lived was considered 'no longer sustainable', and a violation of Article 8 ECHR was finally declared.[54]

A similar evolution can be traced in the case law relating to environmental pollution, even though the Court has never expressly recognized the existence of a 'right to nature preservation' or of a 'right to a healthy environment' as such. To put it with the words of Judge Costa, 'since the beginning of the 1970s, the world has become increasingly aware of the importance of environmental issues and of their influence on people's lives',[55] and a corresponding awareness by the European Court can be demonstrated.

In 1990, the Court released its first judgment on an environmental claim.[56] The applicants were British nationals maintaining that the excessive noise generated by the air traffic in and out of Heathrow Airport had breached their right to respect for private life, protected under Article 8 ECHR. In this early case, the Court did not take into consideration the possibility of classifying the case as an 'environmental issue', and the applicants' claim under Article 8 ECHR was easily dismissed.

In 1994, the Court released judgment in the case of Mrs López Ostra, a Spanish national living in Lorca, nearby a plant for the treatment

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51. *Sheffield & Horshman v United Kingdom*, ECHR 1998-V.
52. *Sheffield & Horshman*, paras 57-60.
53. *Goodwin v United Kingdom*, ECHR 2002-VI.
54. *Goodwin*, paras 84-90.
55. *Hatton & Others v United Kingdom*, App no 36022/97 (ECtHR, 2 Oct. 2001) (Judge Costa).
56. *Powell & Rayner v United Kingdom*, (1990) Series A no 172.

of liquid and solid waste.[57] In 1988, the plant had started to release gas fumes, pestilential smells and contaminations, causing health problems and nuisance to many people. Despite the partial shutdown ordered by the town Council, fumes, repetitive noise and strong smells continued to be emitted. The applicant complained that this affected her right to respect for private and family life, protected by Article 8 ECHR.

The Court, without fully motivating its assertion, stated the following: '[N]aturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health'.[58] Thus, the judgment expressly classified the claim as relating to environmental pollution, and recognized that, in the concrete case under review, this kind of pollution amounted to a violation of Article 8 ECHR. In the following years, similar conclusions were reached with respect to toxic emissions of factories affecting the health of individuals[59] and to noise nuisances caused by night clubs and bars.[60] The Court thus developed the position that, even if 'there is no explicit right in the Convention to a clean and quiet environment . . . , where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8'.[61]

Differently from the *Scoppola* case, the Court does not admit that its interpretation includes in the Convention a 'new' right, and, unlike the transsexuals' rights cases, its judgments on this topic do not rely expressly on an evolutive interpretation of the Convention. However, an evolution in the Court's attitude can surely be traced, and, according to some of the Court's judges, the Court 'has given clear confirmation that Article 8 of the Convention guarantees the right to a healthy environment'.[62] Even if the path is not even, and the Court's approach is still highly casuistic, there is nevertheless a clear tendency of the European case law towards the recognition of a 'right not to be affected by environmental pollution'. Possibly, the evolutive approach usually displayed by the Court will lead, in the end, to an express recognition of that right under the Convention.

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57. *López Ostra v Spain*, (1994) Series A no 303-C.
58. *Lopez Ostra*, par 51.
59. *Guerra & Others v Italy*, ECHR 1998-I.
60. *Moreno Gomez v Spain*, ECHR 2004-X.
61. *Hatton & Others v United Kingdom*, par 96.
62. *Hatton & Others v United Kingdom*, [GC] ECHR 2003-VIII (Judges Costa, Ress, Türmen, Zupančič & Steiner) 4.

IV. RESTRAINTS ON EXCESSIVE ACTIVISM

One famous case is often cited as an example of the Court's ability to restrain from an excessive activism, denying the extension of the Convention provisions where there is no sufficient common grounds between the Member States. The case is that of Pretty, a British national suffering from an incurable, degenerative disease, who wanted to end her life.[63] Her disease did not allow her to commit suicide. However, if her husband helped her in committing suicide, he could face prosecution under English law. She thus applied to the European Court of Human Rights, complaining of a violation of Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatments), 8 (right to respect for private life) and 9 (freedom of thought, conscience and religion) of the Convention. Leaving aside the complaint about Article 9 ECHR (which the Court dismissed quickly), it is interesting to analyse how the Court reacted to Pretty's complaints under Articles 2, 3, and 8 of the Convention.

The applicant argued that Article 2 ECHR not only protects the right to life, but it also entails the right to choose whether or not to go on living. The European Court dismissed the claim, making an important distinction between the case under review and its previous case law on the 'negative right to associate' under Article 11 ECHR. If the freedom of association had been found to involve not only a right to join an association but also a corresponding right not to be forced to join an association, that was due to the peculiarity of the notion involved: a 'freedom' implies some measure of choice as to its exercise, while the right to life under Article 2 ECHR 'is phrased in different terms' and is 'unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life'.[64] The Court concluded that the right to life could not 'without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die'.[65]

The applicant further argued that, under Article 3 ECHR, Member States have an obligation to refrain from torture or inhuman and degrading treatments, as well as an obligation to protect their citizens from similar sufferings. The European Court stated that the applicant's claim placed 'a new and extended construction on the concept of [inhuman and degrading] treatment, which . . . goes beyond the ordinary meaning of words'. The Court recognized the need to take a 'dynamic

63. *Pretty v United Kingdom*, ECHR 2002-III.
64. *Pretty*, par 39.
65. *Id.*

and flexible approach' to the interpretation of the Convention, holding, however, that any interpretation 'must also accord with the fundamental objectives of the Convention and its coherence as a system of human right protection'. The Court stressed the need to interpret Article 3 ECHR 'in harmony' with Article 2 ECHR, and concluded that no obligation arose to require the respondent state not to prosecute the applicant's husband for assisting her suicide.[66]

The applicant argued, also, that Article 8 ECHR includes the right to self-determination and thus the right to choose when and how to die. Interestingly, the Court stated that it was 'not prepared to exclude' that there had been an interference with the applicant's right to respect for private life.[67] However, the interference fell within the legitimate area of discretion of the respondent State.[68] Thus, the Court held unanimously that there had been no violation of any Articles of the Convention.

