

The Paradoxical Relationship between Criminal Law and Human Rights

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Abstract

Christine Van den Wyngaert, currently a judge at the International Criminal Court, is widely credited with the eloquent reference to an opposition between the 'shield' function and the 'sword' function of human rights in the application of criminal law. In short, human rights have both a defensive and an offensive role, a role of both neutralizing and triggering the application of criminal law. If this is indeed a paradox and not just a contradiction, an attempt must be made not to resolve it but to come to terms with it, while being aware of the complexity of the ensuing consequences, and to clarify it in the light of the requisite balance between its component parts. In this contribution, we will examine the way in which the case law of the European Court of Human Rights, in its function of applying and interpreting the rights and freedoms guaranteed by the European Convention on Human Rights, in turn confers on them a role of protecting from and giving rise to criminal law enforcement.

1. Introduction

At the round table held during the colloquy, one of the questions asked was the following:

Christine Van den Wyngaert, currently a judge at the International Criminal Court, is widely credited with the eloquent reference to an opposition between the 'shield' function and the 'sword' function of human rights in the application of criminal law; more specifically, in the sphere of international criminal justice, human rights, which were traditionally viewed as a defensive weapon for the individual, have over the past few decades gradually become an offensive weapon. What do you think?

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It is self-evident that there is a close relationship between human rights and criminal law.¹ This is demonstrated in particular by the various instruments safeguarding fundamental rights and freedoms, whether in domestic, European or international law, in which this relationship is amply illustrated on three levels: classification of offences, sentences and procedure. The obvious nature of this relationship — at least in relative terms — should not, however, obscure its complex and paradoxical character, or the changes and discussions to which it has been subject.

The paradox affecting this relationship has already been discussed by many writers.² According to Mireille Delmas-Marty, it lies in the fact that ‘the criminal law appears to be both a protection and a threat for fundamental rights and freedoms’³ or, in other words, not only ‘a law which protects’ but ‘a law from which protection is required’.⁴ Others have expressed it by describing human rights as both the ‘shield’ and the ‘sword’ of criminal law.⁵ The words of Herbert Packer thirty years previously also come to mind:

The criminal sanction is at once prime guarantor and prime threatener of human freedom. Used providently and humanely it is guarantor; used indiscriminately and coercively, it is threatener. The tensions that inhere in the criminal sanction can never be wholly resolved in favor of guaranty and against threat.⁶

- 1 This discussion is partly based on two recent articles: Fr. Tulkens and M. van de Kerchove, ‘Les droits de l’homme: bonne ou mauvaise conscience du droit pénal?’ in F. Verbruggen et al. (eds), *Strafrecht als roeping. Liber amicorum Lieven Dupont* (Leuven: Universitaire Pers Leuven, 2005) 949–968; and Fr. Tulkens, ‘Human Rights as the Good and the Bad Conscience of Penal Law’, in S. Snacken and E. Dumortier (eds), *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy* (London: Routledge, forthcoming (September 2011)).
- 2 See in particular, A.P. Pires, ‘Quelques obstacles à une mutation du droit pénal’, 26 *Revue générale de droit* (1995) 133–154, at 136, which refers to the ‘ambivalent, if not contradictory, relationship between criminal law and the question of human rights’.
- 3 M. Delmas-Marty, ‘Le paradoxe pénal’, in M. Delmas-Marty and C. Lucas de Leyssac (eds), *Libertés et droits fondamentaux* (Paris: Seuil, 1996) 368–392, at 368.
- 4 R. Koering-Joulin and J.-F. Seuvic, ‘Droits fondamentaux et droit criminel’, *L’Actualité juridique. Droit administratif* (20 July–20 August 1998) 106–129, at 106.
- 5 See, in particular, R. Roth, ‘Libres propos sur la subsidiarité du droit pénal’, in A. Auer et al. (eds), *Aux confins du droit. Essais en l’honneur du Professeur Charles-Albert Morand* (Basel/Geneva/Munich: Helbing & Lichtenhahn, 2001) 429–446, at 437, where the author attributes these expressions to C. Van den Wyngaert who in 1995, in a presentation on the European citizen and criminal justice in the European Union, referred to the dual ‘shield’ and ‘sword’ function of criminal justice [paper presented at the *XVe journées d’études juridiques Jean Dabin* held in Louvain (Belgium) on 27–28 April 1995, the proceedings of which have been published in Fr. Tulkens and H. Bosly (eds), *La justice pénale et l’Europe* (Brussels: Bruylant, 1996)]; J.A.E. Vervaele, ‘Régulation et répression au sein de l’Etat providence. La fonction “bouclier” et la fonction “épée” du droit pénal en déséquilibre’, 21 *Déviance et société* (1997) 121–122; Y. Cartuyvels, ‘Les droits de l’homme, frein ou amplificateur de criminalisation?’ in H. Dumont, F. Ost and S. Van Drooghenbroeck (eds), *La responsabilité, face cachée des droits de l’homme* (Brussels: Bruylant, 2005) 391–439. See also Koering-Joulin and Seuvic, *supra* note 4, at 106, who, for their part, use the terms ‘shield’ (*bouclier*) and ‘two-edged sword’ (*glaive*).
- 6 H.L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), at 366.

In short, human rights have both a defensive and an offensive role, a role of both neutralizing and triggering the criminal law.

If this is indeed a paradox and not just a contradiction, an attempt must be made not to resolve it but to come to terms with it, whilst being aware of the complexity of the ensuing consequences, and to clarify it in the light of the requisite balance between its component parts.

In this contribution, I would like to mention a few stages of this development, and the way in which the case law of the European Court of Human Rights (ECtHR), in its function of applying and interpreting the rights and freedoms guaranteed by the European Convention on Human Rights (ECHR), in turn confers on them a role of protecting from (Section 2) and giving rise to criminal law enforcement (Section 3).

2. The Defensive Role of Human Rights

From a historical perspective, there does not seem to be any doubt that, initially, 'the main effect of taking freedoms into account in the criminal sphere amounted to a limitation of criminal punishment'.⁷

A. Protection from the Criminal Law

The primary, traditional role of human rights is to afford protection from the criminal law. While historically the Declaration of the Rights of Man and the Citizen of 1789 laid down the fundamental principles for protecting the individual from repression 'by an unfettered, unlimited power', those principles gradually became established not only in most countries' positive law but also in the various universal and regional instruments securing recognition of fundamental rights which punctuated the history of the 20th century.

