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Positive Obligations and Criminal Justice: Duties to Protect or Coerce?

Liora Lazarus¹

Andrew Ashworth's prodigious body of work on criminal law, criminal law theory and sentencing theory has more recently been complemented by a relatively newer strand of enquiry on the relationship between criminal law, criminal justice and human rights.² I have been privileged to co-teach two graduate courses with Professor Ashworth on this area. The relationship between human rights, criminal law and criminal justice is relatively under-explored, as it requires an intimate knowledge of more than one field of law. Few are better placed than Ashworth.

Ashworth's scholarship in this area is wide ranging, and he has produced a body of work which provides a framework within which to balance respect for human rights and the pursuit of safety and security, or 'the reduction of harm and reduction of the risk of harm',³ through the criminal law. Much of his work has focused on unearthing the human rights safeguards aimed at constraining coercive activity through criminal procedure. He has sought to outline the ways in which *habeas corpus* and fair trial rights can be used as principles to regulate the criminal process as a whole, and to tame the excesses of political pursuits of security and public protection.⁴ But in his more recent work, Ashworth acknowledges that while 'the constraints imposed by the

¹ Fellow in Law, St. Anne's College, Oxford. My thanks must go to Julia Lewis for her excellent case research work in support of this chapter, and to Miles Jackson and the editors of this volume for their feedback. All errors are my own.

² Some examples include: A Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell 2002); A Ashworth and B Emmerson, *Human Rights and Criminal Justice* 2001; A Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in B McSherry, A Norrie and S Bronitt (eds), *Regulating Deviance: the Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009); A Ashworth and D van Zyl Smit, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 MLR, 541-560; A Ashworth, 'Criminal Procedure, Human Rights and Balance' in T Elholm et al (ed), *Ikke kun Straf: Festskrift til Vagn Greve* (Jurist- og Økonomforbundets Forlag 2008); A Ashworth, 'Security, Terrorism and the Value of Human Rights' in B J Goold and L Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007); A Ashworth, 'Criminal Justice Reform: Principles, Human Rights and Public Protection' (2004) Crim LR, 516-532; A Ashworth and M Strange, 'Criminal Law and Human Rights' (2004) European Human Rights Law Review, 121-140.

³ A Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in B McSherry, A Norrie and S Bronitt (eds), *Regulating Deviance: the Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009).

⁴ Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (n 2 above).

European Convention on Human Rights (ECHR) are significant in relation to criminal procedure', they are 'slightly less significant in matters of sentencing and not extensive at all in the criminal law itself'. He is led to conclude that the 'Convention leaves large gaps in the normative coverage, having nothing to say on major issues'.⁵

As a consequence, Ashworth, whose concern is with the unjustified expansion of the criminal law, seeks to develop human rights principles to underpin a 'liberal theory of criminalisation' based on the principle of harm.⁶ He, along with Lucia Zedner, is right to be worried about the spread of the preventative justice model of criminal law and the potential for coercive overreach.⁷ Ashworth's use of human rights (in particular rights under the ECHR) is thus directed to the limitation of the preventative measures that have proliferated in recent years. His focus on the limiting powers of rights such as liberty (Article 5 ECHR) and fair trial (Article 6 ECHR) is at the core of this project.

What I propose to do in this chapter is to explore the relationship between criminal law, criminal process and human rights from a slightly different perspective. I will seek to demonstrate that while human rights may well be used to limit the excesses of security and law and order politics, the nature of the relationship between human rights and criminal justice cannot be captured alone by the view of rights as a limit on the coercive reach of the criminal law and criminal justice institutions. Increasingly, human rights, cast as positive rights, have resulted in claims for the extension of the criminal law, the creation of preventative duties or 'protective policing measures',⁸ for the intensification of policing and prosecution of sexual and violent crimes in particular, and threats to security or public protection in general.

The story is a complex one which is intimately linked to the growing international acceptance of human rights as including positive rights, and hence a shift from a conception of rights as a limitation on State action to one which now views rights as

⁵ Ashworth, 'Criminal Law, Human Rights and Preventative Justice' (n 2 above) 87, 93.

⁶ Ashworth, 'Criminal Law, Human Rights and Preventative Justice' (n 2 above) 87, 94.

⁷ A Ashworth and L Zedner, 'Just Prevention: preventive rationales and the limits of the criminal law' in RA Duff & S Green (eds), *Philosophical Foundations of the Criminal Law* (OUP, 2011).

⁸ A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Oxford, 2004) 15.

demands for such action.⁹ The result is a process whereby the human rights of those subject to harm - such as the right to life, the right against torture, inhuman and degrading treatment, the right to private life, the right against discrimination, and the right to security - have now combined to create what I argue are most accurately described as *coercive duties* on the State to criminalize, prevent, police and prosecute harmful acts. In short, I want to suggest that human rights may have more to say on the big questions of normative coverage of the criminal law than Ashworth accepts, and as a consequence we need to remain vigilant about the direction of positive duties which require coercive action from the State.

This trend is not only located within the jurisprudence of the European Convention on Human Rights, but is found within international law, as well as domestic constitutions and constitutional adjudication around the world.¹⁰ Any account that seeks to adequately capture the relationship between criminal law, justice and human rights will have to account for the ambiguity that human rights present: both as limiting coercion by the State and as requiring it. Moreover, accounts by human rights lawyers of the benefits of positive rights and duties in general,¹¹ need to take account of the coercive potential which arises out of the logic of positive rights claims and rhetoric in relation to the criminal law.

⁹ S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, 2008); A Mowbray, (n 8 above) See also discussion in Lazarus et al, *The Evolution of Fundamental Rights Charters and Case Law: A Comparison of the United Nations, Council of Europe and European Union Systems* (2011) European Parliament Directorate General for Internal Policies, Part A.

¹⁰ International human rights treaties have always protected positive rights, in particular socio-economic and cultural rights. The language of 'respect, protect, promote and fulfil' suffuses the various rights instruments, implying that even civil and political rights are not merely negative protections against the State. The political struggle for the equal recognition of economic, social and cultural rights gained particular impetus at the 1993 Vienna World Conference and has been consistent since then. See: L Lazarus et al *The Evolution of Fundamental Rights Charters and Case Law* ((2011) European Parliament Directorate General for Internal Policies). The ECtHR is by no means the pioneer regional court on the development of positive rights. The Inter-American Court of Human Rights laid out the basis for positive duties and due diligence requirement 20 years before this in *Velasquez-Rodriguez v Honduras*, judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4. At the domestic level, the German Federal Constitutional Court developed the notion of positive duties even earlier in the 1970s (E Friesenhahn 'Der Wandel des Grundrechtsverständnisses' in *Verhandlungen des 50. Deutschen Juristentages* (Beck München 1974) G1; H H Rupp 'Vom Wandel der Grundrechte' (1976) *AöR* 161). This also relates to the concept of protective duties which were used to protect the unborn foetus in 1975 (*BVerfGE* 39, 1).

¹¹ A Mowbray, (n 8 above) J McBride, 'Protecting Life: a Positive Obligation to Help' 24 (1999) *European Law Review* Human Rights Survey HR/43; JG Merrills, *The Development of International Law by the European Court of Human Rights* (MUP, 1993) 102f; K Starmer *European Human Rights Law* (London, Legal Action Group 199) ch. 5; A Clapham, *Human Rights in the Private Sphere* (Oxford Clarendon Press, 1993).