Subsequently, the Court reaffirmed its unwillingness to pronounce on euthanasia.[69] However, a recent judgment on the topic has made concrete use of Article 8 ECHR to cast doubts upon a Member State's position about the right to choose when and how to die.[70] The request for referral to the Grand Chamber on this case is currently pending.

A. Analysis of the Case Law

The case law recalled by the previous section exemplifies the circumstances in which a lacuna in the law of the Convention occurs. Firstly, the lacuna might refer to a situation which was already known to the common legal tradition of the Member States at the time when the Convention was signed, but which the contracting parties 'forgot' to include in the Convention (as the right to access to Courts), or, for political reasons, willingly omitted (as the negative right to association). Usually, these lacunae were brought to the attention of the Court at a very early stage of the Convention's life. Secondly, the lacuna might refer to a 'partially' new situation, i.e., a situation which, when the Convention was signed, was already contemplated by most legal systems but had not reached the *status* of a human right deserving protection under the Convention. This is the case of the right to the retrospective application of the more lenient penalty, brought under the attention of the Court at a relatively recent stage of the Convention's

66. *Pretty*, par 56.
67. *Pretty*, par 71.
68. *Id.*
69. *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 Jan. 2011).
70. *Gross v Switzerland*, App no 67810/10 (ECtHR, 14 May 2013).

life. Thirdly, the lacuna might refer to a totally new situation. In this case, the lacuna occurs because, at the time when the Convention was signed, that situation was not even contemplated by society (as the right to a healthy environment, euthanasia, or the rights of transsexuals). The Strasbourg case law dealing with new human rights usually develops over long periods of time.

How does the Court react to these different situations?

If the lacuna in the law of the Convention derives from the omission of an already existent human right, the Court is not really interested in the origins of the lacuna, being only concerned with the effective protection of that right. As in the *Golder* case, considerations of purpose predominate over the literal interpretation; as in *Young, James & Webster*, the historical argument is deemed to be irrelevant. The Strasbourg case law thus expresses the idea that the historical will of the Contracting Parties is not relevant, insofar as it concerns an already existent human right, and the exclusion of that right from the Convention runs counter to the aim and purpose of the relevant provision. No more consideration is needed, and the reasoning made by the Court is quite simplified. The *Golder* and the *Young, James & Webster* judgments are good examples of this attitude: in both cases, the conclusion is motivated by the 'logical inherence' of the human right in the relevant provision, without further explanations.

Conversely, in the case of a lacuna due to the partial novelty of a human right, the Court carefully motivates the reasons of its inclusion in the Convention. The *Scoppola* judgment expressly refers to the (new) status of human right acquired by the *lex mitior* principle, and to the necessity of interpreting the Convention as a 'living instrument'. The Court thus elaborated a complex and full motivation of its choice to include *lex mitior* into Article 7 ECHR, expressly holding that a new human right had been included in the Convention.

In the case of a totally new situation, the Court is naturally much more careful. The case law dealing with the right to an healthy environment, or to the rights of transsexuals, provides a good example of the Court's attitude: the Strasbourg judges waited for an evolution in the common legal tradition of the Member States, respecting as much as possible their sovereignty. However, it must be pointed out that the Strasbourg Court sometimes encourages the creation of a 'European standard of protection' for new human rights. The decision of the Court in *Goodwin* expressed the idea that a denial of protection, at a certain point, was simply 'no longer deferrable', irrespectively of the level of protection granted by the States. Even in the delicate field of euthanasia,

the Court's position might be ready to evolve, as demonstrated by the cautious opening recently made by the Second Section.[71]

B. The Position of the European Court of Human Rights Toward Its Own Activism

What can be inferred from the above analysis of the Court's reaction toward lacunae in the law of the Convention?

Since the earliest stage of its activity, the Court has been promoting a 'purposive' interpretation of the Convention. In addition, the Court has been interpreting the Convention as a 'living instrument', ensuring the protection of human rights and freedoms *as developed by the society*. The Court thus conceives its own role as naturally leading to the progressive extension of the Convention provisions. The striking conclusions reached in *Young, James & Webster* may serve as an example: the Court did not feel bound to the express will of the Member States, as long as there was an infringement of the Convention's 'spirit'.

Clearly, this is not the 'classic' attitude of an international Court, working on the ground of an agreement between States: but the European Convention is no 'classic' treaty, for the reasons explained before.[72]

At the very beginning of the Convention life, this revolutionary attitude was not shared by all the Court's judges, and it raised many objections: in 1979, Judge Sir Gerald Fitzmaurice described the extension of a Convention provision as 'virtually an abuse of the powers given to the Court'.[73] Today, the dissenting opinions attached to dubious cases have changed their tone. In 1990, Judge Martens complained about the excessive self-restraint displayed by the majority toward the rights of transsexuals, stating that the Court had 'sadly failed its vocation of being the last-resort protector of oppressed individuals'.[74] Nowadays, the same Strasbourg judges expressly recognize that the Court's 'supervisory function' has an inevitable 'creative, legislative element comparable to that of the judiciary in common law countries'.[75] The Court's tendency to fill the gaps left (willingly or unwillingly) by the Member States has become, matter-of-factly, something not only normal, but even *expected* by the most interventionist among the judges.