Accordingly, the principle that crimes and punishments must be defined by law (together with its corollaries, notably non-retroactivity and proportionality) appears in Article 11 of the Universal Declaration of Human Rights (1948), Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 9 of the American Convention on Human Rights (1969), Article 7 of the African Charter on Human and Peoples' Rights (1981), Article 6 of the Arab Charter on Human Rights (1994), Article 49 of the Charter of Fundamental Rights of the European Union (2000) and Article 15 of the Arab Charter on Human Rights (2004). The position is similar for the prohibition of inhuman or degrading treatment or punishment, or the presumption of innocence. All these safeguards, which circumscribe and limit the application of criminal law, today represent universal values and form part of our common heritage.

7 Delmas-Marty, *supra* note 3, at 369.

In the context of the ECHR, a natural sphere of application for the defensive role of rights and freedoms in relation to the power of the criminal law can be directly found in Article 5. More than 30 years ago, the ECtHR underlined the importance of the right to liberty in a democratic society, holding that this subject formed part of the European public order.⁸ Article 5 ECHR has given rise to a significant body of case law and continues to do so, in both quantitative and qualitative terms, and carefully performs the vital role of the bad conscience of criminal law. Thus, for example, in a judgment marking a departure from precedent, the Court held that detention under a mandatory life sentence did not satisfy the requirements of Article 5, finding

no sufficient causal connection, as required by the notion of lawfulness in Article 5 §1 (a) of the Convention ... between the possible commission of other non-violent offences and the original sentence for murder.⁹

On the contrary,

[t]he Court cannot accept that a decision-making power by the executive to detain the applicant on the basis of perceived fears of future non-violent criminal conduct unrelated to his original murder conviction accords with the spirit of the Convention, with its emphasis on the rule of law and protection from arbitrariness.¹⁰

Indirectly, in a different sphere, that of freedom of expression (Article 10 ECHR), there are further clear indications of the ECtHR's resistance to the idea of excessive use of penalties. In its traditional review of proportionality in determining whether an interference with freedom of expression is necessary in a democratic society to achieve one of the aims referred to in Article 10(2), the nature and severity of the sanction imposed plays a significant role; the Court stresses the subsidiary nature of recourse to the criminal law and suggests a degree of restraint in its use. Thus, in the *Du Roy and Malaurie v. France* judgment of 3 October 2000, the Court expressly mentions the possibility of protecting people's rights by means other than criminal law provisions.¹¹ In the *Cumpănă and Mazăre v. Romania* judgment of 17 December 2004, the Court observes that:

[a]lthough sentencing is in principle a matter for the national courts, [it] considers that the imposition of a prison sentence for a press offence will be compatible with ... freedom of expression ... only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.¹²

Admittedly, for other provisions, such as, paradoxically, Article 7 ECHR, certain writers have noted a softening, or even distortion, of the approach, and

8 *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12.

9 *Stafford v. the United Kingdom* [GC], Appl. No. 46295/99, 28 May 2002, § 81, ECHR 2002-IV.

10 *Ibid.*, § 82.

11 *Du Roy and Malaurie v. France*, Appl. No. 34000/96, 3 October 2000, § 36, ECHR 2000-X.

12 *Cumpănă and Mazăre v. Romania* [GC], Appl. No. 33348/96, 17 December 2004, § 115, ECHR 2004-XI.

have even wondered whether the principle that crimes and punishments must be defined by law is not gradually being replaced by the principle that they must be legitimate, with all the potential abuses this could entail.¹³ Thus, the ECtHR has pointed out that Article 7 ECHR cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation, provided that the resulting development is consistent with the essence of the offence and could reasonably be foreseen.¹⁴

B. Criminal Law Is an ‘Odious Law’

From a fundamental perspective, it is nevertheless worth noting precisely what justifies all these restrictive principles, namely interference by the criminal law with certain fundamental rights. Such interference is not only the result of abuses and a certain immoderation peculiar to the criminal law of the *Ancien Régime*. It is inherent in the criminal law itself, as is suggested by the expressions ‘odious law’¹⁵ or ‘expensive’,¹⁶ often used in the late 18th and early 19th century to describe it. Clarifying the meaning of this description, Bentham stated that criminal justice, ‘throughout the whole course of its operation, can only be a train of evils — evils in the threats and constraint of the law — evils in the pursuit of the accused, before the innocent can be distinguished from the guilty — evils in the infliction of judicial sentences — evils in the inevitable consequences which reverberate upon the innocent’.¹⁷ In the same vein, one may note the specific terms ‘physically restrictive’ (*afflictif*) and ‘dishonouring’ (*infamant*) traditionally associated with criminal punishment.¹⁸ Although Bentham only speaks in terms of ‘evils’, in accordance with his radically utilitarian stance, it is not difficult to translate his statements into

- 13 S. Van Drooghenbroeck, ‘Interprétation jurisprudentielle et non-rétroactivité de la loi pénale’, 27 *Revue trimestrielle des droits de l’homme* (1996) 459–479, at 475; see also, R. Koering-Joulin, ‘Pour un retour à une interprétation stricte ... du principe de la légalité criminelle (à propos de l’article 7 § 1 de la Convention européenne des droits de l’homme)’, in G. Cohen-Jonathan, J.-F. Flauss and P. Lambert (eds), *Liber Amicorum Marc-André Eissen* (Brussels/Paris: Bruylant/LGDJ, 1995) 247–254.
- 14 *Streletz, Kessler and Krenz v. Germany* [GC], Appl. Nos 34044/96, 35532/97 and 44801/98, 22 March 2001, § 90, ECHR 2001-II.
- 15 See in particular, S. Pufendorf, *Of the Law of Nature and Nations*; French version: J. Barbeyrac (trans.), *Le droit de la nature et des gens*, Vol. II (4th edn, Basel: Thourneisen, 1732; repr. Caen: Université de Caen, 1987), at 126; P. Merlin, *Répertoire universel et raisonné de jurisprudence* (5th edn, Brussels: H. Tarlier, 1826), (v) Loi, at 446; P. Coste-Floret, ‘L’interprétation des lois pénales’, 2 *Revue de science criminelle et de droit pénal comparé* (1937) 4–20, at 5. This expression is traditionally found in the principle *odiosa restringenda*, often cited to justify the strict interpretation of criminal law.
- 16 J. Bentham, ‘Rationale of Punishments and Rewards’, 1811; originally published in French as ‘Théorie des peines et des récompenses’, in E. Dumont (ed.), *Cœuvres de J. Bentham, jurisconsulte anglais*, Vol. II (Brussels: Coster et Cie, 1829), at 10.
- 17 *Idem*, ‘Discourse on Civil and Penal Legislation’, 1802, ed. J. Bowring (1843); originally published in French as ‘Traité de législation civile et pénale’, in Dumont, *supra* note 16, Vol. I, at 187.
- 18 See in particular, on this point, M. van de Kerchove, *Quand dire, c’est punir. Essai sur le jugement pénal* (Brussels: Publications des Facultés universitaires Saint-Louis, 2005), at 35.