The chapter will start out by outlining key areas where positive rights claims have shaped the criminal law and criminal justice process. It will then examine the relationship between positive rights and coercion and critique the language used to frame certain positive duties. Finally, the chapter will use the right to security as a case study through which to demonstrate the concerns raised by the development of coercive duties.

Right to life and positive duties

In a variety of jurisdictions, the right to life gives rise to positive duties that the State must fulfill in order to protect life. Here we will focus on the jurisprudence of the European Court of Human Rights (ECtHR). In *Osman v United Kingdom*, the Court developed a wide-ranging general duty out of the right to life, which set aside the exclusionary rule in the UK preventing the police from being held liable in negligence claims for failure to investigate crime.¹² According to the ECtHR, a State has a *general* duty to individuals to protect the right to life. It is required to legislate ‘effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions’.¹³

Given that the specific duties of the State in these cases are also related to tortious liability, the ECtHR acknowledges that it cannot place ‘an impossible or disproportionate burden on the authorities’ as it has to keep ‘bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources’.¹⁴ It also notes that ‘another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice,

¹² *Osman v. United Kingdom*, Application 23452/94 (2000) 29 EHRR 245.

¹³ *Osman* [115].

¹⁴ *Osman* [116]

including the guarantees contained in Articles 5 [right to liberty] and 8 [right to private life] of the Convention'.¹⁵

As a consequence, 'not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising'.¹⁶ Hence, States are only under a *specific* obligation 'in certain well-defined circumstances' to take proactive 'preventive operational measures to protect an individual whose life is at risk from the criminal acts of another'.¹⁷ This specific obligation only arises where 'the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual, and that they failed to take measures within their powers which, judged reasonably, might have been expected to avoid that risk'.¹⁸ This delimited specific duty is clearly framed and informed by tortious notions of causation and responsibility.¹⁹

Since *Osman* was decided, a range of cases have been brought to Strasbourg involving the specific positive duty arising under the right to life,²⁰ and the question of whether the State has fulfilled the general positive duty.²¹ The cases where a breach of the general duty has been found have mostly centered on the State's failure to properly investigate a death.²² This constitutes a breach of an ancillary procedural

¹⁵ *Osman* [116].

¹⁶ *Osman* [116].

¹⁷ *Osman* [115].

¹⁸ *Ibid* [116].

¹⁹ D Fairgreave, *State Liability in Tort: A Comparative Law Study* (OUP Oxford 2003); L Hoyano, 'Policing Flawed Police Investigations: Unravelling the Blanket' (1999) 62 *Modern Law Review* 912-936.

²⁰ Some examples include: *LCB v UK* Application 2341/94, (1998) 27 EHRR 212; *Keenan v UK* Application 27229/95, (2001) EHRR 242; *Rantsev v Cyprus and Russia* [2010] ECHR 25965/04 ; *Kilic v Turkey* Application 22492/93, (2001) 33 EHRR 1357; *Mahmut Kaya v Turkey* Application 22535/93 (ECtHR 28 March 2000); *Nuray Sen v Turkey* Application 25354/94 (ECtHR 30 March 2004) ; *Akkoc v Turkey* Application 22947/93, (2002) 34 EHRR 51; *Kontrova v Slovakia* Application 7510/04 (ECtHR 31 May 2007); *Demiray v Turkey* Application 27308/95 (ECtHR 21 November 2000); *Oneryildiz v Turkey* Application 48939/99, (2005) 41 EHRR 325.

²¹ *Rantsev v Cyprus and Russia* Application 25965/04 (ECtHR 7 Jan 2010); *Kilic v Turkey* Application 22492/93, (2001) 33 EHRR 1357; *Mahmut Kaya v Turkey* Application 22535/93 (ECtHR 28 March 2000); *Nuray Sen v Turkey* Application 25354/94 (ECtHR 30 March 2004); *Akkoc v Turkey* Application 22947/93 (2002) 34 EHRR 51; *Shanaghan v UK* Application 37715/97 (ECtHR 4 May 2001); *Nachova v Bulgaria* Application 43577/98, (2004) 39 EHRR 793; *Kontrova v Slovakia* Application 7510/04 (ECtHR 31 May 2007); *Demiray v Turkey* Application 27308/95 (ECtHR 21 November 2000); *Mastromatteo v Italy* Application 37703/97, [2002] ECHR 689 ; *Calvelli v Ciglio v Italy* Application 32967/96, 17 January 2002; *Vo v France* Application 53924/00, (2005) 40 EHRR 259; *Oneryildiz v Turkey* Application 48939/99, (2005) 41 EHRR 325.

²² *Angelova and Iliev v Bulgaria* Application 55523/00 (26 July 2007); *Rantsev v Cyprus and Russia* Application 25965/04 (ECtHR 7 January 2010) ; *Kilic v Turkey* Application 22492/93, (2001) 33

obligation under Article 2 (right to life) to ‘conduct an effective investigation into the death and instigate criminal proceedings where necessary’.²³ The duty to investigate supplements the general duty of the State to put in place criminal law and policing measures to prevent and deter violations of the right to life. In the ECtHR jurisprudence, breach of the investigative duty is particularly likely to be found where the State has failed to properly investigate a killing which may have been racially motivated, and which also engages Article 14 (prohibition on discrimination).²⁴ The procedural obligation to investigate deaths also presupposes the setting-up of an efficient judicial system and in some circumstances recourse to criminal law.²⁵

Despite the potentially expansive scope of the general duty under *Osman*, the ECtHR’s jurisprudence regarding the right to life has thus far given rise to clearly identifiable and delimited positive duties, which places the standard of fault very high. Given that murder is very likely to be criminalized, the general positive duties that have arisen out of this case law have dealt with serious deficiencies in the investigation, prosecution and trial flowing from deaths. There are a number of cases where applicants have argued for the extension of the criminal law to acts resulting in death.²⁶ In two cases of medical negligence, one dealing with the death of an unborn foetus,²⁷ the Court held that civil law remedies were sufficient and that the right to life did not automatically require recourse to criminal law sanctions where breaches occur.

But the threshold at which criminal law sanctions are required by Article 2, or at which sanctions should be imposed, is not always set this high. In *Oneryildiz v Turkey*

EHRR 1357; *Mahmut Kaya v Turkey* Application 22535/93 (ECtHR 28 March 2000) ; *Nuray Sen v Turkey* Application 25354/94 (ECtHR 30 March 2004), ; *Akkoc v Turkey* Application 22947/93, (2002) 34 EHRR 51; *Kontrova v Slovakia* Application 7510/04 (ECtHR 31 May 2007); *Demiray v Turkey* Application 27308/95 (ECtHR 21 November 2000).

²³ See on standards of the investigation: *Keenan v UK* Application 27229/95, (2001) EHRR 242; *Jordan v UK* Application 24746/94, (2003) 37 EHRR 2.

²⁴ *Menson v UK* Application 47916/99, 6 May 2003 ; *Nachova v Bulgaria* Application 43577/98, (2004) 39 EHRR 793; *Angelova and Iliev v Bulgaria* Application 55523/00 (ECtHR 26 July 2007) ; but see *Shanaghan v UK* Application 37715/97 (ECtHR 4 May 2001), where the obligation to investigate possible racist overtones was not viewed as mandatory unless there was a real and legitimate concern of discriminatory practice.