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71. *Gross*, App no 67810/10 (ECtHR, 14 May 2013).
72. *See supra* text accompanying note 20.
73. *Marckx v Belgium*, (1979) Series A no (Judge Sir Gerald Fitzmaurice).
74. *Cossey v United Kingdom*, (1990) Series A no 184 (Judge Martens) 3.6.4.
75. H Waldock, *The Effectiveness of the System Set Up by the European Convention on Human Rights*, HRLJ I 9 (1980).

It is true that, sometimes, this attitude is restrained by the need to respect the developments of 'common grounds' among the Member States. However, the sensation is that Court makes a display of restrained attitude with the perfect consciousness that this attitude will not last. The Court's review over the British legislation on the rights of transsexuals has been narrowed, initially, by considerations relating to the non-existence of a common attitude among the Member States. However, the conclusions reached in the *Goodwin* case did not rely on the fact that a clear and uncontested common position had been finally reached, but on the existence of a 'continuing international trend', and (more importantly) on a judgment of 'no-longer-sustainability' of the situation under the Court's attention. Shortly, the Court conceives its own activism as the necessary tool to promote progress toward a better and wider protection of human rights.

These conclusions are not contradicted by the Court's prudent attitude in the *Pretty* case. That case dealt with one of the most controversial problem of our times, euthanasia. Despite the many disputes on this point, the Court not only was willing to examine the applicant's claims, but it also recognized the possibility of considering the ban on assisted suicide as an interference with Mrs Pretty's right to private life. The Court held that 'the very essence of the Convention is respect for human dignity and human freedom' and that 'without in any way negating the principle of sanctity of life. The Court considers that it is under Article 8 that notions of the quality of life take on significance'.[76]

These statements are of a certain importance, especially if accompanied by references to a new attitude displayed by society ('In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity').[77] The judgment gives the strong sensation that the main reason why the Court did not extend the Convention provisions was not really the 'sanctity' of the right to life, but the certainty that it was not possible to stretch the limits of its creative powers so far as to overcome the many disputes on this delicate point.

It must be recalled that the aim of the present Article is not to evaluate the extent or the legitimacy of the Court's activism, but only to give an insight of the Court's feelings toward it. From the above analysis,

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76. *Pretty v United Kingdom*, par 65.
77. *Id.*

the attitude of the European Court emerges clear and uncontested: the Court conceives its own activism as the legitimate means by which granting the Convention its much-praised effectiveness. For this reason, the Court frequently extends the Convention provision beyond their original meaning, in order to fill the gaps that the Member States left, or to keep the Convention system in line with the developments of society. Exceptions to these conclusions may be motivated by the fear of exceeding the limits of a role that the Court, however, feels entitled to play.

C. The External Perspective

1. Lacunae in the Law of the Member States

Do gaps in the national law of the Member States infringe any human right? No provision under the European Convention requires Member States to have a complete legislation. However, there are gaps in the domestic law that may infringe a human right.

Many Convention Articles refers to the 'law' of the Member States, or to the 'lawfulness' of their actions. Article 2, paragraph 1, ECHR, requires that the right to life is 'protected by law'. Article 5, paragraph 2 ECHR lists the circumstances in which limitations to the right to liberty of person are to be considered 'lawful'. Article 7, paragraph 1, ECHR, encompasses the *nullum crimen sine lege* principle, stating that only the law can describe a crime and prescribe a penalty. In every article containing a 'limitation clause' (e.g., articles 8 to 11 ECHR), interferences to the right protected are allowed only if 'in accordance with the law', or 'prescribed by law'. Moreover, the Strasbourg case law requires Member States to actively protect human rights, and most Convention provisions are today interpreted as implying 'positive obligations' on their part. Sometimes, these 'positive obligations' can be satisfied only by adopting effective criminal law provisions.[78]

In all these cases, a lacuna in the domestic law of the Member States can amount to an infringement of a human right or freedom protected by the Convention. Thus, the case law relating to these lacunae can be divided in two sets. The first set stems from the lack of a valid 'law' for the purpose of the Convention provisions referring to that term (e.g., Article 5, paragraph 2, ECHR; Articles 8 to 11 ECHR). The second set stems from the infringement of 'positive obligations',

78. *X. & Y. v The Netherlands*, (1985) Series A no 91.

whenever the duty to actively protect human rights requires the Member States to criminalize their violations.

2. Lacunae as Lack of a Valid 'Law' for the Purpose of the Convention Provisions Referring to that Term

Many Convention provisions expressly refer to the domestic law of the Member States. Some of them contain a 'limitation clause', allowing the national authorities to interfere, under certain conditions, with the right or freedom protected.[79] Others identify and list lawful exceptions to the respect for the right protected.[80] In all these cases, the first and most important requirement is that the exception or the limitation to the human right or freedom protected complies with (and/or is prescribed by) the domestic law.