‘infringements of human rights’ by seeing any criminalization of an act as an infringement of whatever right or freedom it restricts, any accusation as an infringement of the right to a reputation deriving from respect for private life, and any punishment as an infringement of the right to life, liberty, reputation or property.

C. *Subsidiarity of the Criminal Law*

It can probably not be inferred from this characterization of the criminal law that its application is impossible to justify. However, such justification is traditionally based on an extremely strict criterion, that of *necessity*: not, of course, as Alvaro Pires rightly points out, in the sense that the criminal law constitutes ‘an evil to which it is *always necessary to resort*,¹⁹ but in the sense that it constitutes an evil to which recourse is justified only where ‘the other legal responses prove inadequate.’²⁰ The same may be said of detention pending trial, and of each type of penalty in particular. One consequence resulting from this is the traditional idea of the ‘subsidiarity’²¹ of criminal law in relation to alternative forms of intervention, or non-intervention. Another is the subsidiarity, *within* criminal law, of a more severe penalty, such as a penalty entailing deprivation of liberty, in relation to a less severe penalty, such as a penalty entailing mere restriction of liberty or a purely pecuniary sanction. This requirement can also be assessed in terms of ‘proportionality’, as the European Court of Human Rights construes that term today; that is to say, its application is justified only where there are no other less harmful means of ensuring the protection of a right guaranteed by the Convention.

3. The Offensive Role of Human Rights

Here, the scenario is reversed: the criminal law is called into play to protect human rights. This theory is consistent with the development of the case law of the ECtHR, where a significant trend may be noted whose effects have contributed to the shift, or indeed reversal, in perspectives that forms the subject of the present discussion.²² Such a trend did not escape the attention of Jean Rivero who, in an article devoted precisely to the protection of human rights between private individuals, observed that while criminal law provisions were generally intended to preserve public order and protect the state, criminal law

19 Pires, *supra* note 2, at 145 (emphasis added).

20 Koering-Joulin and Seovic, *supra* note 4, at 106.

21 See in particular, M. van de Kerchove and S. Van Drooghenbroeck, ‘Subsidiarité et droit pénal: aspects nouveaux d’une question ancienne’, in E. Delpérée (ed.), *Le principe de subsidiarité* (Brussels/Paris: Bruylant/LGDJ, 2002) 153–160.

22 Fr. Tulkens and S. Van Drooghenbroeck, ‘La Cour européenne des droits de l’homme depuis 1980. Bilan et orientations’, in W. Debeuckelaere and D. Voorhoof (eds), *En toch beweegt het recht* (Bruges: Die Keure, 2003) 211–235, at 219 *et seq.*

enforcement sometimes served to protect individual freedoms to such an extent that one might begin to wonder whether most offences did not ultimately serve the cause of such protection.²³

A. The Horizontal Effect and Positive Obligations

On a conceptual level, this trend in the Court's case law results from two developments. Whereas traditionally the responsibility of the states parties to the ECHR could be engaged where the alleged violation of Convention rights and freedoms originated in or was caused by an act or omission by the national authorities themselves, the idea has gradually developed that the states parties' 'responsibility for others' could extend to violations of the Convention directly perpetrated by private individuals. Through its successive judgments, the Court has thus come to accept that a violation of the Convention committed by a private individual may be indirectly attributed to the state where the state has made it possible or probable, either through simple negligence or through benign tolerance.²⁴ This trend is itself the result of the development and extension of the theory of positive obligations.²⁵ Since the *Marckx v. Belgium* judgment of 13 June 1979, the ECtHR has begun to accept that states' undertakings under the ECHR, which are generally negative in essence, may be accompanied by a positive obligation to guarantee effective respect for the rights and freedoms secured. In this context, the Court's case law has thus inferred an obligation for states to ensure, through appropriate legislative, administrative and judicial frameworks, that violations of the Convention are not committed in relations between individuals. The far-reaching effects of the acceptance of the principle of horizontal applicability of human rights and the emergence of positive obligations within the general theory of human rights are immediately apparent. Previously conceived solely as 'brakes' on state power and limits on repression, rights and freedoms may today be viewed, at the same time, as a driving force for intervention and as justification for states' deployment of their power, in particular that of coercion.

- 23 J. Rivero, 'La protection des droits de l'homme dans les rapports entre personnes privées', in *Amicorum Discipulorumque Liber. Mélanges René Cassin. Protection des droits de l'homme entre personnes privées*, Vol. 3 (Paris: Pédone, 1971) 311–322, at 317.
- 24 *Cyprus v. Turkey* [GC], Appl. No. 25781/94, 10 May 2001, § 81, ECHR 2001-IV: 'the acquiescence or connivance of the authorities of a contracting state in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that state's responsibility under the Convention.' Concerning this 'horizontal' effect of human rights, see in particular S. Van Drooghenbroeck, 'L'horizontalisation des droits de l'homme', in Dumont, Ost and Van Drooghenbroeck, *supra* note 5, 355–390.
- 25 For a more detailed discussion, see D. Spielmann, 'Obligations positives et effet horizontal des dispositions de la convention', in F. Sudre (ed.), *L'interprétation de la Convention européenne des droits de l'homme* (Brussels: Bruylant/Nemesis, 1998) 133–174; R. Lawson, 'Positieve verplichtingen onder het EVRM: Opkomst en ondergang van de "fair-balance" test', 20 *NJCM-Bulletin* (1995) 558–573 (Part 1) and 727–750 (Part 2); A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford/Portland, OR: Hart Publishing, 2004).