²⁵ *Vo v France* Application 53924/00, (2005) 40 EHRR 259 ; *Demiray v Turkey* Application 27308/95 (ECtHR 21 November 2000).

²⁶ *Calvelli v Ciglio v Italy* Application 32967/96, 17 January 2002; *Vo v France* Application 53924/00, (2005) 40 EHRR 259; *Oneryildiz v Turkey* Application 48939/99, (2005) 41 EHRR 325.

²⁷ *Vo v France* Application 53924/00, (2005) 40 EHRR 25 .

the State was held liable for being too lenient on local mayors whose ‘negligent omissions’ resulted in the death of a number of Turkish citizens where a rubbish dump collapsed on their shacks after a methane explosion.²⁸ The mayors were held guilty of ‘negligent omissions in the performance of their duties’ (§230 of the Turkish Criminal Code) and given a suspended fine which was the lowest available penalty. The ECtHR took the view that the criminal provision in question did ‘not in any way relate to life-endangering acts or to the protection of the right to life within the meaning of Article 2’ and hence there was no ‘acknowledgment of any responsibility for failing to protect the right to life’. The Court argued further there was no ‘precise indication that the trial court had sufficient regard to the extremely serious consequences of the accident; the persons held responsible were ultimately sentenced to derisory fines, which were, moreover, suspended’. As a consequence the ECtHR concluded:

‘It cannot be said that the manner in which the Turkish criminal justice system operated in response to the tragedy secured the full accountability of State officials or authorities for their role in it and the effective implementation of provisions of domestic law guaranteeing respect for the right to life, in particular the deterrent function of the criminal law. In short, it must be concluded in the instant case that there has also been a violation of Article 2 of the Convention in its procedural aspect, on account of the lack, in connection with a fatal accident provoked by the operation of a dangerous activity, of adequate protection “by law” safeguarding the right to life and deterring similar life-endangering conduct in future’.²⁹

Oneryildiz is only one example of how the right to life can have an intensifying effect on the shape and implementation of the criminal law, on the exercise of prosecutorial discretion, the conduct of a criminal trial, and on the type and gravity of sentence. There are other instances where the ECtHR has held that ordinary criminal law protections were not effective enough due to basic defects in the ambit and implementation of the criminal law. Many of these are very extreme cases in the south-east region of Turkey and concern the criminal law regulation of official

²⁸ *Oneryildiz v Turkey* Application 48939/99, (2005) 41 EHRR 325, paragraph 118.

²⁹ *Oneryildiz v Turkey* [116-117].

killings of Kurds suspected of supporting the PKK.³⁰ But not all successful applications are limited to such politically extreme circumstances. In *Kontrova v Slovakia*,³¹ the ECtHR found the State in breach of the right to life where the police had failed to respond adequately to an initial complaint of domestic violence, which was directly related to the death of two children. In this case the ECtHR was particularly critical of the fact that ‘one of the officers involved assisted the applicant and her husband in modifying her criminal complaint of 2 November 2002 so that it could be treated as a minor offence calling for no further action’.³² This action, and other dereliction of police duties in response to the emergency calls of the applicant, were seen as leading directly to the death of the applicant’s two children and were key in the success of this application.

The case law on the right to life is instructive in respect of how positive rights claims, most frequently arising out of tortious actions against the State, can shape the criminal law and its enforcement in a variety of circumstances. Later in this chapter, the broader implications of such duties will be explored. Suffice it to say, at this stage, that the rhetoric of positive duties in relation to the right to life is not confined to the court rooms. Politicians and State actors are all aware of, and quick to deploy, a justification for an increasing range of preventive criminal law measures based on the right to life. This is also mirrored in the language of the right to security in a range of jurisdictions and will be explored in a later part of this chapter. In short, case law is one thing, it is another matter how States and governments translate the messages they are hearing from the ECtHR and other constitutional courts, and how they are incorporating these messages into the rhetoric of public protection. The risk of coercive overreach may not lie then in the specific decisions of the Courts, but rather in the reception of the messages in question within a broader politics of security.

Gender violence and positive duties

Since the Convention on the Elimination of All Forms of Discrimination Against

³⁰ *Mahmut Kaya v Turkey* Application 22535/93 (ECtHR 28 March 2000), *Kilic v Turkey*, Application 22492/93 (2001) 33 EHRR 1357 and *Akkoc v Turkey* Application 22947/93 (2002) 34 EHRR 51 held the transfer of jurisdiction to national security forces for terrorist crimes was incompatible with art.6.

³¹ *Kontrova v Slovakia* Application 7510/04 (ECtHR 31 May 2007).

³² *Kontrova v Slovakia* [54].

Women (CEDAW) was adopted by the UN General Assembly, gender violence has been the subject of extensive international law activity.³³ This includes the 19th General Recommendation of the CEDAW Committee,³⁴ which notes that States should ‘take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act’ and ‘ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity’.³⁵ Similarly, the General Assembly Declaration on the Elimination of Violence Against Women (DEVW) enshrines a ‘due diligence’ standard and enjoins States to ‘pursue by all appropriate means and without delay a policy of eliminating violence against women’ including: exercising ‘due diligence to prevent, investigate and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons’.³⁶ The international duty of due diligence with respect to the treatment of violence against women is also supported by the Committee of Ministers of the Council of Europe in their Recommendation (2002) which obliges states to penalize all non-consensual sexual acts, including where the victim does not show resistance.³⁷

Much of this international activity is directed towards systemic reform of the treatment of victims of gender violence and could not be said to establish positive duties directed at the coercion of perpetrators of gender violence. Nevertheless, there is little question that the activities have led to an extension of the criminal law, and a strong intensification of the policing and prosecution of acts of gender violence. This was particularly evident in the case of *MC v Bulgaria* where the ECtHR declared itself:

... persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the

³³ L Lazarus, ‘*The Human Rights Framework Relating to the Handling, Investigation and Prosecution of Rape Complaints*’, *Annex A to the Stern Report on The Handling of Rape Complaints* (2010).

³⁴ General Recommendation 19 of January 29, 1992.

³⁵ General Recommendation 19 of January 29, 1992, s 24.

³⁶ General Assembly Resolution 48/104 of 20 December 1993, Article 4.

³⁷ Recommendation No. R (2002) 5 adopted by the Committee of Ministers on 30 April 2002 and Explanatory Memorandum. H/Inf (2004).

individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the Member States' positive obligations under Articles 3 [prohibition on torture, inhuman and degrading treatment] and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual act, including the absence of physical resistance by the victim.³⁸

The international law obligations, soft law, and jurisprudence of the ECtHR have all played into domestic court interpretations of the right to sexual autonomy and rape. This is evident in both the South African and English cases which we will return to below.³⁹

Domestic Violence and Violence Against Children

A number of decisions by the ECtHR have developed protective duties with respect to domestic violence and violence against children. *Opuz v Turkey* dealt with a pattern of domestic violence culminating in a murder.⁴⁰ The authorities repeatedly failed to take special measures to protect the victims, on the grounds that they were limited by the applicable domestic law. Here the ECtHR incorporated a broader view of the discriminatory nature of violence against women. The decision, which was heavily influenced by the CEDAW committee's work and the Recommendations of the Committee of Ministers of the Council of Europe, declared that the ineffectiveness of domestic remedies and the failure to take pre-emptive protective measures in relation to domestic violence constituted a violation of Article 14 as well as Articles 2 and 3 (prohibition on torture, inhuman and degrading treatment) in this context. The Court was highly critical of the authorities failure to properly consider the risks and threats that the offender posed. It rejected the Government's arguments that there was no 'tangible evidence' that the life of the victim was in danger.⁴¹ The Court noted that no attempt had been made to balance the risks and consider the proportionality of

³⁸ *MC v Bulgaria* Application 39278/98, (2005) 40 EHRR 20, [166].