Since the earliest stages of its activity, the Court has developed a unitary and autonomous notion of 'law'. The notion is unitary, because it has always the same meaning. In the case law relating to Article 7 ECHR, the Court frequently holds that 'when speaking of law, Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term'. Similar statements can be found in other judgements concerning different Convention provisions.[81] The notion is autonomous, because the Court gives the term a meaning which is independent from that in use among Member States.[82] The need to develop autonomous notions is justified by the need to grant effective protection to the Convention rights: only using autonomous definitions of legal concepts the Court can avoid that the protection of human rights is subordinated to the sovereign will of Member States.[83] Thus, the creation of an autonomous notion of 'law' is the means by which the Court reviews domestic law independently from national authorities.

The term is autonomous in a double sense. Firstly, when the Court verifies the existence of a domestic legal basis, it is satisfied by a 'substantial notion' of law, which does not refers to strict formal criteria with respect to its institutional origin.[84] The need to apply the same

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79. ECHR, arts. 89, 10-11; ECHR, Protocol n. 7, art. 1; ECHR, Protocol n. 4, arts. 2-3; ECHR, Protocol n. 7, art. 2.

80. ECHR, arts. 2, 5.

81. *E.g.*, *Malone v United Kingdom*, (1984) Series A no 82, par 66.

82. Many authors point out that 'law' is a 'semi-autonomous' notion, because it gives normative weight to national law (whereas, normally, international courts see the national law as a fact). *E.g.*, G LAUTENBACH, THE RULE OF LAW CONCEPT IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 162-63 (2013).

83. *Engel & Others v The Netherlands*, (1976) Series A no 22, par 81.

84. LAUTENBACH, *supra* note 82, at 112.

standards of protection to countries having different legal traditions led the Court to include in the notion of law 'statutes and unwritten law' as well as 'enactments of lower rank'.[85] This principle was enunciated for the first time in 1979, when the Court was faced with the need to apply Article 10 ECHR (freedom of expression) to a common law jurisdiction.[86] The question was: can a restriction to the freedom of expression be 'prescribed by law', and thus be legitimate by virtue of Article 10 ECHR second paragraph, even if it is not regulated by a written provision? The European Court observed that interpreting 'law' only as 'statutory law' would imply the exclusion of common law jurisdictions from the ambit of application of the European Convention. Hence, the Court admitted that legitimate restrictions to the freedom of expression may derive from unwritten law.[87]

In addition to the existence of a domestic legal basis, the Court requires that the domestic law complies with qualitative standards: the law must be both 'adequately accessible' and 'formulated with sufficient precision to enable the citizen to regulate his conduct'.[88] The citizen 'must be able to have an indication . . . of the legal rules applicable to a given case' and 'must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[89] Thus, in the Strasbourg system, 'law' is 'a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability'.[90]

It must be stressed that this notion is applied by the ECtHR also in the delicate field of criminal law. According to the case law relating to Article 7 ECHR, in all the Convention States 'the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition'.[91] Thus, the case law can contribute to the definition of the criminal law, provided that its developments are 'consistent with the essence of the offence' and 'reasonably foreseeable'.[92]

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85. *Kafkaris v Cyprus*, App no 21906/04 (ECtHR [GC] 12 Feb. 2008) par 139. Interestingly, the substantial notion of law applies also to countries of civil law tradition (*Huvig v France*, (1990) Series A no 176-B, par 28), where a formalistic attitude toward the law makes the notion difficult to be accepted.

86. *Sunday Times v United Kingdom*, (no 1) (1979) Series A no 30.

87. *Sunday Times*, (no 1), par 47.

88. *Sunday Times*, (no 1), par 49.

89. *Silver & Others v United Kingdom*, (1978) Series A no 61, paras 87-88.

90. *C.R. v United Kingdom*, (1995) Series A no 335-C, par 33.

91. *C.R.*, par 34.

92. *G. v France*, (1995) Series A no 325-B, par 34.

Having clarified the extent of the autonomous notion of 'law' adopted by the European Court, it is possible to analyse samples of the Strasbourg case law dealing with lacunae in the domestic law of the Member States.

In 2000, the Court gave judgment in the case of Baranowski, a Polish national who had been held on remand after the expiry of the time limit indicated by the detention order.[93] Baranowski's applications for release, motivated by the expiry of the time limit, had been denied by the competent domestic authorities, on the basis of a practice developed in the absence of any statutory limits concerning the length of detention on remand. The applicant complained that his detention had violated Article 5, paragraph 1 of the Convention, which allows the deprivation of the right to liberty for 'the purpose of bringing [the person] before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so', but only if the deprivation of liberty is in accordance with a procedure prescribed by law. Specifically, Baranowski complained that its continuous deprivation of liberty had not been 'lawful', since it had not been based on a 'law' of adequate foreseeability but on a practice which had been entirely unsupported by any legislative provision or case law, and had moreover arisen to fill a statutory *lacuna*. That practice could, therefore, neither replace or be equal to a 'law', nor fulfil the requirement of 'foreseeability' of a 'law'.[94]

The European Court of Human Rights showed little interest for the evident absence of a domestic law, stating that the 'lawfulness' of the detention under domestic law was the primary but not the decisive element. Its attention focused, instead, on assessing 'whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein'.[95] Accordingly, the Court assessed the following:

> [T]he relevant Polish criminal legislation, by reason of the absence of any precise provisions laying down whether—and if so, under what conditions—detention ordered for a limited period at the investigation stage could properly be prolonged at the stage of the court proceedings, does not satisfy the test of "foreseeability" of a "law" for the purposes of Article 5 § 1 of the Convention.[96]

93. *Baranowski v Poland*, ECHR 2000-III.
94. *Baranowski*, par 43.
95. *Baranowski*, par 51.
96. *Baranowski*, par 55.