This dialectic may no doubt appear relatively self-evident since it is fundamental to the doctrine of the social contract. What is new is that these two contradictory dimensions of rights and freedoms now form the subject of legal obligations that must be satisfied by the state and are enforceable in the courts.

B. The Leading Judgment

With regard to the effect of this trend on the role of criminal law in the protection of human rights, the *X and Y v. the Netherlands* judgment of 26 March 1985 can probably be seen as the leading judgment. The applicants complained, under Article 8 ECHR, of their inability to have criminal proceedings instituted against the person who had raped a young girl with learning disabilities. The Court began by endorsing the idea that

the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the contracting states' margin of appreciation. In this connection, there are different ways of ensuring 'respect for private life', and the nature of the state's obligation will depend on the particular aspect of private life that is at issue. Recourse to the criminal law is not necessarily the only answer.²⁶

However, the Court found that:

the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.²⁷

C. Use of the Criminal Option

In subsequent judgments, the ECtHR has had no hesitation in using — some would say exploiting — the criminal law to reinforce and safeguard more effectively the rights of victims of infringements of fundamental rights. From this perspective, it is no longer necessary to justify the use of the criminal option but rather the absence of its use. Ultimately, the Court might be prompted to conceal the physically restrictive and dishonouring nature of the criminal instrument and perhaps even to introduce some confusion between the characteristics inherent in the criminal law and the aims it may pursue.

In concrete terms, the use of the criminal law has appeared in the ECtHR's recent case law in connection with *two types of obligations on the state*.

The first may be described as a positive *substantive obligation*. Thus, in the context of Article 2 ECHR, which acknowledges that everyone's right to life is protected by law, the Court has pointed out that the state's positive obligations

²⁶ *X and Y v. the Netherlands*, Appl. No. 8978/80, 26 March 1985, § 24, Series A no. 91.

²⁷ *Ibid.*, § 27.

under that article include putting in place effective criminal law provisions to deter the commission of offences against the person.²⁸ Under Article 3 ECHR, the Court has likewise held, for example, that the United Kingdom should be held responsible for the failure to ensure effective criminal punishment for the ill-treatment of a child by his stepfather.²⁹ In the *M.C. v. Bulgaria* judgment of 4 December 2003 the Court held that 'effective protection against rape and sexual abuse requires measures of a criminal-law nature'.³⁰

The second obligation may be described as a positive *procedural obligation*. According to the Court's settled case law,

the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the state's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.³¹

This requirement means, among other things, that the state must set up an effective judicial system which, in some circumstances, must include recourse to the criminal law.³² Indeed, the Court has held that

the obligations of the state under Article 2 cannot be satisfied merely by awarding damages. The investigations required under Article 2 of the Convention must be able to lead to the identification and punishment of those responsible.³³

The investigation must, in addition, satisfy a number of requirements, including that of reasonable expedition:

[w]hile there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.³⁴

The same type of procedural obligation has been developed by the ECtHR in the context of Article 3 ECHR to ensure that the rights

28 *Kılıç v. Turkey*, Appl. No. 22492/93, 28 March 2000, § 62, ECHR 2000-III; *Mahmut Kaya v. Turkey*, Appl. No. 22535/93, 28 March 2000, § 85, ECHR 2000-III.

29 See *A. v. the United Kingdom*, Appl. No. 25599/94, 23 September 1998, § 22, *Reports* 1998-VI. See also, *Z. and Others v. the United Kingdom* [GC], Appl. No. 29392/95, 10 May 2001, § 73, ECHR 2001-V.

30 *M.C. v. Bulgaria*, Appl. No. 39272/98, 4 December 2003, § 186, ECHR 2003-XII (extracts).

31 *Yaşa v. Turkey*, 2 September 1998, § 98, *Reports* 1998-VI.

32 *Paul and Audrey Edwards v. the United Kingdom*, Appl. No. 46477/99, 14 March 2002, §§ 69 and 71, ECHR 2002-II; *Mastromatteo v. Italy* [GC], Appl. No. 37703/97, 24 October 2002, § 89, ECHR 2002-VIII.

33 *McKerr v. the United Kingdom*, Appl. No. 28883/95, 4 May 2001, § 121, ECHR 2001-III; *Khashiyev and Akayeva v. Russia*, Appl. Nos 57942/00 and 57945/00, 24 February 2005, § 153 *in fine*.

34 *Isayeva v. Russia*, Appl. No. 57950/00, 24 February 2005, § 213; *Hugh Jordan v. the United Kingdom*, Appl. No. 24746/94, 4 May 2001, §§ 108 and 136–140.

enshrined in that article are not theoretical and illusory but practical and effective. Thus,

[i]n a number of judgments the Court found that where a credible assertion is made that an individual has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the state, that provision ... requires by implication that there should be an effective official investigation. As with an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity.³⁵

Lastly, and at the same time, this extension of the state's obligations entails a large number of both diverse and subtle requirements,³⁶ which may be noted at *each stage of the criminal law process*: criminalization in primary legislation (that is, the definition of proscribed conduct),³⁷ interpretation of the criminal law,³⁸ prosecution policy,³⁹ the form of prosecution,⁴⁰ the availability and

35 *Khashiyev and Akayeva*, *supra* note 33, § 177. See also *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, Reports 1998-VIII; *Labita v. Italy* [GC], Appl. No. 26772/95, 6 April 2000, §§ 131–136, ECHR 2000-IV.

36 See Fr. Tulkens and S. Van Drooghenbroeck, 'La clémence pénale et les droits de l'homme. Réflexions en marge de la jurisprudence récente de la Cour européenne des droits de l'homme', in Fr. Tulkens, Y. Cartuyvels and C. Guillain (eds), *La peine dans tous ses états. Hommage à Michel van de Kerchove* (Brussels: Larcier, 2011) 125–147, at 129 *et seq.*

37 See, for example, concerning the criminalization of conduct consisting in holding a person in 'servitude' within the meaning of Art. 4 ECHR, *Siliadin v. France*, Appl. No. 73316/01, 26 July 2005, ECHR 2005-VII.

