

Individualism in times of crisis – theorising a shift away from classic liberal attitudes to human rights post 9/11.

Abstract

A significant portion of human rights instruments in the world contain rights that are ‘freedoms from’ governmental intrusion, reflecting traditional liberal sensibilities that the state can be a danger to human rights. But the state is arguably no longer the principal threat to the security of the individual: human rights are being violated much more by non-state actors such as suspected terrorists. In 2017, for example, the UK was the victim of several terror attacks from individuals with alleged links to Islamist groups: atrocities committed on Westminster and London Bridges in London in March and June respectively; and a suicide bombing at an Ariana Grande concert in Manchester in May. In the so called ‘War on Terror’, to counter these Islamist atrocities, many, particularly those in the media, see human rights merely as a vehicle to secure the ‘undeserving’ rights of terror suspects over the more important rights of victims. The idea that human rights protect the ‘few’ over the ‘many’ has therefore contributed to a substantial disengagement with the topic of fundamental freedoms. Is it time, therefore, for a ‘rethink’ about the nature and significance of human rights?

Moreover, according to the *Global Terrorism Index 2016*, significant factors causing terrorism, particularly in Europe, are socio-economic ones: inequality, youth employment and drug crime. Indeed, in *Changes in Modus Operandi of Islamic State Revisited*, Europol, 2016, the vast majority of terrorist attackers in Europe have been young men with a criminal past, who were not strict Muslims and only recently converted to Islam. The attacker responsible for the terror attack on Westminster Bridge in London, for example, Khalid Masood, born Adrian Russell Ajao, was a Muslim convert, of African-Caribbean descent, with a history of violence spanning 20 years. Was Masood failed by human rights? In their seeming absoluteness (or at least those enshrined in America’s Bill of Rights), do human rights also attach too little weight to responsibilities, particularly to those on the periphery of society, who could so spectacularly turn against a society that allegedly alienates them? A

re-engagement with human rights for the 21st Century, along the lines of the African Charter on Human and People's Rights, for example, to encompass a rights debate that is less individualistic and more inclusive, which seeks to challenge marginalisation and foster a collective sense of duty and responsibility, is the principal aim of this paper.

Introduction

If asked 'what are human rights?', rather than give an erudite, conceptual reply about the nature and significance of fundamental freedoms, a person is very likely to give examples of rights, drawing on the *Universal Declaration of Human Rights* (UDHR) for inspiration. The UDHR was proclaimed by the United Nations General Assembly in 1948 as 'a common standard of achievements for all peoples and all nations'.¹ It consists of freedoms that people associate with the 'first generation'² of rights such as: the right to life, liberty and security of person, Article 3; no one shall be held in slavery and servitude, Article 4; and no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, Article 5. The UDHR also consists of rights that people associate with the 'second generation'³ such as: the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment, Article 23(1); everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, Article 25(1); and everyone has the right to education, Article 26(1). The UDHR also consists of rights that people associate with the 'third generation'⁴ such as: everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised, Article 28. Whilst some commentators have claimed that the UDHR is a source of customary international law,⁵ the

¹ UNGA Res 217 (10 December 1948) <<http://www.un-documents.net/a3r217a.htm>> accessed 1 June 2018.

² The phrase 'generation of rights' is commonly attributed to the French jurist Karel Vasak. See, for example: Karel Vasak, 'A Thirty-Year Struggle: the Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights.' 30 *UNESCO Courier*, November 1977, 29-32.

³ *ibid.*

⁴ *ibid.*

⁵ Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context:*

majority of opinion, supported, by, for example, the ruling of the US Supreme Court in *Sosa v. Alvarez-Machain*,⁶ is that it is not.⁷ Thus, whilst the collection of rights contained in the UDHR is non-justiciable, specific rights located within the Declaration are in fact enforceable before the courts.

Using justiciability as an indicator of the primacy of a freedom within a catalogue of human rights, we can see that the first generation – ‘civil and political rights’ – clearly prevails. Although only a regional document the *European Convention on Human Rights* (ECHR) is a classic source of justiciable, first generation rights, in that it permits individuals to make applications to the European Court of Human Rights (ECtHR) in Strasbourg, as per Article 34 of the ECHR. For example, over 93,000 applications by nationals alleging breaches of the Convention against their home countries were processed by the ECtHR in 2017.⁸ Indeed, when the United Kingdom, this author’s country, wished to give a collection of human rights the force of law within the Human Rights Act 1998, it drew on the ECHR for encouragement, incorporating the rights directly into domestic law. ‘Second generation’ rights, that is, ‘socio-economic rights’, can be located in, for example, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). In addition to non-justiciability, the rights contained in ICESCR are not ‘immediate’, unlike freedoms from the first generation. According to Article 2(1) of ICESCR, each state party only undertakes to take steps to achieve ‘progressively’ the full realisation of the rights recognised in the Covenant. The full realisation of second generation rights is also qualified in Article 2(1) by the phrase ‘to the maximum of its available resources’, further emphasising the supremacy of first generation rights over other generational ones. Thus, for the purposes of this chapter (at least for the time being), first generation freedoms are synonymous with the phrase ‘human rights’.