In addition, the Court stated that the practice developed in response to the statutory lacuna was contrary to the principle of legal certainty, a principle which is 'implied in the Convention and which constitutes one of the basic elements of the rule of law'.[97] To conclude, Baranowski had been the victim of a violation of Article 5 by the respondent State.

The same *rationale* of this case was subsequently applied in other judgments, where the Court was confronted with the same lacuna in the law of the respondent States.[98] The most famous case is that of Tymoshenko, former prime minister of Ukraine.[99]

In 2013, the Court issued judgment in the case of Vyerentsov, a Ukrainian national who had taken part in a pacific demonstration in Ukraine.[100] He had been sentenced to a three-day administrative arrest under a provision prescribing a penalty for breaches of the procedure for organising and holding demonstrations. The Ukrainian law, however, did not describe the procedure to be followed during demonstrations, and the statutory lacuna had not been filled by the national Courts.

The applicant thus complained that both the *nullum crimen sine lege* principle (Article 7 ECHR), and his right to peaceful assembly (Article 11 ECHR) had been infringed. Article 11 ECHR protects the 'right to freedom of peaceful assembly and to freedom association with others', stating, in its second paragraph, that '[n]o restrictions shall be placed on the exercise of these right other than such are prescribed by law'.[101] The European Court did not focus its attention on the total lack of a national law, assessing, instead, that the absence of clear indications as to the rules under which a demonstration could be organised caused the national law to be unforeseeable.[102]

Thus, the restriction to the applicant's right to peaceful assembly had not respected the qualitative standards required by the Convention notion of 'law', and the applicant's conviction had not been grounded on a valid 'law'. The Court held that there had been a breach of Articles 11 and 7 ECHR, and concluded that these 'violations of Articles 11 and 7 . . . stem from a legislative lacuna concerning freedom of assembly which remains in the Ukrainian legal system for more than two

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97. *Baranowski*, par 56.

98. *Kawka v Poland*, App no 25874/94 (ECtHR, 9 Jan. 2001); *Case of Yeloyev v Ukraine*, App no 17283/02 (ECtHR, 6 Nov. 2008); *Farhad Aliyev v Azerbaijan*, App no 37138/06 (ECtHR, 9 Nov. 2010).

99. *Tymoshenko v Ukraine*, App no 49872/11 (ECtHR, 30 Apr. 2013).

100. *Vyerentsov v Ukraine*, App no 20372/11 (ECtHR, 11 Apr. 2013).

101. ECHR, Art. 11 par 2.

102. *Vyerentsov v Ukraine*, paras 54, 67.

decades'.[103] Consequently, the Court invited the Ukrainian legislator to intervene 'in order to bring . . . legislation and practice in line with the Court's conclusion in the present judgment'.[104]

3. Lacunae as an Infringement of 'Positive Obligations'

According to the Strasbourg case law, Member States are not merely compelled to restrain from violations of human rights, but are under the duty to adopt measures designed to secure their respect.[105] Even if most of the Convention Articles are formulated in negative terms, the existence of a 'positive dimension' in the Member States' engagement to respect the Convention rights has been present in the Strasbourg case law since its earlier stages.[106] The doctrine thus developed by the Court takes the name of 'positive obligations' doctrine, and it is applied to most of the Convention provisions.[107]

A relevant implication of this doctrine is that it might be necessary to secure the respect of human rights in the 'sphere of the relations of individuals between themselves', e.g., through the adoption of criminal law provisions.[108] The following cases are samples of how the Strasbourg Court reacts to lacunae in the criminal law of the Member States.

In 1985, an application was made to the ECtHR because of a lacuna in the Dutch legislation criminalising rape. The case was that of Miss Y, a mentally handicapped girl who had been raped but, because of her mental illness, could not lodge the necessary complaint for the institution of a criminal proceeding. Her father, not being the actual victim, could not lodge the complaint on her behalf.[109] The gap in the criminal system

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103. *Vyerentsov*, par 95.

104. *Id.*

105. *E.g.*, *Marckx v Belgium*, (1979) Series A no 31, par 31; *Airey v Ireland*, (1979) Series A no 32; *X. & Y. v The Netherlands* (1985) Series A no 9. More recently: *McCann & Others v United Kingdom*, (1995) Series A no 324; *LCB v United Kingdom*, ECHR 1998-III; *Hatton & Others v United Kingdom*, ECHR 2003-VIII.

106. *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium*, (1968) Series A no 6 (also known as *Belgian Linguistic Case*), The law, sect I A, par 3-5.

107. For the positive obligations deriving from Article 2, e.g., ECtHR, case of *LCB v United Kingdom*. For the positive obligations deriving from Article 3, e.g., *Moldovan & Others v Romania*, ECHR 2005-VII. For the positive obligations deriving from Article 4, e.g., *Siliadin v France*, ECHR 2005-VII. For the positive obligations deriving from Article 5, see, e.g., ECtHR, *Case of Storck v Germany*, 16 June 2005. For the positive obligations deriving from Article 8, e.g., *Hatton & Others v United Kingdom*, ECHR 2003-VIII. For a complete study of positive obligations in the Convention system, see A MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2004).

108. *X. & Y. v The Netherlands*, (1985) Series A no 91, paras 23-24.