38 See, for example, concerning the interpretation of the criminal offence of rape, *M.C.*, *supra* note 30.

39 For example, in the *Wiktorko v. Poland* judgment the ECtHR found against the respondent state on account of the inadequacy of the criminal investigation it had carried out in respect of public officials who were found guilty of ill-treatment in a 'sobering-up' centre. The investigation had failed to consider the victim's allegation that, in addition to the physical coercion used against her, she had been forced to undress in front of persons of the opposite sex (*Wiktorko v. Poland*, Appl. No. 14612/02, 31 March 2009, esp. § 60). See also, concerning the question of the obligation to prosecute when the victim — of domestic violence in this particular case — has withdrawn the complaint, *Opuz v. Turkey*, Appl. No. 33401/02, 9 June 2009, esp. §§ 138–139, ECHR 2009–....

40 The ECtHR recently introduced the idea of a gradation in the criminal law response to be expected of the authorities, according to the intrinsic gravity of the alleged offence. Thus, for example, the case of *Sandra Janković v. Croatia* concerned a complaint under Art. 8 ECHR about the allegedly inadequate protection of the applicant from the acts of harassment and mild physical violence to which she had been subjected. The Court considered those acts to be sufficiently serious to require, as a matter of principle, the institution of criminal proceedings against the perpetrators, but insufficiently serious to require such proceedings to be necessarily instituted and conducted by the State Attorney's Office; a 'private prosecution', as provided for by Croatian law in the case of 'minor offences', could suffice. In the Court's own words, 'in the specific circumstances of the present case, without overlooking the importance of protection from attacks on one's physical integrity, the Court cannot accept the applicant's arguments that her Convention rights could be secured only if the attackers were prosecuted by the state and that the Convention requires state-assisted prosecution. In this connection the Court is

choice of investigative measures to clarify the facts in issue,⁴¹ the classification by the courts of conduct being punished,⁴² sentencing⁴³ and, last but not least, execution of the sentence.⁴⁴ For each of these operations, the state can today potentially be called to account before the ECtHR: was its 'criminal arm' strong enough to prevent and, where necessary, punish infringements of the most fundamental rights occurring within its jurisdiction, whether they were committed by a public official or a private individual?

D. What about Criminal Clemency?

The other side of the debate is equally interesting and significant: in the context of this case law, the ECtHR has quite naturally come to take a critical look at states' use of 'criminal clemency',⁴⁵ thereby contributing to the 'malaise' this measure has already provoked in other legal spheres.⁴⁶

'Rights that are practical and effective and not theoretical and illusory':⁴⁷ the formula is well known. The obligation to ensure criminal law protection of the most fundamental Convention rights and freedoms can clearly not be limited to the enactment of criminal provisions destined to remain a dead letter; those who contravene them must, in addition, be actually prosecuted, tried and punished. Accordingly, the ECtHR has necessarily had cause to be suspicious in its examination of any legal techniques which, in extreme cases, form an obstacle to prosecution or trial or which, in less extreme cases, lead to some kind of relaxation of the sentences imposed or executed.⁴⁸

satisfied that in the present case domestic law afforded the applicant a possibility to pursue the prosecution of her attackers, either as a private prosecutor or as the injured party in the role of a subsidiary prosecutor, and that the Convention does not require state-assisted prosecution in all cases' (*Sandra Janković v. Croatia*, Appl. No. 38478/05, 5 March 2009, § 50, ECHR 2009–...). This case law concerning the expected form of criminal proceedings held to be *necessary as a matter of principle* has engendered an implicit form of 'casuistry': it is sufficient to read the concurring opinion of Judge Spielmann annexed to the judgment to be persuaded of this.

41 See, for example, *K.U. v. Finland*, Appl. no. 2872/02, 2 December 2008.

42 *Öneryıldız v. Turkey* [GC], Appl. No. 48939/99, 30 November 2004, esp. § 116, ECHR 2004-XII.

43 *Ibid.*

44 The early release of a prisoner who subsequently commits a homicide is capable of engaging the state's responsibility under Art. 2 ECHR, where it results from a serious error of assessment by the authorities. This approach was affirmed in principle in *Mastromatteo*, *supra* note 32. It was later confirmed and updated in the specific circumstances of the case in the *Branko Tomašić* judgment, concerning the early release of a prisoner who had not received the psychiatric treatment he had been ordered to undergo (*Branko Tomašić and Others v. Croatia*, Appl. No. 46598/06, 15 January 2009, § 57, ECHR 2009–... (extracts)). See also *Maiorano and Others v. Italy*, Appl. No. 28634/06, 15 December 2009.

45 Tulkens and Van Drooghenbroeck, *supra* note 36, at 130.

46 See J. Makowiak, 'L'amnistie en question', 124 *Revue du droit public et de la science politique en France et à l'étranger* (2008) 511–538, at 524.

47 See, among many other authorities, *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32.

48 On this point, see *Nikolova and Velichkova v. Bulgaria*, Appl. No. 7888/03, 2 December 2007, §§ 60–64: the Court considered inappropriate the criminal sanction imposed on police officers responsible for ill-treatment causing death.

Thus, addressing the issue of the criminal proceedings to which acts contrary to Article 3 ECHR should give rise, the *Yeşil and Sevim v. Turkey* judgment of 5 June 2007 states that

it is not in principle permissible that the conduct and completion of such proceedings, including the phases of the imposition and execution of sentences, should be hindered as a result of exceptional measures such as an amnesty or pardon, or that they should become time-barred on account of judicial delays incompatible with the requirement of promptness and reasonable expedition that is implicit in this context.⁴⁹

The *amnesty* issue was, in particular, central to the case of *Ould Dah v. France*, which was declared inadmissible in a decision of 17 March 2009.⁵⁰ The applicant in that case, an officer in the Mauritanian army, was arrested, prosecuted and convicted in France, on the basis of French law, for acts of torture committed during the inter-ethnic unrest in Mauritania in the early 1990s. France had thereby exercised the universal jurisdiction it enjoyed for crimes of this kind, honouring the undertakings it had entered into under the United Nations Convention against Torture of 10 November 1984. The applicant complained that his conviction and, especially, the application of French substantive criminal law were incompatible with the principle that crimes and punishments must be defined by law, set forth in Article 7 ECHR. From that standpoint, he argued, among other things, that the acts in respect of which he had been convicted by the French courts had been covered by a Mauritanian amnesty law in 1993. The Court, however, declared the complaint ill-founded, for reasons which are worth citing at length:

in the instant case the Mauritanian amnesty law was passed not after the applicant had been tried and convicted, but precisely to prevent any criminal proceedings being brought against him. Admittedly, in general terms it cannot be ruled out that there might be a conflict between the need to prosecute those responsible for the crimes committed and the desire for a country's social reconciliation. Be that as it may, no reconciliation process of this kind has been established in Mauritania. However, ... the prohibition of torture occupies a prominent place in all international instruments for the protection of human rights and enshrines one of the fundamental values of a democratic society. The obligation to prosecute the perpetrators of such acts must not be undermined by granting them impunity through an amnesty law that might be considered contrary to international law.