Law, Politics, Morals. 3rd ed. (Oxford University Press 2007) 161.

⁶ 542 U.S. 692, 734 (2004).

⁷ See, for example, Eric Posner, ‘The Case Against Human Rights’ *The Guardian*. 4 December 2014 <<https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights>> accessed 19 June 2018.

⁸ The Council of Europe, European Court of Human Rights: Analysis of Statistics 2017’ January 2018 <https://www.echr.coe.int/Documents/Stats_analysis_2017_ENG.pdf> accessed 1 June 2018, 9.

Human rights are justiciable and immediate. Conceptually, they are ‘negative’ ie ‘freedoms from’ the state, such as ‘freedom from’ torture and ‘freedom from’ slavery. (Indeed, ‘freedoms from’ such as freedom from torture and slavery are especially important justifying international conventions of their own: the *UN Convention Against Torture* (UNCAT) and the *Slavery Convention* respectively.) These ‘negative’ freedoms reflect traditional liberal fears that the state is a threat to the security of the individual.⁹ Such fears are often attributed to the English philosopher, John Locke, and his *Two Treatises of Government* in particular. Locke sought to effect a civil authority that maintained collective peace and order. Pre-the institution of civil authority, man lived in the ‘state of nature’ – ‘a state of liberty’ – which was a state of ‘perfect freedom’ and ‘equality’,¹⁰ and ‘peace, good will, mutual assistance, and preservation’.¹¹ Human rights for Locke, which he classified as ‘life, liberty, and estate (property)’, were very important. They were ‘natural’ and individual, conferred by God.¹² But in the absence of security in the ‘state of nature’ to protect individuals’ natural rights from those who sought to deny them, it was necessary for individuals to covenant – a ‘social contract’ – with a civil authority, a sovereign, to guarantee these rights.¹³ With Locke reluctantly transitioning to a civil authority from the perfect

⁹ In this chapter the author uses the term ‘liberal’ loosely. Here he positions John Locke as one of the founders of liberalism. But to be more precise, Locke would now be considered as a ‘libertarian’. The following commentators epitomise modern libertarianism: F A Hayek, *The Constitution of Liberty* (University of Chicago Press 1960); Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1962); and Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974). Libertarians support a minimal role for the state such as enforcing contracts, protecting private property from theft and keeping the peace. That is, in the name of human freedom, they oppose government regulation and favour unfettered markets. People should do whatever they want with their things as long as they respect other peoples’ rights to do so – see, for example: Michael J Sandel, *Justice: What’s the Right Thing to Do?* (Penguin Books 2010) 58-74.

¹⁰ Chapter II, though Locke did qualify this: ‘But though this be a state of liberty, yet is not a state of licence: though man in the state have an uncontrollable liberty to dispose of his person or his possessions...the state of nature has a *law of nature* [my italics]...which obliges every one...that being all equal and independent, [not] to harm another in his life, health, liberty, or possessions.’ (Chapter II)

¹¹ Chapter III.

¹² Chapter IX.

¹³ The type of security provided by civil government was, for Locke, established laws, a body invested with the power of executing those laws and an independent arbiter to adjudicate on those laws.

freedom of the state of nature, it is unsurprising therefore that he approached the new sovereign with suspicion. So Locke advocated a minimal state whose power was limited to its preservation and could not be used 'to destroy, enslave, or designedly to impoverish the subjects.'¹⁴ Thus, in addition to emphasising the primacy of the individual, the classic liberal approach to the state as a guarantor of rights, but, perhaps more importantly, as a possible violator of rights, is a significant influence on the predominant idea of liberties as being 'freedoms from' the state. But since the 9/11 attacks, for example, in New York and Washington, by Al-Qaeda, and now the growing threat of Islamic State in Syria and Iraq, as well as Boko Haram in Nigeria, is the state still the principal threat to the security of the individual: human rights are being violated much more by non-state actors such as suspected terrorists?