³⁹ *R v G* [2008] UKHL 37; *S v Chapman* 1997 (3) SA 342 (SCA); *The State v Baloyi* (2000) 1 SACR 81 (CC).

⁴⁰ *Opuz v Turkey* (Application no. 33401/02) 9 June 2009.

⁴¹ *Opuz v Turkey* [147].

particular protective measures.⁴² Notably, however, it added, citing decisions of the CEDAW Committee, that:

‘In any event, the Court underlines that in domestic violence cases perpetrators’ rights cannot supersede victims’ rights to life and to physical and mental integrity’.⁴³

It is striking that the countervailing rights and interests of those subject to protective measures received so little regard here. This is a theme to which we return at a number of points later in this chapter.

In *Opuz*, the ECtHR identified women and children as ‘vulnerable groups entitled to State protection’.⁴⁴ This is consistent with a range of decisions regarding violence against children. One of these cases, *A v UK*,⁴⁵ resulted in a clear extension of the criminal law by redefining the context in which the defence of ‘reasonable chastisement’ could be invoked. The Court took the view that ‘beating of a child aged 9 year old with a garden cane applied with considerable force reached the severity [of treatment] prohibited by Article 3’.⁴⁶ It was clear that Article 3 placed positive obligations on the State, and hence ‘children and other vulnerable individuals in particular are entitled to State protection, in the form of effective deterrence, against such breaches of personal integrity’.⁴⁷ Hence placing the burden of proof on the prosecution to ‘establish beyond reasonable doubt that the assault went beyond the limits of law punishment’ meant that the ‘law did not provide adequate protection to V against treatment contrary to article 3, constituting a violation of article 3’.⁴⁸ *A v UK* remains one of the least popular decisions of the ECtHR in the UK, having clearly extended criminal law protections against parental chastisement.

⁴² The ECtHR was equally critical of the Croatian authorities for failure to implement protective measures that had been ordered against an abusive husband in *A v Croatia* (App. No. 55164/08). Here the Court found a violation of the victim’s personal and psychological integrity under Article 8 of the Convention (right to private life). The Court did not find sufficient evidence to ground a claim of discrimination against women however, and was unpersuaded that the actions were discriminatory.

⁴³ *Opuz v Turkey* [147].

⁴⁴ *Opuz v Turkey* [160].

⁴⁵ *A v UK* Application 25599/94 (ECtHR 23 September 1998).

⁴⁶ *A v UK* [21].

⁴⁷ *A v UK* [22].

⁴⁸ *A v UK* [23 - 24].

Three further groundbreaking cases regarding domestic abuse of children gave rise to a significant change in tort law in the UK.⁴⁹ These all involved the failure of local authorities to prevent gross or sexual abuse of children giving rise to potential breaches of Articles 3 and 8. The Court held that ‘the obligation imposed by art. 3 requires that the State take measures to provide effective protection, in particular, of children and other vulnerable persons and take reasonable steps to prevent the ill-treatment of which the authorities had or ought to have had knowledge’.⁵⁰ While the threshold of this substantive test was not met in *DP*, all cases rejected the rule in *X v Bedfordshire* which protected local authorities from liability in negligence in respect of the exercise of their statutory duties to protect children.⁵¹ The *X v Bedfordshire* rule was held to violate Article 13 ECHR (right to an effective remedy) which requires a ‘mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention’.⁵² The child protection cases demonstrate clearly how protective duties arising from international and regional human rights law obligations can transform the contours of domestic tort law, even where the implications for criminal law are not as evident.

Protective duties and the right to security

A range of protective duties have arisen out of the right to security in South Africa where the right is enshrined in the Constitution.⁵³ The Constitutional Court and Supreme Court have been faced with a number of applications regarding the failure of police to protect individuals who have been subject to serious violence and sexual violence.⁵⁴ As with the ECtHR in *MC v Bulgaria*, these cases often raise the right to security in conjunction with other rights such as the prohibition on gender-based violence in international law. While the South African courts have accepted a broad

⁴⁹ *Z v UK* Application 29392/95 (ECtHR 10 May 2001); *E v UK* Application 33218/96 (ECtHR 26 November 2002); *D.P v UK* Application 38719/97 (ECtHR 10 October 2002).

⁵⁰ *E v UK* [88].

⁵¹ [1995] 3 AER 353.

⁵² *Z v UK* [109].

⁵³ Article 12 South African Constitution, in particular Art. 12(1)(c) ‘obliges the State directly to protect the right of everyone to be free from private or domestic violence’.

⁵⁴ *S v Baloyi (Minister of Justice Intervening)* 2000 (1) BCLR 86 (CC); *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC); *Minister of Safety and Security v Van Duivenboden*, case no. 209/2001; *Carmichele v Minister of Safety and Security* 2001 (4) BCLR 938 (CC); *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA).

duty to ‘protect the right of everyone to be free from violence’,⁵⁵ they have (again like the ECtHR) constrained the coercive duties arising from this right by considerations of reasonableness, proximity and resource constraints.⁵⁶

This legal taming of far reaching demands for State coercion arising out of the right to security is welcome, but similarly to the ECtHR jurisprudence most of these cases have involved claims against the State in respect of its failure to act. Here it is the Court’s decision whether the State is at fault, and responsible for wrongs committed in circumstances where it has failed to arrest individuals (*Carmichele*), granted bail to suspects (*Carmichele*), released individual offenders or allowed offenders to escape (*Van Eeden*), or failed to secure the security of individuals on commuter trains (*Metrorail*), where there was an evident risk of harm occurring. Because these cases are about actionable claims and the clear attribution of responsibility, the construction of the duty here has been intimately connected to the South African equivalent of tort law, the law of delict. Hence, while the founding duty is broadly framed, the obligation on the State is constrained by questions of reasonableness (as is the case in the ECtHR’s approach to the right to life). As stated in *Van Eeden*:

A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment, based *inter alia* upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.⁵⁷

The delimitation of positive duties in South Africa echoes the approach taken in *Osman* and is also reflected in the ECtHR’s restricted approach to local authority

⁵⁵ SA Constitution Article 12(1)(c); *S v Baloyi (Minister of Justice Intervening)* 2000 (1) BCLR 86 (CC).

⁵⁶ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC).

⁵⁷ *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) [9].

liability in the child abuse cases.⁵⁸ Clearly these restrictions of the protective duties of the State are welcome. But, as a later part of this chapter will demonstrate, this approach does not always travel across to cases where the issue is one of balance between an individual right and the State's protective duty.