It is useful to contrast the ECtHR's reasoning here with the tolerance shown by the former European Commission of Human Rights, in its *Dujardin and Others v. France* decision of 2 September 1991, towards a law that had established an amnesty prior to trial in respect of the massacre of four gendarmes during the Ouvéa cave attack. The resulting impunity was not found by the

49 *Yeşil and Sevim v. Turkey*, Appl. No. 34738/04, 5 June 2007, § 37.

50 *Ould Dah v. France* (dec.), Appl. No. 13113/03, 17 March 2009, ECHR 2009–... For a commentary on this decision, see J.-E. Renucci, 'La CEDH consacre le principe de la compétence universelle', 185 *Recueil Dalloz* (2009) 1573–1575.

Commission to be in breach of Article 2 ECHR⁵¹ and the state's positive obligations under that article.

E. Towards a Typology

A dividing line seems to be emerging as regards the use of the criminal option according to the types of situation concerned. As matters currently stand, the ECtHR's case law appears to require recourse to the criminal law for intentional offences against the right to life, physical integrity or sexual integrity. The same does not apply, however, to cases of unintentional homicide. Thus, in the *Calvelli and Ciglio v. Italy* judgment of 17 January 2002, the Court considered that

if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged.⁵²

In the *Vo v. France* judgment of 8 July 2004 the Court further held that

in the circumstances of the case an action for damages in the administrative courts could be regarded as an effective remedy that was available to the applicant. Such an action, which she failed to use, would have enabled her to prove the medical negligence she alleged and to obtain full redress for the damage resulting from the doctor's negligence, and there was therefore no need to institute criminal proceedings in the instant case.⁵³

51 EurCommHR, *Dujardin and Others v. France* decision of 2 September 1991: 'The Commission notes that as a result of the amnesty law adopted in this case in the light of the special circumstances, i.e. the political situation in New Caledonia, the prosecution of those suspected of murdering the applicants' close relatives lapsed. Accordingly, the question which arises is whether this infringed the right protected by Art. 2 of the Convention. The Commission considers in this connection that the amnesty law, which is entirely exceptional in character, was adopted in the context of a process designed to resolve conflicts between the various communities of the islands. It is not for the Commission to assess the advisability of the measures taken by France to that end. The state is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the state and the interests of individual members of the public in having the right to life protected by law. In the present case, the Commission considers that such a balance was maintained and that there has therefore been no breach of the above-mentioned provision.'

52 *Calvelli and Ciglio v. Italy* [GC] Appl. No. 32967/96, 17 January 2002, § 51, ECHR 2002-I.

53 *Vo v. France* [GC], Appl. No. 53924/00, 8 July 2004, § 94, ECHR 2004-VIII.

In the *Öneryıldız v. Turkey* judgment of 30 November 2004, the criterion applied appears to be that of the seriousness of both the damage and the negligence. The Court considered that

in areas such as that in issue in the instant case, the applicable principles are rather to be found in those the Court has already had occasion to develop in relation notably to the use of lethal force.⁵⁴

In that case, negligence was established on the part of two mayors who ought to have known from an expert report that a rubbish tip carried a high risk and yet failed to take any measures to prevent such an accident. In that context, the Court reiterated that

in cases of homicide the interpretation of Article 2 as entailing an obligation to conduct an official investigation is justified not only because any allegations of such an offence normally give rise to criminal liability ...but also because often, in practice, the true circumstances of the death are, or may be, largely confined within the knowledge of state officials or authorities ... In the Court's view, such considerations are indisputably valid in the context of dangerous activities, when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents. Where it is established that the negligence attributable to state officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity ... the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative.⁵⁵

E. Postulates

What are the postulates on which this 'promotion' of the criminal law as the best way of protecting fundamental rights is based?

In certain situations, the very purpose of the criminal law is emphasized. Where the ECtHR is confronted with extreme situations (disappearances, extrajudicial executions, terrorism, rape, etc.), the criminal option is felt to be the best way of satisfying the need to protect/highlight the fundamental values of society. The dissenting opinion of Judge Rozakis appended to the *Calvelli and Ciglio v. Italy* judgment of 17 January 2002 underlines this aspect:

it is difficult for one to accept that respect for the right to life, as provided for by Article 2, can, in principle, be satisfied by proceedings which, by their nature, are not designed to protect the fundamental values of society.⁵⁶

⁵⁴ *Öneryıldız*, *supra* note 42, § 93.

⁵⁵ *Ibid.*

⁵⁶ See *Calvelli and Ciglio v. Italy*, *supra* note 52.

In addition to this, there is a need to express disapproval, from an essentially Durkheimian perspective:

[w]hile, in contrast, civil proceedings are basically intended to satisfy private interests, material aspects of human transactions, they do not satisfy the requirement of expressing public disapproval of a serious offence, such as the taking of life.⁵⁷

In other situations, the functions of the penalty are highlighted, in particular those of prevention and deterrence.

Lastly, in yet other situations the qualities, or more precisely the potential results, of the criminal proceedings are taken into account: only a criminal investigation, by appropriate means, can lead to the identification of the perpetrators. Thus, in the *Khashiyev and Akayeva v. Russia* judgment of 24 February 2005, the Court confirmed that

a civil action is incapable, without the benefit of the conclusions of a criminal investigation, of making any meaningful findings as to the perpetrators of fatal assaults, and still less to establish their responsibility.⁵⁸

In other words, criminal proceedings would appear to constitute *par excellence* the most appropriate remedy for satisfying the procedural requirements of Article 2 ECHR in particular.

G. Cascade Effects

The offensive role of human rights, which allows recourse to criminal remedies under the circumstances and conditions described above, inevitably entails other cascade effects in relation to the ECHR. Let us discuss some of them.