In 2017 the UK, for example, was the victim of several terror attacks from individuals with alleged links to Islamist groups: an atrocity committed on Westminster Bridge in London in March, where the attacker drove his car along the bridge deliberately killing four people and injuring a further 50; a similar incident occurred on London Bridge in June, where the attackers, having to abandon their van, ran at pedestrians at a nearby market, fatally stabbing eight and injuring a further 40. And there was also a suicide bombing at an Ariana Grande concert in Manchester in May – the worst terror atrocity committed in the UK since '7/7' – killing 22 people and injuring a further 500. In addition, a bomb was left on a tube train at Parsons Green, west London, in September, but failed to fully explode. A further nine terrorist attacks, in 2017, were prevented.¹⁵ Recently, Andrew Parker, the Director-General of MI5, the UK's Security Service, said that Britain was facing its most severe terrorist threat ever and fresh attacks in the country were 'inevitable'.¹⁶ The UK's terror threat level is currently at 'severe', meaning an attack is highly likely. Twice in 2017 it was

¹⁴ Chapter XI.

¹⁵ Chris Johnston, 'Two detained under Terrorism Act as UK arrests reach record high' *The Guardian* 29 November 2017 <<https://www.theguardian.com/uk-news/2017/nov/29/two-detained-under-terrorism-act-as-uk-arrests-reach-record-high>> accessed 19 December 2017.

¹⁶ Vikram Dodd, 'UK facing most severe terror threat ever, warns MI5 chief' *The Guardian* 17 October 2017 <<https://www.theguardian.com/uk-news/2017/oct/17/uk-most-severe-terror-threat-ever-mi5-islamist>> accessed 19 December 2017.

raised to its maximum level, 'critical', meaning an attack was imminent, after the Manchester and Parsons Green attacks. The severe terror threat from non-state actors to the UK is real and set to continue.

The UK can expect further terror atrocities and further high profile arrests. Those that are detained will claim their human rights: the right to liberty, for example – the right to be either released or charged in a matter of days; and the right to a fair trial – the right to either challenge one's pre-charge detention, or, if one is charged, the right to be tried by an independent and impartial court or tribunal. But in the so called 'War on Terror', many, particularly those in the media, see human rights as merely obstructions to countering terrorism. There are several headlines in the *Daily Mail*, for example, supporting this claim: 'Sorry, human rights DO shield terrorists';¹⁷ 'PM vows to rip up human rights laws in war on terror'¹⁸; and 'An insult to terror victims'¹⁹ being just a few examples. Reviewing the comments section for one of these articles, one finds reader remarks such as: 'As usual, HIS 'human rights' are considered to be MORE IMPORTANT than the lives of his potential victims'; 'Put British human rights ahead of those who are trying to murder us'; 'I really couldn't care less about his human rights, it's time we looked after this country's citizens' human rights, by weeding out these cockroaches'; and 'blow his human rights, what about ours?'²⁰. The common idea that freedoms are merely a vehicle to secure the 'undeserving' rights of terror suspects, for example, over the 'deserving' rights of victims has arguably contributed to a significant disengagement with the nature of rights. But even terror suspects are not best served by human rights either. According to the *Global Terrorism Index 2016*, significant factors causing terrorism, particularly in Europe, are socio-economic

¹⁷ Daily Mail Comment, 'Sorry, human rights DO shield terrorists' *Daily Mail* 8 June 2017 <<http://www.dailymail.co.uk/debate/article-4583006/DAILY-MAIL-COMMENT-Human-rights-shield-terrorists.html>> accessed 19 December 2017.

¹⁸ James Tapsfield, 'PM vows to rip up human rights laws in war on terror' *Daily Mail* 7 June 2017 <<http://www.dailymail.co.uk/news/article-4576146/PM-says-MI5-does-face-questions-London-Bridge-killer.html>> accessed 19 December 2017.

¹⁹ Paul Bentley, 'An insult to terror victims' *Daily Mail* 8 June 2017 <<http://www.dailymail.co.uk/news/article-4597508/Jihadi-fighting-stay-Britain-given-250k-legal-aid.html>> accessed 19 December 2017.

²⁰ *ibid.*

ones – inequality and youth unemployment – and drug crime.²¹ Indeed, other studies focusing on particular organisations or recruits from particular regions or cultures outside of Europe have found some common characteristics among individuals: exclusion and forms of discrimination.²² Similar findings were presented in the 2017 Index: ‘Individuals whose expectations for social mobility and economic welfare have been frustrated are at a greater risk of radicalisation.’²³ Moreover, in *Changes in Modus Operandi of Islamic State Revisited*, for Europol, the vast majority of terrorist attackers in Europe have been young men with a criminal past – not just a history of drug crime – who were not strict Muslims and only recently converted to Islam.²⁴ Indeed, the *Global Terrorism Index 2017* states: ‘Terrorist organisations have also recruited many fighters with extensive criminal backgrounds...A study across Europe found that 57% of individuals had been in jail prior to becoming radicalised while 31% of incarcerated individuals began the radicalisation process while in jail.’²⁵ The attacker responsible for the terror attack on Westminster Bridge in London in March 2017, for example, Khalid Masood, born Adrian Russell Ajao, was a Muslim convert, of African-Caribbean descent, with a history of violence spanning 20 years.²⁶