Positive rights and the coercive sting

Having provided a brief overview of the kind of rights claims that can result in positive duties related to the scope of the criminal law (and tort or delict law) and the way in which criminal justice institutions behave, we might reflect for a moment on how these duties can be properly characterized.

Human rights theorists argue persuasively that a theory of rights only as limits on State action is premised on a set of misplaced conceptions. Fredman argues that a conception of rights as limitations is premised on 'a conception of freedom as absence of interference' and 'a characterization of the State as separate from and opposed to the individual'. In contrast, values of 'substantive equality', 'social solidarity' and participative democracy gives rise to a strong claim that rights give rise to a range of duties which involve 'positive action' as well as 'restraint'.⁵⁹ Fredman is joined by a range of contemporary rights theorists who are agreed that rights go beyond subjective individual entitlements that place limitations on the State or other duty bearers, and that rights incorporate the notion that States or other actors have duties to

⁵⁸ The South African and ECtHR approach is also echoed in India where a series of cases have established that the State could be held liable for negligent acts resulting in the violation of the right to life (what many refer now to as a 'constitutional tort'). See: *National Human Rights Commission v. State of Arunachal Pradesh and another* AIR 1996 SC 1234; *M Hongray v. Union of India* AIR 1984 SC 1026; *Challa Ramkonda Reddy v. State of Andhra Pradesh* (1990) ACJ 668; *R Gandhi v. Union of India* AIR 1989 Mad 205; *M/s Inderpuri General Stores v. Union of India* AIR 1992 J&K 11; *Manjit Singh Sawhney v. Union of India* 2005 Indlaw DEL 379; Ken Cooper-Stephenson, 'The Emergence of Constitutional Torts Worldwide', Presented at the Conference on Comparative Constitutionalism on 12. 12. 2005, University of Kwazulu, Natal, South Africa.

⁵⁹ S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, 2008) 1.

respect and protect rights and not merely a duty to desist from violating them.⁶⁰ In the words of Shue: ‘taking rights seriously means taking duties seriously’.⁶¹

These moral claims are hard to refute, and it is not the objective here to take to task those who have proposed them. Even if we do not accept these foundational moral arguments, any analysis of the analytical structure of rights naturally leads us to accept that rights give rise to positive duties. The work on the structure of rights by theorists such as Hohfeld and Jellinek direct us just as comfortably to the conclusion that positive duties are an inevitable consequence of the recognition of a right.⁶² So to avoid any doubt on this question, the claim here is not that there is a foundational or analytical problem with the recognition of positive duties arising out of human rights.

Neither is the claim here that positive duties inevitably result in coercion. Many positive duties which relate to the criminal law and criminal justice agencies are not directed towards the coercion of perpetrators of harm. For example, much of the due diligence requirement with respect to gender violence is directed towards systemic reforms required for the sensitive treatment of victims of sexual violence. Moreover, the term coercion can encompass a range of interferences with the liberty of individuals which are not all of equal gravity. A system of taxation that distributes resources within society so as to protect the dignity rights of the worst off necessarily entails some limitations on the property rights of all individuals in that society. This normally involves law enforcement and the coercion of individuals who breach these rules. These kinds of coercive activities which arise indirectly from the assertion of a general human right such as dignity or equality are less the concern here, than those protective duties which arise directly from the assertion of a right which involve the sharp end of the State’s criminal law enforcement mechanism or military apparatus. We are concerned here with the forms of coercion directed at perpetrators of harm (or potential perpetrators of harm) which restrict rights and liberties to a far greater extent

⁶⁰ D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP, 2007); A Sen *Development as Freedom* (Knopf, 1999); H Shue *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2nd edn, Princeton University Press, 1996); J Waldron ‘Socio-Economic Rights and Theories of Justice (Public Law & Legal Theory Research Paper Series Working Paper No. 10-79, November 2010).

⁶¹ Shue (n 60 above) 167.

⁶² G Jellinek, *System der subjektiven öffentlichen Rechte* (2nd edn, Tübingen 1905); WN Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923 New Haven Yale University Press); R Alexy *A Theory of Constitutional Rights* (translated by J Rivers) (OUP, 2002) 169.

than the normal general limitations we might experience by living in a fair, socially democratic, and redistributive society.

So what should we call these duties? Many of the duties examined in this chapter are well known to human rights lawyers, and even criminal lawyers. But they are not recognized as ‘coercive duties’. They are referred to as ‘protective duties’⁶³ or as the Germans refer to it ‘*Schutzpflichten*’.⁶⁴ This descriptor is incomplete. When the right to life gives rise to a duty on the State it often engages both a protective duty directed towards the individual at risk of harm, as well as a coercive duty directed at the perpetrator or potential perpetrator of the harm. The duty frequently cuts both ways.⁶⁵ While some protective duties give rise to non-coercive duties, such as the training of officers in sensitivity around domestic violence victims, other protective duties *require* the State to coerce individuals who harm or individuals who are at risk of harming, in order to fulfill the duty. To call these duties protective duties alone risks masking the coercive sting in its tail.

Of course, coercive duties are not necessarily a bad thing. Most would argue that they are in fact a very good thing, because they create requirements on the State which are essential to the protection of others. Certainly, coercive duties that are correlative upon rights as fundamental as life or dignity can constitute what we can all comfortably recognize as ‘justified coercion’.⁶⁶ Moreover, coercive duties are also mechanisms by which the State enforces the correlative duties upon individuals not to

⁶³ A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004) 15 – 22, 127-30, 181; J McBride, ‘Protecting Life: a Positive Obligation to Help’ 24 (1999) *European Law Review Human Rights Survey* HR/43.

⁶⁴ *Schutzpflichten* in Germany have commonly been used to justify extension of the criminal law. Most controversially, *Schutzpflichten* have been used to protect the unborn foetus (*BVerfGE* 39, 1). See J Isensee ‘Das Grundrecht als Abwehrrecht und als staatliche Schutzpflicht’ J Isensee and P Kirchhoff, (edd), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band IV: Allgemeine Grundrechtslehren* (Müller Heidelberg 1992) 143. As the FCC is equivocal on this matter, I will not here enter the ongoing debate over whether *Schutzpflichten* should be seen as objective State duties or as correlative duties derived from subjective individual rights to State protection; see R Alexy *A Theory of Constitutional Rights* (trans. Julian Rivers OUP Oxford 2002) 301f.

⁶⁵ This is not to argue that the coercion of a perpetrator or potential perpetrator automatically results in the protection of the subject of the harm. Certainly, in most cases that come to Court the harm has already occurred, and where it has not already occurred we cannot be sure that the coercion of potential perpetrators will in actual fact result in the protection of those at risk of harm.

⁶⁶ R Dworkin, *Law’s Empire* (Harvard University Press, 1986).

breach the rights of others.⁶⁷ The State is indeed required to restrain individuals from breaching the rights of others. To this extent, coercive duties can easily be reconciled with Ashworth's 'liberal theory of criminalisation' in that they anchor coercion in relation to the harm to others.