First of all, there is an effect on other substantive provisions of the ECHR itself. Thus, in the *August v. the United Kingdom* decision of 21 January 2003 the ECtHR dismissed as manifestly ill-founded the allegation that Article 8 ECHR had been breached as a result of the refusal to award compensation to the applicant, who had been involved in incidents of homosexual prostitution since the age of 13 years:

the abuser ... was subject to criminal proceedings and received a substantial term of imprisonment in respect of his conduct with the applicant. It cannot therefore be said that the United Kingdom criminal law condoned or permitted the acts ... performed.

Some commentators have subsequently wondered whether, where protection against intentional acts is concerned, the ECtHR is not shifting its approach from the protection of individuals to the prevention of crime through the imposition of criminal sanctions.⁵⁹

⁵⁷ *Ibid.*

⁵⁸ *Khashiyev and Akayeva*, *supra* note 33, § 121; *Isayeva*, *supra* note 34, § 157.

⁵⁹ C. Pitea, 'Rape as a Human Rights Violation and a Criminal Offence: the European Court's Judgment in *M.C. v. Bulgaria*', 3 *Journal of International Criminal Justice* (2005) 447–462, at 456.

Next, there is an effect on the right to an effective remedy, guaranteed by Article 13 ECHR to everyone whose rights and freedoms as set forth in the Convention are violated. Thus, in the *Keenan v. the United Kingdom* judgment of 3 April 2001, the Court held that

[g]iven the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.⁶⁰

Similarly, in more recent judgments, the Court has emphasized that

a contracting state's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if, in respect of complaints under those articles, an applicant would be required to exhaust an action leading only to an award of damages.⁶¹

On account of the close link which the Court acknowledges between Articles 13 and 35 ECHR, the same observation applies as regards the exhaustion of domestic remedies.

Lastly, there is an effect on the victim status of applicants before the ECtHR. In the *Krastanov v. Bulgaria* judgment of 30 September 2004 the Court held that if the authorities could confine their reaction to incidents of intentional police ill-treatment to the mere payment of compensation, while remaining passive in the prosecution of those responsible, it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity. Accordingly, the award of damages in civil proceedings to establish the state's liability is not sufficient to deprive applicants of their status as a victim for the purposes of Article 34 ECHR.⁶²

Where will such a trend lead? Some have argued that eventually it could undermine, or at the very least erode, state sovereignty in the criminal sphere and, in certain cases, the principle of discretionary prosecution. As matters currently stand, however, there is a clear *limitation* on the applicability of the ECHR in criminal proceedings. This was again given significant emphasis in the *Perez v. France* judgment of 12 February 2004, where the ECtHR held that a civil-party complaint now came within the scope of Article 6(1) ECHR, the aim being, as it stressed, to strengthen victims' rights.⁶³ However, the Court considered that the applicability of Article 6 in such cases had reached its limits; noting that the Convention did not confer any right to 'private revenge' or to an *actio popularis*, it confirmed that 'the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently'.⁶⁴

60 *Keenan v. the United Kingdom*, Appl. No. 27229/95, 3 April 2001, § 123, ECHR 2001-III.

61 *Khashiyev and Akayeva*, *supra* note 33, § 121; *Isayeva*, *supra* note 34, § 157.

62 *Krastanov v. Bulgaria*, Appl. No. 50222/99, 30 September 2004, §§ 48-60.

63 *Perez v. France* [GC], Appl. No. 47287/99, 12 February 2004, § 72, ECHR 2004-I.

64 *Ibid.*, § 70.

4. Conclusion

While human rights have been able to contribute to a profound humanization of the criminal law, through the 'bad conscience' they have engendered for almost two centuries in relation to its application, they have also contributed to a strengthening of the criminal law, through the 'good conscience' they give it in ensuring the protection of such rights. This second dimension of human rights has no doubt always been present but today it appears at least to possess a number of *new features*.

First, the affirmation of the role of the criminal law in protecting human rights generally appears to be accompanied by an overall weakening of its traditional function as a shield against the threats it poses itself to rights and freedoms. So it is not simply a question of noting the legitimate existence of the other side of the balance; we should consider whether taking that other side into account does not frequently result nowadays in our forgetting that there are two sides to the balance and upsetting the necessary equilibrium between them. In this respect, it has been possible to speak of a 'turnaround in human rights',⁶⁵ or a 'Copernican revolution',⁶⁶ and to refer to the 'undermining of the "shield" function' and the 'extension of the "sword" function of the criminal law'.⁶⁷

Furthermore, alongside this turnaround, many writers have noted in different domestic legal systems,⁶⁸ as well as in European criminal law⁶⁹ and especially international criminal law,⁷⁰ the multiple erosions of the principles that traditionally ensured the implementation of the 'shield' function of the criminal law. This applies in particular to the principle that punishments must be prescribed by law and its corollaries, the principle that punishments must be

65 R. Roth, 'Synthèse des débats et perspectives', in M. Henzelin and R. Roth (eds), *Le droit pénal à l'épreuve de l'Internationalisation* (Paris/Geneva/Brussels: LGDJ-Georg-Bruylant, 2002) 347–355, at 353. See also, D. Salas, *La volonté de punir. Essai sur le populisme pénal* (Paris: Hachette, 2005), at 22: 'Comment ne pas craindre une dérive fondamentaliste qui conduirait les droits de l'homme à une inversion par excès?'

66 M. Henzelin, 'Droit international pénal et droits pénaux étatiques. Le choc des cultures', in Henzelin and Roth, *supra* note 65, 69–118, at 107.

67 Vervaele, *supra* note 5, at 121; Cartuyvels, *supra* note 5, at 405 *et seq.*

68 See, in particular, Koering-Joulin and Seuvic, *supra* note 4; D. Spielmann, 'Du délicat exercice de mettre en balance certains droits fondamentaux', 12 *Annales du droit luxembourgeois* (2002) 25–70; Pires, *supra* note 2; Cartuyvels, *supra* note 5; E. Claes and J. Vrielink, 'Antiracisme en rechtstatelijke strafrechtspleging', 4 *Nieuw Juridisch Weekblad* (2005) 151–168.