‘Joe Public’, or at least a typical reader of the *Daily Mail*, is contemptuous of human rights, especially in the so-called ‘War on Terror’; the rights of a terror suspect apparently trump the rights of the general public. It will also be recalled that the classic liberal idea views human rights as protectors of the individual from the state. With an emphasis on the

²¹ Institute for Economics and Peace, *Global Terrorism Index 2016* <<http://economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf>> accessed 7 January 2017, 70.

²² *ibid* 65.

²³ Institute for Economics and Peace, *Global Terrorism Index 2017* December 2017 <<http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf>> accessed 19 December 2017, 65.

²⁴ Europol, *Changes in Modus Operandi of Islamic State Revisited*, 2016, <<https://www.europol.europa.eu/publications-documents/changes-in-modus-operandi-of-islamic-state-revisited>> accessed 19 December 2017, 8.

²⁵ Institute for Economics and Peace (n 21) 66.

²⁶ Robert Booth and Nazia Parveen, ‘Khalid Masood a violent criminal who was regularly on the move’ *The Guardian* 24 March 2017 <<https://www.theguardian.com/uk-news/2017/mar/23/birmingham-neighbour-khalid-masood-winson-green>> accessed 8 May 2017.

individual comes, for liberals, a natural corresponding scepticism towards increases in state power. Are human rights eschewing genuine efforts by the state to address drivers of terrorism, particularly in the West: discrimination, marginalisation and joblessness? Is there therefore a 'crisis' within human rights? On the one hand, there is a disengagement with rights since, in seemingly benefitting an undeserving minority, they are too individualistic and insufficiently majoritarian; and on the other, ironically, whilst suspected terrorists are accused (wrongly) of exploiting rights, freedoms are in fact too selfish and insufficiently inclusive, compromising security. Poor old human rights! It is time, therefore, for a 'rethink' about the nature and significance of human rights post 9/11, or at least move the discussion away from its traditional liberal, first generation foundations, which, for the purposes of this chapter, are insufficiently attentive to increases in state power pursuing legitimate collective goals. To that end, the next section of this piece will assess human rights (or at least those that rely on their enforceability by the courts) through the lens of critical legal theory, and critical legal studies in particular. Once legitimate criticisms have been raised about human rights as claims in law, this chapter will continue to assess human rights, theoretically, but from the perspective of communitarian ideals, since, in this author's opinion, critical legal theory can only take the debate so far – communitarianism is a natural, critical progression. Following communitarian critiques of liberal attitudes to rights, the African Charter on Human and Peoples' Rights (ACHPR) is examined. This positions human rights, it is believed, more appropriately within the clashes presented above.

Critical legal theory and its attitudes towards human rights

The most significant feature of critical legal theory is its rejection of what it is taken to be the natural order of things, be it the free market, patriarchy, or the conception of race.²⁷ The myth of determinacy in the law is a significant component of the critical assault on law. Far from being a determinate, coherent body of rules and doctrine, the law is depicted as uncertain, ambiguous, and unstable.²⁸ One critical legal theorist, however, Jack M Balkin proposes an 'ambivalent' approach to the law, which recognises both the beneficial and

²⁷ Raymond Wacks, *Philosophy of Law*. 2nd ed. (Oxford University Press 2014) 214.

²⁸ *ibid.*

harmful aspects of the law.²⁹ For Balkin, whilst powerful people have ‘used law to subordinate others and secure their own interests’ under the guise of promoting laudable goals like freedom, equality, liberty, consent, community and human dignity, he believes that, by choosing to speak in the language of law, powerful people and interests can sometimes be called to account, because they try to legitimate what they are doing in these terms.³⁰ In supporting an ‘ambivalent’ approach to the law, Balkin, perhaps unsurprisingly shows a fidelity to rights within his writings, particularly in times of crisis.³¹

Within critical legal theory there is Critical Legal Studies (CLS). For CLS, law is ‘simply politics dressed in different garb’;³² it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society.³³ CLS also believes that legal doctrine not only does not, but also cannot, generate determinant results in concrete cases,³⁴ meaning it can be ‘manipulated’ to justify an almost ‘infinite spectrum of possible outcomes’.³⁵ Thus, in

²⁹ Jack M. Balkin, ‘Critical Legal Theory Today’, in Francis J. Mootz III (ed), *On Philosophy in American Law*. (Cambridge University Press 2009), 64-72, 65.