109. *X. & Y.*, (1985) Series A no 91.

was evident, and the Dutch Court of Appeal in charge of judging the case had not 'feel able to fill this gap in the law by means of a broad interpretation to the detriment' of the accused.[110]

The European Court held, for the first time, that positive obligations might imply the need to adopt effective criminal law provisions. The protection afforded by the civil law was deemed to be insufficient 'in the case of wrongdoing of the kind inflicted on Miss Y', because that was 'a case where fundamental values and essential aspects of private life are at stake' and where 'effective deterrence is indispensable'.[111] Having thus stated that effective protection in this case could be achieved only by criminal law provisions, the European Court could not but conclude that the Dutch provisions in force at the time failed to provide Miss. Y. 'with practical and effective protection', by reason of the lacuna in the criminal protection afforded to mentally handicapped persons. Thus, the Court found that Miss Y was the victim of a violation of Article 8 of the Convention by the State.[112]

Recently, another judgement considered a lacuna in the national law on rape. The case was that of M.C., a Bulgarian national who had been raped as a young girl.[113] She applied to the European Court of Human Rights, complaining that, under the Bulgarian law (and practice), rape was punished only when physical or psychological force was applied to the victim. The alleged perpetrators of the crime of which she was victim had never been prosecuted because they had not used force on her. Thus the Bulgarian applicant claimed that the lacuna in the domestic law on rape had caused an infringement of her right to respect for private and family life.

The Court recalled the 'positive obligations' doctrine, and held the following: 'States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution'.[114] In determining the content of those criminal provisions 'States undoubtedly enjoy a wide margin of appreciation'. However, 'the limits of the national authorities' margin of appreciation are . . . circumscribed by the Convention provisions', which are interpreted by the Court in accordance with the principle of 'evolutive' interpretation.[115]

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110. *X. & Y.*, par 29.
111. *X. & Y.*, par 27.
112. *X. & Y.*, par 30.
113. *M.C. v Bulgaria*, ECHR 2003-XII.
114. *M.C.*, par 154.
115. *M.C.*, par 155.

On the basis of the major developments undergone by national and international law in the field of sexual self-determination, the Court concluded as follows: 'Member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act'.[116] In the case of M.C., the lack of consideration for the victim's consent could not but result in a 'violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention'.[117]

On a different occasion, the Court received a complaint about the lack of criminalisation of sexual offences. The case was that of E.S., a Swedish national whose stepfather had tried to film her undressed while she was under age.[118] She complained that the Swedish law did not contain any specific offence criminalising an act of covert or illicit filming and that for this reason her stepfather had been acquitted by the national Court of Appeal.

The European Court underlined that, under the Swedish law, 'there was a legal framework in place which could, at least in theory, cover acts such as the one at issue'.[119] According to the Court, 'the Swedish legislation and practice and their application to the case before it, did not suffer from such significant flaws that it could amount to a breach of Sweden's positive obligations under Article 8 of the Convention'.[120] At the time of writing, the case is now under referral to the Grand Chamber.

The Strasbourg case law has also been facing gaps in the criminalisation of slavery, servitude and forced labour. One case was that of Siliadin, a Togolese national who had been held under conditions of domestic servitude in France when still under age.[121] She complained that the French law did not criminalize slavery, servitude, forced or compulsory labour. The provisions in force at the material time had not afforded her adequate protection from servitude or from forced or compulsory labour in their contemporary forms, failing to respect the positive obligations deriving from Article 4 of the Convention.

The Court, quoting its previous case law on Articles 3 and 8 ECHR, grounded its reasoning on the consideration that 'Article 4 enshrines one of the fundamental values of democratic societies', and that 'children and other vulnerable individuals, in particular, are entitled to State protection,

116. *M.C.*, par 166.
117. *M.C.*, par 187.
118. *E.S. v Sweden*, App no 5786/08 (ECtHR 21 June 2012) (referred to the Grand Chamber on 19/11/2012).
119. *E.S.*, par 60.
120. *E.S.*, par 72.
121. *Siliadin v France*, ECHR 2005-VII.

in the form of effective deterrence, against such serious breaches of personal integrity'.122 Accordingly, it concluded that 'in accordance with contemporary norms and trends in this field, the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person' in a situation of slavery, servitude or forced labours.[123] The French criminal legislation in force at the material time 'did not afford the applicant a minor, practical and effective protection against the actions of which she was a victim', because of the lack of a specific provision criminalising slavery, servitude and forced labours.[124] Thus, the Court found that Siliadin had been the victim of a violation of Article 4 ECHR by the French State.

Another case was that of C.N., a Ugandan national who had escaped from her country and entered illegally the United Kingdom, where she had been kept under conditions of domestic servitude.[125] She complained that the U.K. legislation did not contemplate a specific offence of servitude or forced labours, unless it related to the trafficking of human beings. Given that she had not been trafficked into the United Kingdom, however, she had not received the necessary protection by the U.K. authorities.[126] The applicant pointed out that the British Government accepted that there was a 'lacuna in the law' which 'needed to be filled'. After the events relating to her case, specific offences of slavery, servitude and forced or compulsory labour were created.[127]

The European Court recalled its conclusions in the *Siliadin* judgment and asserted the following: 'Article 4 entails a specific positive obligation on Member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour'.[128] The Court asserted that, when the applicant had been (allegedly) subjected to treatments falling within the scope of Article 4 of the Convention, such conduct was not specifically criminalised under domestic law.[129] Thus, 'the legislative provisions in

122. *Siliadin*, par 144.

123. *Siliadin*, par 112.