69 See, in particular, A. Weyembergh, 'L'impact du 11 Septembre sur l'équilibre sécurité/liberté dans l'espace pénal européen', in E. Bribosia and A. Weyembergh (eds), *Terrorisme et droits fondamentaux* (Brussels: Bruylant/Nemesis, 2002) 153–195, at 167 *et seq.*

70 See, in particular, Henzelin, *supra* note 66, at 101 *et seq.*; W.A. Schabas, 'Droit pénal international et droit international des droits de l'homme: faux frères?' in Henzelin and Roth, *supra* note 65, 165–181; R. Maison, 'Le droit international des droits de l'homme et les juridictions internationales pénales', in G. Cohen-Jonathan and J.-F. Flauss (eds), *Droit international, droits de l'homme et juridictions internationales* (Brussels: Bruylant/Nemesis, 2004) 121–138; M.-A. Beernaert and Fr. Tulkens, 'Dans quelle mesure les juridictions pénales internationales peuvent et/ou doivent-elles prendre en compte le droit international des droits de l'homme?', in H. Müller-Dietz et al. (eds), *Festschrift für Heike Jung* (Baden-Baden: Nomos, 2007) 1005–1119.

applied equally and be proportionate, the presumption of innocence or the limitation of pre-trial detention to cases of strict necessity. Such erosions, scarcely justifiable if one bears in mind the ‘odious’ nature of the criminal law, appear not only acceptable but also desirable in the eyes of those who now see the criminal law as an instrument for the protection of human rights. On the basis of this new form of instrumentalism, where the legitimacy of the end pursued once again justifies the choice of means, no matter how harmful, as long as they are the most effective (which would still need to be demonstrated on a case-by-case basis), it will come as no surprise to see the different safeguards traditionally associated with criminal remedies collapse to such an extent that the very principle of subsidiarity of the criminal law will cease to have any relevance. Accordingly, it appears that the reserved and essentially negative obligation to use the criminal law only as a last resort is being replaced, at least in part, by a positive obligation to favour it and to implement it in practical terms.⁷¹

Lastly, it is worth noting a final change that has affected the development of the conception of human rights and certain consequences ensuing from it concerning the place of the victim in this development. P. Poncela and P. Lascoumes have provided a clear illustration, in their study of the successive French Criminal Codes of 1791 and 1810 and the new Criminal Code which was adopted in 1992 (and came into force in 1994), of the transition from a ‘political conception of human rights’, which ‘favoured the defence of pre-democratic institutions and of the individual as a citizen participating in the political regime’, to an ‘individualist conception of human rights’, which in turn favoured the defence of ‘individualist values, the person and private property’,⁷² entailing a ‘radical reversal of priorities’.⁷³ This widespread individualization of human rights to become ‘the norm organising the collective conscience and the yardstick of public action’⁷⁴ has inevitably had an impact on the evolution of criminal law, as Durkheim very correctly predicted. Not, as he first imagined, through a gradual ‘shrinking’ of the place of criminal law in society,⁷⁵ but instead through the shift from collective feelings of communal or religious entities towards the individual and, as a corollary, the replacement of crimes ‘against divinity’ by crimes ‘against humanity’.⁷⁶

This evolution of the conception of human rights has inevitably had an influence on the victim’s relationship with the criminal law. Whereas it could

71 See in particular, Pires, *supra* note 2, at 145; van de Kerchove and Van Drooghenbroeck, *supra* note 21, at 158–159.

72 P. Poncela and P. Lascoumes, *Réformer le code pénal. Où est passé l’architecte?* (Paris: Presses universitaires de France, 1998) 286–287.

73 *Ibid.*, at 287.

74 M. Gauchet, ‘Quand les droits de l’homme deviennent une politique’, *Le Débat* (2000) 258–288, at 260.

75 E. Durkheim, *De la division du travail social* (9th edn., Paris: Presses universitaires de France, 1973), at 120.

76 *Idem*, ‘Deux lois de l’évolution pénale’: reproduced and translated into English as ‘The Evolution of Punishment’, in S. Lukes and A. Scull (eds), *Durkheim and the Law* (Oxford: Robertson, 1983), at 125.

previously be claimed that ‘the emergence and development of criminal law are linked ... to the substitution of the sovereign for the victim in the role of injured party’,⁷⁷ the consequence being that the penalty was to be distinguished ‘from the reparation of the wrong caused to the victim’,⁷⁸ we are now compelled to observe that there has been a remarkable change over the past few decades. First, the victim is accorded an increasingly important role in criminal proceedings; secondly, the aim of repairing the damage sustained is occupying an increasingly fundamental position in that context.⁷⁹ As is only logical, this development appears to be in direct correlation with the evolution of human rights. As Marc Henzelin has observed, ‘human rights specialists have considered for some years that the victim is the alpha and omega of the law.’⁸⁰ As he points out, while ‘initially, the approach to human rights was centred on the possibility for victims to obtain redress in the courts’, this approach has gradually shifted ‘from the right to civil redress to the right to satisfaction in criminal proceedings, causing human rights lawyers to advocate thorough and intensive punishment when they consider that the victims’ “human rights” have been infringed.’⁸¹ In domestic law, the increasing recourse to civil-party applications in criminal proceedings has enabled victims to become involved in criminal trials by showing an ‘interest in punishment’ which coincides with a desire to obtain both practical redress and symbolic satisfaction.⁸² It is legitimate to wonder to what extent the individual remedy used by victims of infringements of fundamental rights is not playing a similar role today before the ECtHR and contributing at the same time to gradually bringing such infringements into the criminal sphere, at least in part.

77 P. Robert, *La question pénale* (Genève: Droz, 1984), at 172.

78 *Ibid.*, at 168.

79 On this point, see in particular, Fr. Tulkens, M. van de Kerchove, Y. Cartuyvels and C. Guillain, *Introduction au droit pénal. Aspects juridiques et criminologiques* (9th edn., Brussels: Kluwer, 2010), at 61 *et seq.* and 131 *et seq.*

80 Henzelin, *supra* note 66, at 104.

81 *Ibid.*, at 105. On this point, see also the many examples cited by Cartuyvels, *supra* note 5.

82 On this point, see in particular M. van de Kerchove, ‘L’intérêt à la répression et l’intérêt à la réparation dans le procès pénal’, in P. Gérard, F. Ost and M. van de Kerchove (eds), *Droit et intérêt*, Vol. 3 (Brussels: Publications des Facultés universitaires Saint-Louis, 1990), esp. at 91 *et seq.*