³⁰ *ibid* 68.

³¹ See, in particular: Jack M. Balkin, ‘The Constitution in the National Surveillance State’ (2008) 93 *Minnesota Law Review*, 1-25, where, for example, Balkin poses three major dangers to ‘our freedoms’ from the national surveillance state (at p.15-17). See also, for example: Jack M. Balkin, ‘The Rhetoric of Responsibility’ (1990) 76 *Virginia Law Review*, 197-263; and Jack M. Balkin, ‘Ideology as Constraint’ (1991) 43 *Stanford Law Review*, 1133-1178.

³² Allan C Hutchinson and Patrick J Monahan, ‘Law, Politics, and the Critical Legal Scholars: the Unfolding Drama of American Legal Thought’ (1984) 36 *Stanford Law Review*, 199-245, 206.

³³ *ibid*.

³⁴ *ibid*.

³⁵ *ibid*. Here one may wish to look further at the indeterminacy thesis. If one subscribes to the idea that laws have nothing to do with how cases are decided, that is, they are just window dressing that skilful lawyers and judges can manipulate to justify any decision they please, then this is indeed ‘indeterminacy’. However, if a court is faced with a multifarious number of possible legal outcomes, meaning that a judge will simply have to decide for one party rather than another, then to be precise, this is ‘underdeterminacy’ rather than ‘indeterminacy’ – see, for example: Lawrence Solum, ‘Legal Theory Lexicon 036: Indeterminacy’

<http://lsolum.typepad.com/legal_theory_lexicon/2004/05/legal_theory_le_2.html>

accessed 26 June 2018. Solum states: ‘The distinction between indeterminacy and underdeterminacy is rarely observed in the indeterminacy debate, but it is nonetheless important to assessing the debate. Claims that the law is radically indeterminate are implausible, but more modest claims about underdeterminacy may both be defensible and

emphasising the manipulation of the law, Mark Tushnet, for example, rejects the idea of an autonomous and neutral mode of legal reasoning.³⁶ Behind this veil of seeming neutrality, Tushnet believes that the law is merely synonymous with the principles of liberalism and the emphasis on the individual.³⁷ Liberal legalism, for CLS scholars, represents the status quo in society and that it seeks to mask the injustice of the system.³⁸ With this apparent bias within the law, it is perhaps natural, therefore, for Tushnet and others to attack a 'darling' of liberalism: human rights.³⁹ It is within this CLS assessment of liberalism, and especially its critique of human rights, that this chapter begins to position a theoretical re-engagement with rights away from their classic liberal traditions and the related controversies presented hitherto.

Following CLS's criticisms with the law more generally, one finds many of these applicable to justiciable rights in particular. Firstly, CLS scholars such as Mark Tushnet believe that the language of legal rights is so open and indeterminate.⁴⁰ Within a human rights claim, there is commonly a 'balancing' exercise – a trade-off between an individual's rights, such as free speech or freedom of assembly, and the legitimate interests of the state such as prevention of disorder and crime or national security (as per Articles 10 and 11 of the ECHR, for

play a role in a radical critique of liberal legal theory.'

³⁶ Mark Tushnet, 'Perspectives on Critical Legal Studies' (1984) 52 *George Washington Law Review*, 239-242, 239. In its rejection of the neutrality in legal reasoning, there is maybe very little to distinguish Critical Legal Studies from the earlier 'American legal realism' of eg Karl Llewellyn and Jerome Frank. But, according to Tushnet, whilst the realists accepted the indeterminacy of legal reasoning, they remained firmly committed to liberalism. And whilst they wanted a better understanding of how the law worked, they wanted to make the existing processes work better – not reject them (239). For other references to Tushnet's critical legal studies 'credo', see, for example, Mark Tushnet, 'Critical Legal Studies: an Introduction to its Origins and Underpinnings' (1986) 36 *Journal of Legal Education*, 505-517; and Mark Tushnet, 'A Critical Legal Studies Perspective' (1990) 38 *Cleveland State Law Review*, 137-151.

³⁷ *ibid* 240.

³⁸ Hilaire McCoubrey and Nigel White, *Textbook on Jurisprudence*. 3rd ed. (Blackstone Press 1999) 216.

³⁹ Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review*, 1363-1403. But Tushnet does still believe citizens need protecting from the state, especially post 9/11 – see: Mark Tushnet, 'Controlling Executive Power in the War on Terror' (2005) 118 *Harvard Law Review*, 2673-2682.