124. *Siliadin*, par 148.

125. *C.N. v United Kingdom*, App no 4239/08 (ECtHR, 13 Nov. 2012).

126. On 11 August 2009, the police noticed that they would write to the applicant's solicitor to confirm that 'this particular case does not fulfil the requirements of human trafficking as per UK legislation and that legislation does not exist in relation to sole and specific allegations of domestic servitude where trafficking is not a factor' (*C.N.*, par 29).

127. Coroner and Justice Act 2009, Section 71, criminalising 'Slavery, servitude and forced or compulsory labour' (entered into force on 6 Apr. 2010).

128. *C.N.*, par 66.

129. *C.N.*, par 7.

force in the United Kingdom . . . were inadequate to afford practical and effective protection against treatment falling within the scope of Article 4 of the Convention', and C.N. had been the victim of a violation of the Convention.[130]

4. Analysis of the Case Law

The case law recalled by the previous Parts exemplifies the circumstances in which a lacuna in the domestic law of the Member States can amount to a violation of the Convention. The first set of circumstances refer to the lack of a valid 'law' under the Convention system. Whenever the State interferes with, or make an exception to, certain rights and freedoms, the interference or the exception must be authorized by a valid 'law', possessing all the qualitative requirements indicated by the Court. As clearly shown by the case law selected, the European Court tends to focus more on the lack of 'foreseeability' of the domestic law, rather than on the lack of a national legal basis. In both *Baranowski* and *Vyerentsov*, the Court, confronted with a lacuna, did not consider the lacuna *in itself* a violation of the Convention: the lacuna was deemed to cause a lack of 'foreseeability' in the national law.

The origins of this tendency are probably rooted in the broad definition of law promoted by the Court. As previously recalled, the Court considers valid sources of law every 'enactment in force as the competent courts have interpreted it'.[131] For this reason, it is uncommon for the Court to be faced with a total lack of a national legal basis. The Court is usually confronted with national laws not complying with the qualitative requirements of accessibility and foreseeability, and it has thus developed a well-considered case law relating to this hypothesis. Consequently, the Court tends to concentrate more on the qualitative requirements than on the national legal basis: this might be the reason why, even if there is a clear lacuna in the domestic law, the Court's reasoning tends to adhere to the 'safe' path traced by the noncompliance with the Convention standards of quality (and, especially, with the standard of foreseeability).

The second set of circumstances refer to the violation of positive obligations. As clearly shown by the case law selected, positive obligations imply the need for effective criminal law provisions when

130. *C.N.*, par 76.

131. *Huvig v France*, (1990) Series A no 176-B, par 28.

'fundamental values' are at stake, and especially (but not only) if children and other vulnerable individuals are involved.

Thus, the Strasbourg Court condemns lacunae in the domestic law of the Member States when the failure to provide protection refers to values such as the freedom from servitude, slavery and forced labour (as in *Siliadin*), or the right to personal integrity and sexual self-determination (as in *X. and Y.*). The different attitude displayed by the Court in the *E.N.* case might be due to the fact that the violation involved was 'minor', since 'there was no element of physical contact between the applicant and her stepfather'[132] (the case, however, is now under referral to the Grand Chamber). On the other hand, when the gap amounts to a 'major' violation of fundamental values, the Court can go as far as to require the criminal provision to have certain contents (as in the *M.C.* judgment). In this case, the Court justifies the 'intrusion' into the State sovereignty by recalling the principle of evolutive interpretation. The need for an homogenous protection of fundamental values by all Member States is clearly implied.

It is to be noted that the Strasbourg case law does not exclude the possibility that the judiciary might play a role in the creation of effective criminal law provisions. Coherently with the substantial notion of 'law' promoted by the European Court, it is, on the contrary, normal that the case law might be the ground for the criminal liability of the accused.[133] Thus, in the case of *M.C. v Bulgaria*, the failure by the domestic law to comply with the necessary standards of protection did not derive only from the inadequacy of the written provision. On the contrary, the Court pointed out that, even if 'in most European countries . . . the definition of rape contains references to the use of violence or threats of violence by the perpetrator', the case law of those countries requires 'lack of consent, not force . . . as the constituent element of the offence of rape'.[134] The absence of a similar case law developed by the Bulgarian courts contributed to the finding of a violation of the applicant's right under Article 8 ECHR.

5. The Position of the European Court of Human Rights Toward the Activism Displayed by National Courts

Having concluded that, under certain circumstances, a gap in the domestic law might cause a violation of the Convention rights and

132. As pointed out by the respondent Government (*E.S. v Sweden*, App no 5786/08 (ECtHR 21 June 2012) (referred to the Grand Chamber on 19/11/2012) par 51).

133. *E.g., C.R. v United Kingdom*, (1995) Series A no 335-C.

134. *M.C. v Bulgaria*, ECHR 2003-XII, par 159.

freedoms, it is worth asking whether domestic courts may legitimately fill that gap.

As previously stated, the Court promotes a 'substantial' notion of law, including written as well as unwritten law.[135] Clearly, the 'substantial' notion of law promoted by the ECtHR allows domestic courts to contribute to the formation of the domestic law, with the aim of improving its quality. However, the domestic courts' activism is not unlimited. The wide notion of 'law' elaborated by the European Court encompasses qualitative requirements ('accessibility' and 'foreseeability') which not only the written law, but also the case law must respect.