To be clear, the purpose of this chapter is not to reject or critique the existence of coercive duties. It is more to name them, and thereby to highlight their existence, rather than sublimating them within the comforting label of 'protective duties'. The motive here is to raise some questions and concerns about how coercive duties may be framed. While we can accept that rights give rise to justified coercion by the State, or that the necessary correlative of a right is a duty on individuals to respect the rights of others and the State is justified in enforcing these, it is crucial that we understand how to shape the scope of coercive duties. The key questions that arise when a coercive duty is established is how much coercion is required to fulfill the right or rights of individuals at harm, or at risk of harm. To put this another way, where the State is under a protective duty as a consequence of a positive right, it is critical to establish how much coercion must be exercised in order to fulfill the duty, what form that coercion should take in order to fulfill the duty, what the relation is, and how we strike a balance, between the rights of the person subjected to harm (or at risk of harm) and the perpetrator (or potential perpetrator) of the harm.

A short case example may help demonstrate the problem here. The case is *R v G*.⁶⁸ G, a 15 year old boy, had sexual intercourse with R when she was 12. He agreed to submit a guilty plea on the basis that R had willingly agreed to have intercourse with him and that he honestly believed she was 15 as she had told him so. R agreed to G's plea and the prosecutor was invited to drop the charge. G was nevertheless convicted and sentenced under section 5 of the Sexual Offences Act 2003 (rape of a child under 13). G appealed arguing that he could have been charged with a less serious offence under section 13 of the Sexual Offences Act 2003 (child sex offences committed by children or young persons). Part of G's argument was that his rights under Article 8 of the ECHR included a right not to be subject to undue stigma and practical

⁶⁷ L Lazarus et al, *The Relationship Between Rights and Responsibilities* (2009) 18/09 Ministry of Justice Research Series.

⁶⁸ *R v G* [2008] UKHL 37.

interference with his right to private life. G argued that the choice of the more serious offence of rape by the prosecutor and his subsequent conviction was therefore a disproportionate interference with his Article 8 rights. On the other hand, the Supreme Court was aware that the ECHR has developed a set of positive duties with regard to the protection of rape victims or victims of sexual violence that arise out of Article 8 and 3.⁶⁹ The case involved a number of arguments, some of which veered away from the competing rights arising from Article 8, but the key passage on this question came from Baroness Hale who had already pointed to the countervailing positive obligations that the ECHR had developed regarding the State's protection of rape victims or potential rape victims:⁷⁰

In effect, therefore, the real complaint is that the appellant has been convicted of an offence bearing the label 'rape'. Parliament has very recently decided that this is the correct label to apply to this activity. In my view this does not engage the Art. 8 rights of the appellant at all, but if it does, it is entirely justified. The concept of private life "covers the physical and moral integrity of the person, including his or her sexual life" (*X and Y v Netherlands* at [22]). This does not mean that every sexual relationship, however brief or unsymmetrical, is worthy of respect, nor is every sexual act which a person wishes to perform. It does mean that the physical and moral integrity of the complainant, vulnerable by reason of her age if nothing else, was worthy of respect. The state would have been open to criticism if it did not provide her with adequate protection. This it attempts to do by a clear rule that children under 13 are incapable of giving any sort of consent to sexual activity and treating penile penetration as a most serious form of such activity. This does not in my view amount to a lack of respect for the private life of the penetrating male.⁷¹

⁶⁹ *X and Y v Netherlands* Application 8978/80 (1986) 8 EHRR 235; *MC v Bulgaria* Application 39278/98 (2005) 40 EHRR 20. See in general L Lazarus, *The Human Rights Framework Relating to the Handling, Investigation and Prosecution of Rape Complaints*, Annex A to the *Stern Report on The Handling of Rape Complaints* 2010.

⁷⁰ Reference to *X and Y v Netherlands* (1986) 8 EHRR 235 in *R v G* [UKHL] 37 [41].

⁷¹ *R v G* [2008] UKHL 37, [54].

Baroness Hale's observations demonstrate the difficulty of framing and balancing the competing rights and duties arising in this case. Article 8 has frequently been deployed to protect the private life or sexual autonomy of individuals. This notion of sexual autonomy cuts both ways. On the one hand, Article 8 was deployed in the decriminalisation of homosexuality.⁷² On the other hand, Article 8 has been used to require 'practical and effective protection' by the criminal law of those vulnerable to sexual violence.⁷³ The difficulty that Baroness Hale had to confront was how to reconcile these two parts of the right to sexual autonomy, and to frame the duties on the State in response to these rights. According to Baroness Hale G's article 8 rights had almost no countervailing weight against the State's duty under Article 8 to protect potential victims of rape. The justification she provides for her view is shallow. The State was duty bound to protect victims of rape, but this did not in her view 'amount to a lack of respect for the private life of the penetrating male'. The difficulty here was that the duty of general protection against the population at large is being deployed to justify the coercion of a particular individual in a particular way. There was no consideration by Baroness Hale of the individual circumstances of the case, or for that matter of the rights of the individual in question.

To be sure, *R v G* provides a a crisp example of the dilemmas and complexity that arise where the State is both under a coercive duty regarding perpetrators of sexual offences, while also subject to their countervailing rights to autonomy. How are we to know whether the choice of the more serious offence in this case constitutes the best balance? Where the Court has to take such competing rights and duties into account, the answer can only be found if we understand the contours of the coercive duty to which these rights give rise, and the extent of the countervailing negative rights protections. In the *R v G* decision, the cursory balancing act was insufficient. It rested on broad brush rhetorical assertions of the protective duties of the state, and included almost no analysis of the content of the competing right.

The rhetorical assertion of coercive duties within the law needs also to be read against the background of an increasing rhetorical use of rights to justify coercive measures by politicians and State actors internationally. As noted earlier, the implications of

⁷² *Dudgeon v UK* Application 7526/76 (1982) 4 EHRR 149.

⁷³ *X and Y v Netherlands* Application 8978/80, (1986) 8 EHRR 235.

legal language of this kind cannot be confined to courts of law. We also need to be concerned about the extra-legal implications of broad rhetorical assertions of coercive duties inside the Courts, and the concomitant risk of coercive overreach. As I have argued elsewhere in more depth, this has been well demonstrated by the growing rhetoric of the right to security.

The right to security, political rhetoric, and the risk of coercive overreach

Coercive duties are even harder to frame when the right that underpins them is underdetermined, and the potential for their political exploitation is even higher. The right to security is such a right. In a recent piece, I analyse references to the ‘right to security’ in the English speaking press globally over the last 10 years.⁷⁴ This shows that assertions of the right to security can imply, and have been increasingly politically exploited to mean, increasing police powers, powers of surveillance, powers of pre-trial detention, and pre-emptive measures aimed at risk prevention. This right is also frequently used to legitimate invasions or incursions into countries seen to be a threat to security.⁷⁵

As in South Africa, the right to security is enshrined in a number of domestic constitutions internationally while also being expressed within international law,⁷⁶ and the jurisprudence around this right has generated a range of potential claims. Importantly, the right to security has gained an increasing currency in political debate around the world. The political currency of the right to security has not been overlooked by political actors in their quest to legitimate and develop various security measures since 9/11.⁷⁷ The rhetoric has been deployed consistently with respect to

⁷⁴ L Lazarus, 'The Right to Security - Securing Rights or Securitizing Rights' in C Murray et al (ed), *Examining Critical Perspectives on Human Rights* (Cambridge University Press 2011). See also: L Lazarus 'Mapping the Right to Security' in B Goold and L Lazarus (eds) *Security and Human Rights* (Hart Oxford, 2007).