⁴⁰ *ibid* 1371.

example). Tushnet believes for there to be an effective balancing exercise by the courts, competing interests must be reduced to some common measure of value, but in many instances this is simply not possible.⁴¹ Indeed, there is often a trade-off between rights which have a similar level of constitutional protection. Which right does the court give greater priority?⁴²

Drawing further on the indeterminacy argument within the law, Tushnet questions the 'utility of rights'. To say that rights are politically useful is to say that they do something, yet, for Tushnet, to say that rights are indeterminate is to say that one cannot know whether a claim of right will do anything.⁴³ This suggests an indifference towards rights but in some circumstances Tushnet is much more explicit in his criticisms. In some situations, such as the emphasis on free speech in the First Amendment of the US Constitution, Tushnet believes that rights, rather than 'not doing much good', are positively 'harmful'.⁴⁴ He believes:

'I have yet to run across a decent argument that access to sexually explicit material of the sort protected by the [Supreme Court's] obscenity decisions is itself a positive good. In the free press/fair trial controversy, the present balance between the interests of defendants and victims, on the one side, and the morbid curiosity of the press, on the other, is not obviously correct.'⁴⁵

In a separate article Tushnet further explores the criticisms of rights stated above. He claims that the discourse of rights reflects and produces a kind of isolated individualism.⁴⁶ And on the indeterminacy thesis, and its corresponding rejection of neutrality, Tushnet claims that 'nothing whatever follows from a court's adoption of some legal rule...except the ideological dimension with which the critique of rights is concerned'.⁴⁷ Indeed, for Tushnet, legal

⁴¹ *ibid.*

⁴² *ibid* 1373.

⁴³ *ibid* 1384.

⁴⁴ *ibid* 1386.

⁴⁵ *ibid.*

⁴⁶ Mark Tushnet, 'The Critique of Rights' (1993) 47 *SMU Law Review*, 23-34, 27.

⁴⁷ *ibid* 32. Tushnet uses the same words in another article, in attacking liberal legalism more generally – see: Mark Tushnet, 'The Dilemmas of Liberal Constitutionalism' (1981) 42 *Ohio*

victories can actually impede political goals. The victory may make those who won it complacent while galvanizing their opponents to do all they can to minimize the effects of the ruling.⁴⁸

More recent critics of human rights law include Hurst Hannum,⁴⁹ Dominique Clement and Eric Posner. Clement, for example, is concerned about conflating every grievance as a human right; illiteracy, poverty, lack of health care should be framed as violators of social justice rather than rights. The language of human rights, for Clement, means the law, which is an 'ineffective solution to a systematic social problem'.⁵⁰ Moreover, the existence of a legal right must be premised on the ability of the state and society to guarantee such rights. Resources are limited, and any attempt to recognise all rights in an era of rights inflation forces people to prioritise some rights claims above others.⁵¹ In contrast, Posner frames his criticism of rights at the international level in particular. For Posner the international legal effort to force countries to protect human rights has failed; there is little evidence that countries that ratify human rights treaties improve their human rights performance.⁵²

Thus far, addressing the apparent 'crisis' within human rights, especially post 9/11, the author maybe ought not to do so through the lens of critical legal theory: a preponderance of critical legal theory, and its criticism of human rights in particular, suggests a rejection of rights as a tool for remedying the challenges presented hitherto. However, Tushnet is not

State Law Journal, 411-426, 425.

⁴⁸ *ibid* 30.

⁴⁹ Hurst Hannum, 'Reinvigorating Human Rights for the Twenty-First Century' (2016) 16 *Human Rights Law Review*, 409-451.

⁵⁰ Dominique Clement, 'Human Rights or Social Justice: The Problem of Rights Inflation' (2018) 22 *The International Journal of Human Rights*, 155-169, 160; and Dominique Clement, *Debating Rights Inflation in Canada: a Sociology of Human Rights* (Wilfrid Laurier University Press 2018). To continue the debate about the so-called benefits of increasing human rights claims more broadly, see: Carl Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Routledge 1998).

⁵¹ *ibid*.

⁵² See, for example, Eric Posner, *The Twilight of Human Rights Law*. Open Global Rights 25th November 2014 <<https://www.openglobalrights.org/twilight-of-human-rights-law/>> accessed 19 June 2018; and Eric Posner, *The Twilight of Human Rights Law*. (Oxford University Press 2014). See also: Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' 111 (2001-02) *Yale Law Journal*, 1935-2034.

entirely dismissive of rights: he only says that a critique of rights must caution against an overestimation of the significance of legal victories and the contributions lawyers can make to social progress.⁵³ Indeed, within his ‘disutility’ criticism of human rights, Tushnet attacks the predominance of ‘negative’ rights, suggesting an openness to other rights. He believes that people usually agree that the present balance between negative and ‘positive’ rights ie ‘rights to’, such as the ‘right to work’, is ‘askew’ and that positive rights should be created or strengthened. Yet it may be impossible to carry out that programme. In the US, for example, the language of negative rights supports a sharp distinction between the ‘threatening public sphere’ and the ‘comforting private one’. Tushnet therefore opposes the ‘contemporary rhetoric of rights’ which speaks primarily to negative ones.⁵⁴ Thus, employing a CLS approach, greater weight should be attached to other generations of rights, not only because of the first generation’s strong association with the law and the courts, but also because of their traditional liberal foundations.