The requirement of accessibility is satisfied when the case law is published.[136] Foreseeability, instead, is a much more complex and flexible requirement.[137] The foreseeability of the domestic case law is never in doubt whenever there is a 'long-established case law', having taken a 'clear and consistent position' toward the interpretation and application of the written law.[138] However, foreseeability depends 'to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed'.[139] Thus, the lack of a long-established case law might be of no importance, for instance, when the applicants are professionals or persons otherwise expected to know the regulation on a certain issue.[140] If a judgment has been delivered by the national courts on a topic which was not previously regulated, or if there is a reversal of case law, the new interpretation will be foreseeable if 'consistent with the essence of the offence'.[141]

To conclude, domestic courts are not only allowed, but sometimes required, to take part into the creation of a valid domestic 'law' under the Convention, because the European Court promotes a notion of 'law' grounded on the cooperation between the legislature and the judiciary. However, the domestic case law has to comply with the same standards of quality that the written law is required to fulfil: namely, accessibility

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135. *See supra* text accompanying note 95.

136. *G. v France*; *Kokkinakis v Greece*.

137. On this topic, see the interesting analysis by LAUTENBACH, *supra* note 82, at 119.

138. *Achour v France*, ECHR 2006-IV, par 52.

139. *Cantoni v France*, ECHR 1996-V, par 35.

140. *K.A. & A.D. v Belgium*, App nos 42758/98, 45558/99 (ECtHR, 17 Feb. 2005), par 55; *see also Custers, Deveaux & Turk v Denmark*, App nos 11843/03, 11847/03, 11849/03 (ECtHR, 3 May 2007), par 81.

141. *E.g.*, *S.W. v United Kingdom*, (1995) Series A nos. 335-B, par 41; *Jorgic v Germany*, App no 74613/01 (ECtHR, 12 July 2007) par 109; *Dragotoniu & Militaru-Pidhorni v. Romania*, App no 77193/01; 77196/01 (ECtHR, 24 May 2007) par 37; ECtHR, *Case of Moiseyev v. Russia*, App no 62936/00 (ECtHR, 9 Oct. 2008) par 241.

and foreseeability. The process of gap-filling is thus admissible, provided that the final result is both accessible and foreseeable to the citizens. If this result is granted, the gap-filling process does not infringe any human right.

V. CONCLUSION

The aim of the present Article is to investigate the attitude of the European Court toward judicial activism. The case law analysed leads to the conclusion that the Court encourages and approves of the phenomenon.

From an 'internal' perspective, the Strasbourg Court conceives its own activism as a natural consequence of its purposive approach to the Convention, aiming at the double result of granting effectiveness to human rights and allowing the Convention to keep pace with the changes occurring into the society. The Court is favourable to extend the Convention provision beyond its original meaning, in order to fill the lacunae left by the Contracting Parties. Moreover, as the Convention is a 'living instrument', the Court promotes the evolution of its provisions in order to protect those human rights which are 'new' to the society. This attitude is, of course, not always acceptable. The Court may deviate from its ordinary path in order to avoid the risk of losing the Member States' respect and support, but, on the whole, its case law demonstrates a strong tendency toward the evolution of a better and wider protection of human rights.

From an 'external' perspective, the European Court encourages the judiciary to contribute to the creation of the domestic law: domestic courts are thus allowed (and required) to cooperate with the legislature in order to provide the citizens with an accessible and foreseeable law. This result may serve the purpose of creating the grounds for a 'legitimate' interference with a human right or freedom, or of providing effective protection to human rights in the inter-individual sphere.

Clearly, the external perspective of the Strasbourg Court towards judicial activism is influenced by the autonomous notion of domestic law adopted by the Court, including (accessible and foreseeable) written and unwritten laws. This notion finds its roots in the common law tradition, but it is applied, also, to the civil law jurisdictions.[142] In 1990, this choice was contested by reason that 'in the case of Continental countries . . . only a substantive enactment of general application—whether or not

142. *Huvig v France*, (1990) Series A no 176-B, par 28.

passed by Parliament—could amount to a "law"'.[143] On that occasion, the Court wisely remembered that 'it would be wrong to exaggerate the distinction' between common law and civil law jurisdictions, because 'statute law is, of course, also of importance in common-law countries. Conversely, case law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts'.[144]

This assertion is likely to have an impact on continental legal systems, where the traditional opinion that courts do not create law is accompanied by a lack of regulation for the overruling of previous decisions. The need to comply with the Convention standard of foreseeability could force domestic courts to develop rules governing the evolutions of their case law. Indeed, among those scholars who complain about the dangerous lack of consistency and foreseeability of the Italian case law,[145] one suggests that the influence of the European Convention might represent the solution to an old problem affecting civil-law jurisdictions.[146]

In the end, the European Court's theory of the sources of law could strengthen the convergence of civil law and common law traditions, thus blurring the distinction once separating them.

143. *Huvig*, par 28.

144. *Id.*

145. *E.g.*, A CADOPPI, IL VALORE DEL PRECEDENTE NEL DIRITTO PENALE (Torino, Giappichelli 2007); O Di Giovine, *Ancora sui rapporti tra legalità europea e legalità nazionale: primato del legislatore o del giudice?*, DIRITTO PENALE CONTEMPORANEO (2012), http://www.penalecontemporaneo.it.

146. S Riondato, *Retroattività del mutamento giurisprudenziale sfavorevole, tra legalità e ragionevolezza*, *in* DIRITTO E CLINICA. PER L'ANALISI DELLA DECISIONE DEL CASO 255 (U Vincenti ed., Padova, CEDAM 2000).