⁷⁵ Lazarus 'Mapping the Right to Security' (n 74 above) Lazarus, 'The Right to Security - Securing Rights or Securitizing Rights' (n 74 above).

⁷⁶ E.g: Section 7 of the Canadian Charter; Article 55(1) Constitution of Hungary; Northern Ireland Draft Bill of Rights includes a right to be free of violence. See also Article 143 of the United Nations General Assembly 2005 World Summit Outcome Document on 'Human Security'.

⁷⁷ Lazarus, 'The Right to Security - Securing Rights or Securitizing Rights' (n **Error! Bookmark not defined.** above).

the Middle East⁷⁸ and North Korea.⁷⁹ It has also been engaged to justify tightening anti-terrorism measures or even to justify military invasion or responses with respect to Afghanistan,⁸⁰ Kosovo,⁸¹ Pakistan⁸² and, in Columbia's case, Ecuador.⁸³ In the war on terror, the language of the right to security is ubiquitous.⁸⁴

Political rhetoric also manifests in the claim that the right to security, cast as 'the protection of life and limb' is 'the basic right on which all others are based'.⁸⁵ These attempts to cast the right to security as a meta-right, and to reorder the priority of rights, hold the risk that rights themselves will be securitized.⁸⁶ In other words, rights to autonomy and liberty may themselves be viewed as a product of the meta-right to security. Or as Waldron argues, we may become so preoccupied with delivering security as the precondition to liberty that we end up with perfect security and very little liberty.⁸⁷

Part of the difficulty with the development of the right to security is that it has been taken to mean not just freedom from physical violence in the most core sense,⁸⁸ but also a range of other values such as 'personal autonomy', 'physical and psychological

⁷⁸ As George W. Bush declared: 'I can understand the deep anger and anguish of the Israeli people. You've lived too long with fear and funerals, having to avoid markets and public transportation, and forced to put armed guards in kindergarten classrooms. The Palestinian Authority has rejected your offered hand and trafficked with terrorists. You have a right to a normal life. You have **a right to security**. And I deeply believe that you need a reformed, responsible Palestinian partner to achieve that security'. George Bush, 'Remarks on the Middle East', speech from the Rose Garden of the White House, 24 June 2002. Full text available at CNN.com <http://www-cgi.cnn.com/2002/ALLPOLITICS/06/24/bush.mideast.speech/index.html> (last accessed 14 September 2010) (emphasis added). George Bush has been joined by Barak Obama, Nicolas Sarkozy, Vladimir Putin, Franco Fini, David Milliband, and Colin Powell (amongst others) who have all asserted the collective right to security of the Israeli people,

⁷⁹ See *The Associated Press*, 'Non-Aligned meeting backs calls for Iraq to disarm; Malaysia warns attack on Iraq would be considered a "war against Muslims"', 23 February 2003.

⁸⁰ E Cochrane, 'Troops deserve our support', *Carstairs Courier* (Alberta), 6 November 2007.

⁸¹ *The Vancouver Sun*, 'Yeltsin's final fling: The Russian leader, often portrayed in the West as a boorish drunk, had substance that belied his unvarnished style', 27 January 2001.

⁸² *The Press Trust of India*, 'Pak should give firm assurance against abetting terrorism', 30 December 2001.

⁸³ *BBC Worldwide Monitoring*, 'Colombia defends its incursion into Ecuador' 23 March 2008.

⁸⁴ For UK and EU examples see: European Commissioner responsible for Justice, Freedom and Security 'EU counterterrorism strategy' European Parliament, Sept. 5, 2007, Speech/07/505. J Reid, 'Rights, Security Must Be Balanced', Associated Press Online 16 August 2006.

⁸⁵ Full text of speech reported by *BBC News* 'Reid Urges Human Rights Shake Up' 12 May 2007, available at http://news.bbc.co.uk/2/hi/uk_news/politics/6648849.stm (last accessed 30 August 2011).

⁸⁶ Lazarus, 'The Right to Security - Securing Rights or Securitizing Rights' (n 46 above)

⁸⁷ J Waldron, 'Security as a Basic Right (after 9/11)' in *Torture, Terror and Trade-Offs: Philosophy for the White House* (OUP 2010) 166.

⁸⁸ South African Constitution, art 12; Northern Ireland Draft Bill of Rights.

integrity and basic human dignity’.⁸⁹ The right has also been described by the United Nations as a right to human security which includes ‘the right of people to live in freedom and dignity, free from poverty and despair’ and to enjoy ‘freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential’.⁹⁰ In short, the range of goods and interests that the right to security can protect internationally is now so extensive that it could in theory be deployed to protect most things we want in life. This porous boundary to the right to security leaves open a greater potential for political and State legitimization of coercive overreach where the right is deployed. This is why I have argued strongly for a legal approach to the right to security that restricts the correlative duty to coerce to one that involves ‘the development of structures and institutions capable of responding to and minimizing ‘critical and pervasive threats’ to human safety, namely ‘absence from harm in the most core physical sense of harm to person’.⁹¹

For the purposes of the argument here, the example of the right to security is raised to demonstrate how particular rights claims may permeate political rhetoric and legitimate strong coercive measures. It is the courts, I argue, that should be tempering broad brush rhetorical claims made in the name of the right to security, and the potential correlative duties that may flow from them.

Rhetoric and the risk of coercive overreach in the courts

As *R v G* demonstrated above, in cases where the fault of the State is not at issue the duty to coerce is not always adequately restricted. In contrast to the State liability cases, coercive duties have been broadly framed and deployed to legitimate criminal law measures that are highly coercive, where the rights of offenders are at issue. This is also demonstrated in the South African case of *Chapman*,⁹² where an appeal of a 14 year prison sentence of a rapist was based on the fact that the defendant was subsequently brain damaged from a serious head injury. Here the Court framed their duty to coerce as follows:

⁸⁹ Canada: *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519.

⁹⁰ United Nations General Assembly 2005 World Summit Outcome Document.

⁹¹ Lazarus, 'The Right to Security - Securing Rights or Securitizing Rights' (n 46 above)

⁹² *S v Chapman* 1997 (3) SA 342 (SCA).

The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. ... Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. ... The appellant showed no respect for their rights. He prowled the street and shopping malls and in a short period of one week he raped three young women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and then proceeded to rape them callously and brutally, after threatening them with a knife. At no stage, did he show the slightest remorse. ... The Courts are *under a duty* to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.⁹³

The questions of whether the appellant deserved his sentence, or whether it was proportionate to the gravity of the crime, or whether the case can be used to imply a harsher sentence for rapists, is not our primary concern here. What is our concern is the mode of legitimation deployed by the Supreme Court. A broad-brush language of rights and duties is harnessed with great effect to legitimate highly coercive measures, which the Court describes itself as *duty bound* to implement. The rights are very broadly framed, as is the correlative duty of the Court, and there is no proper discussion about the nature of the duty, and how it can be framed or narrowed. There is also no consideration of the possibility that coercion in this instance may have a very limited impact on the rights of the victims or potential victims. It cannot be shown that the type and length of sentence (and whether it occurs in a prison or secure hospital) is directly related to the way in which rights of those at risk of harm might be protected. *Chapman* and *R v G* argue that serious criminalization of such harmful acts which result in harsh sentences provide a deterrent effect on potential offenders.