Furthermore, if we were to continue to defend addressing the challenges posed in this chapter from a critical legal perspective, there are many other arguments from that tradition that can be presented in support. For example, in addition to the ‘ambivalent’ approaches to the law already expressed by Balkin,⁵⁵ there are also scholars of feminist jurisprudence and critical race theory, such as Elizabeth Schneider and Kimberle Crenshaw, who believe that human rights claims are among the few resources that disempowered people have.⁵⁶ Indeed, within the Marxist tradition, a philosophy well renowned for its

⁵³ Tushnet (n 46) 25.

⁵⁴ Tushnet (n 39) 1392.

⁵⁵ Within critical legal theory Balkin is not alone in having an ambivalent approach towards the law – see, for example: Alan Hunt (n 54). Hunt, who believes CLS is synonymous with critical legal theory (5), and therefore can be labelled as a CLS scholar, says: ‘It is a travesty of the critical school to allege that their project is to show law in its worst light. A distinctive feature of critical scholarships is a deep perplexity about law. We perceive law as involving both negative and positive characteristics.’ (11). For a much more detailed discussion of Hunt’s approach to CLS, see, for example: Alan Hunt, ‘The Theory of Critical Legal Studies’ (1986) 6 *Oxford Journal of Legal Studies*, 1-45.

⁵⁶ See, for example: Elizabeth M. Schneider, ‘The Dialectic of Rights and Politics: Perspectives from the Women’s Movement’ (1986) 61 *New York University Law Review*, 589-653; and Kimberle W. Crenshaw, ‘Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law’ (1988) 101 *Harvard Law Review*, 1331-1387.

rejection of liberalism, legal scholars such as Paul O’Connell defend rights, since, for O’Connell, social movements around the world ‘continue to frame their struggles and demands, at least partly, through the language of human rights’.⁵⁷ Thus, this piece will continue to defend a re-engagement with freedoms from the perspective of human rights claims, acknowledging the legitimate concerns of CLS.

Often critics of CLS claim the principle is too easy to criticise liberalism, and human rights in particular, but reluctant, within the terms of its own methodology, to propose a model of its own, as a basis for reform.⁵⁸ In reply, the author views this, therefore, as an opportunity to move the rights debate forward, in bridging the valid CLS criticisms of liberalism, with that ideology’s emphasis on the individual and antipathy towards increases in state power, which for this piece is particularly telling post 9/11, with other comparable theories more suited to addressing predictors of terrorism such as social exclusion and marginalisation.

⁵⁷ Paul O’Connell, ‘On the Human Rights Question’ (2018) *Human Rights Quarterly* (forthcoming). There are scholars, such as Cass Sunstein – Cass Sunstein, ‘Rights and Their Critics’ (1999) 71 *Notre Dame Law Review*, 727-757 – who have deliberately sought to temper the CLS critical presentations of rights. Sunstein is not entirely dismissive of the CLS arguments: rather, their ‘plausible’ claims should be ‘stated far more cautiously and narrowly’ (729). First, Sunstein agrees with CLS, for example, that rights are indeterminate, but only when they are in the abstract. For Sunstein, rights in fact become determinate – ‘specified’ – when they operate in law (742). It will also be recalled that Mark Tushnet was particularly dismissive of the US Supreme Court’s interpretation of the First Amendment, the right to speech. Although not responding to Tushnet directly, Sunstein would question whether this is really an attack on a specific right, free speech, in particular, rather than an attack on rights in general? (743-744). Sunstein rejects the argument that rights as interests operate only negatively: ‘The right to associational freedom is hardly individualistic. It is meant precisely to protect collective action and sociality.’ (745) Finally, Sunstein also states that many rights are best understood as a solution to a collective action problem, such as a lack of legal entitlements for specific groups within society such as prisoners (737).

⁵⁸ Hilaire McCoubrey and Nigel White (n 38) 211. In the defence of CLS, Hunt, for example says: ‘Given the predominance of liberal legal theory, it is difficult to make the first steps in making out an alternative theory for each of us is deeply imbued with the influence of that tradition’ – see: Alan Hunt, ‘The Critique of Law: What is Critical About Critical Legal Theory’ (1987) 14 *Journal of Law and Society*, 5-20, 13. That said, Hunt believes that is ‘desirable and necessary’ to advance a general theory of law (5), which he discusses and describes as a ‘relational’ theory of law (16-18).