⁹³ *Chapman*, p. 4, emphasis added.

But this is an empirical claim about which many criminologists are rightly wary,⁹⁴ and which in any event raises serious questions about using the individual offenders in these particular cases as a means to an end.

In the cases where actions are brought regarding State liability, the link between the actions of the State body and the breach of the duty was the primary question: was the State at fault for not coercing the individuals in question. This restricted duty is centered around question of proximity and reasonableness with respect to the State's assessment of the risk of harm. But in cases like *R v G* and *Chapman*, the idea that the State might be duty bound to protect individuals from the harmful acts of other individuals in clearly defined circumstances, transmutes into a broad-brush legitimation directed at the coercion of the individual offender. These legitimations involve very little rights analysis, and the language in the courtroom sounds not dissimilar to the kind of political rhetoric surrounding the right to security. It is also noteworthy that the coercive duty is far narrower when it applies to the State's wrongdoing, than when it applies to the individual offenders wrongdoing. This suggests that the risk of coercive overreach is higher where the criminal law is applied to individuals, than when the rights are invoked against the State. The risk of coercive overreach is also higher where the reasoning rests on a rhetorical assertion of rights and correlative coercive duties which are not decisive to the resolution of the case, where no countervailing rights are taken into account, and no systematic analysis of the rights and duties in play is undertaken.

Balancing coercive duties

The ECtHR stipulated in *Osman* that coercive duties had to be balanced against countervailing rights of the accused. But the mechanism by which that balance takes place is opaque, or even non-existent, in the cases discussed where the coercion of the individual is at issue. The matter isn't helped by throwaway lines found in *Opuz v Turkey* where the Court, admittedly facing very extreme circumstances, underlined 'that in domestic violence cases perpetrators' rights cannot supersede victims' human

⁹⁴ See: A von Hirsch, A Bottoms, E Burney and P-O Wickström *Criminal Deterrence and Sentence Severity* (Hart 1999).

rights to life and to physical and mental integrity’.⁹⁵ The balance has to be struck regardless of the gravity of the harm in question. The right cannot merely be suspended in face of the competing protective duty. It must at the very least receive due regard.

In the *Baloyi* case in the South African Constitutional Court,⁹⁶ Albie Sachs was clear that such a balance is unavoidable. This case dealt with the allegation that the Prevention of Family Violence Act 1993 reversed the burden of proof, placing the onus on the accused. The State argued that if the legislative provision in question could be read this way, it was justified as a consequence of the constitutional guarantee of the right to security, as well as international obligations regarding gender violence. Sachs noted that the ‘Court faces the novel and complex task of establishing the appropriate balance between the state’s constitutional duty to provide effective remedies against domestic violence, and its simultaneous obligation to respect the constitutional rights to a fair trial of those who might be affected by the measures taken’.⁹⁷ When concluding that the legislation in question could not be read to place a reverse burden of proof on the accused, he argued:

The Constitution embodies many enduring common law principles, especially those associated with personal freedom. The Constitution also articulates, however, new values and contains different emphases. As pointed out above, the Constitution and South Africa’s international obligations require effective measures to deal with the gross denial of human rights resulting from pervasive domestic violence. At the same time the Constitution insists that no-one should be arbitrarily deprived of freedom or convicted without a fair trial. The problem, then, is to find the interpretation of the text which best fits the Constitution and balances the duty of the state to deal effectively with domestic violence with its duty to guarantee accused persons the protection involved in a fair trial.⁹⁸

Sachs’s judgment is an exemplar of the sort of reasoning that needs to be deployed

⁹⁵ *Opuz* [147]. See discussion of *Opuz* earlier in the chapter.

⁹⁶ *The State v Baloyi* (2000) 1 SACR 81 (CC).

⁹⁷ *Baloyi* [1].

⁹⁸ *Baloyi* [26].

when faced with the competing imperatives of coercive duties on the one hand, and negative rights on the other. But perhaps an even more compelling example of an insistence on the need for a balance between the State's protective duties and the rights of individuals is to found in the German Aviation case.⁹⁹ The German Federal Constitutional Court (FCC) struck down powers under the Aviation Security Act to shoot down aircrafts which had been hijacked with the intention of using the aircraft 'as weapons in crimes against human lives'. The judges argued that the measures violated the essence of the right to life and human dignity of the innocent passengers on the plane who had been made into mere objects of State action. Importantly, the FCC rejected the Government's argument that the relevant powers under the Aviation Security Act could be justified as a consequence of the State's protective duties. It argued thus:

Finally, § 14.3 of the Aviation Security Act also cannot be justified by invoking the state's duty to protect those against whose lives the aircraft ... is intended to be used. In complying with such duties of protection, the state and its bodies have a broad margin of assessment, valuation and organisation ... Unlike fundamental rights in their function as subjective rights of defence [against the state], the state's duties to protect which result from the objective contents of the fundamental rights are, in principle, not defined ... How the state bodies comply with such duties of protection is to be decided, as a matter of principle, by themselves on their own responsibility ... This also applies to their duty to protect human life. It is true that especially as regards this protected interest, in cases with a particular combination of circumstances, if effective protection of life cannot be achieved otherwise, the possibilities of choosing the means of complying with the duty of protection can be restricted to the choice of one particular means ... The choice, however, can only be between means the use of which is in harmony with the constitution.¹⁰⁰

Given the extreme facts of the German Aviation case, and the explicit reasoning deployed by the FCC, this case is a crisp example of both the necessity for, and

⁹⁹ *BVerfGE* (2006) 1 BvR 357/05, 15 February 2006, paragraphs 120 – 121.

¹⁰⁰ *BVerfGE* (2006) 1 BvR 357/05, 15 February 2006, paragraph 136.

framework within which, the balance between coercive duties and individual rights must be struck. Far from the broad brush approach of *R v G* and *Chapman*, and even the dicta in *Opuz v Turkey*, we see here a court insistent on the necessity of holding both the individual right in play and the protective duty asserted. The case explicitly argues that coercive duties are neither absolute, nor so prescriptive as to require one particular kind of coercion on individuals.¹⁰¹ On the contrary, protective duties are broadly defined giving the State a range of alternative routes to their fulfillment, and importantly, must always accord with the values of the Constitution.

Conclusion

This is a modest contribution to the question of the relationship between human rights and criminal justice which builds upon Ashworth's work. It asks for a clearer understanding of positive rights as potentially leading to sharply coercive activity by the State. It also raises some concerns about the rhetorical expression of rights in this context both within the Courts and without. While the case law surrounding the liability of States in respect of their failure to protect individuals from harm by other individuals has managed to contain the reach of coercive duties (or at least the conditions in which a breach of that duty will be found), there are examples of cases like *R v G* and *Chapman* that demonstrate the potential for coercive overreach upon individuals subject to such coercion. We risk overlooking the tensions here if we continue to refer to these positive rights claims only as protective duties. We must not lose sight of the coercive sting in the tail of positive duties, and the necessity of deploying frameworks in which countervailing rights claims can be weighed in the balance. We must also not overlook the potential for rights to intensify and expand criminal law and justice.

¹⁰¹ See also K Moller 'The Right to Life Between Absolute and Proportional Protection' *LSE Law, Society and Economy Working Paper Series*, WPS 13-2010, February 2010.