Communitarianism is arguably one such philosophy and is discussed in detail in the next section.⁵⁹

Communitarianism and its emphasis on responsibilities

Communitarianism, such as that proposed by Alasdair MacIntyre,⁶⁰ Michael J Sandel,⁶¹ Charles Taylor⁶² and Michael Walzer,⁶³ began in the form of a critical reaction to John Rawls' *A Theory of Justice*. In *A Theory of Justice*, for example, Rawls arrived at his conception of justice by considering what individuals in the 'original position' would choose as principles of justice for the basic structure of society. They would decide behind a 'veil of ignorance' which prevented them from knowing their place in society, their class position or social status, their fortune in the distribution of natural assets and abilities, their intelligence and their strength. This ensured that no one was advantaged or disadvantaged in the choice of principles.⁶⁴

⁵⁹ Some commentators have sought to draw parallels with CLS and communitarianism much more closely – see, for example: Richard Bauman, 'The Communitarian Vision of Critical Legal Studies' (1988) 33 *McGill Law Journal*, 295-356.

⁶⁰ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*. (University of Notre Dame Press 1981).

⁶¹ Michael J Sandel, *Liberalism and the Limits of Justice*. (Cambridge University Press 1982).

⁶² Charles Taylor, *Sources of the Self: The Making of Modern Identity*. (Harvard University Press 1989).

⁶³ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*. (Basic Books 1983).

⁶⁴ John Rawls, *A Theory of Justice*. (Harvard University Press 1971) 136-142. (Individuals were not completely ignorant, however: they knew 'the general facts about society', for example (137)). Rawls believed two principles of justice would be chosen in the 'original position'. The first of these, the 'liberty principle' was 'each person is to have an equal right to the most extensive of equal basic liberties compatible with a similar liberty for all' (302). That is, each person would have the maximum amount of liberty without interfering with the similar liberties of others, which even the general welfare could not override (61). These 'basic liberties' were political freedoms, such as speech, assembly and conscience, freedom from arbitrary arrest and freedom of personal property (61). For Rawls, the first principle of justice, which is appropriate to this chapter, prevailed over the second one because, for example, this dealt with constitutional fundamentals (63). The second principle of justice, which had two limbs, 'the difference principle' and 'fair equality of opportunity' (159-161), dealt with merely the operation of these constitutional fundamentals (63).

There are many reasons for communitarianism's attack on *A Theory of Justice* but these are, sadly, beyond the limits of this piece.⁶⁵ For the purposes of this chapter, in rejecting Rawls's 'veil of ignorance' hypothetical exercise, communitarians did not believe that individuals were born free and unencumbered, wholly autonomous agents seemingly living isolated lives, strangers to one another.⁶⁶ MacIntyre, for example, believed that we all approached our own circumstances as bearers of a particular social identity:

'I am someone's son or daughter, someone's cousin or uncle; I am a citizen of this or that city, a member of this or that guild or profession; I belong to this clan, that tribe, this nation...I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral starting point.'⁶⁷

Thus, for communitarians, liberalism, or at least Rawls' approach to liberalism, in representing an overly individualistic conception of 'the self',⁶⁸ was insufficiently sensitive to the importance of community, traditions and lived experiences.⁶⁹

A more recent communitarian theorist is Amitai Etzioni,⁷⁰ who echoes the earlier communitarians in emphasising liberalism's apparent neglect of community. He believes

⁶⁵ For example, can we partake in Rawls' 'veil of ignorance' experiment from a neutral position? Sandel questions, for example, whether the principles of justice that govern the basic structure of society can be neutral with respect to the competing moral and religious convictions its citizens espouse? He believes that one way of linking justice with the conceptions of the good holds that principles of justice derive their moral force from values commonly espoused or widely shared in a particular community or tradition. This way of linking justice and the good is communitarian in the sense that the values of the community define what counts as just or unjust (n 61) ix-x. Thus, one of the main themes of communitarianism is that there are common formulations of the public good rather than leaving it to be determined by each individual; the state cannot remain neutral on the issue.

⁶⁶ Michael Walzer, 'The Communitarian Critique of Liberalism' in Amitai Etzioni (ed), *New Communitarian Thinking: Persons, Virtues, Institutions and Communities*. (University of Virginia Press 1995), 52-70, 53-54.

⁶⁷ MacIntyre (n 60) 204-205.

⁶⁸ Daniel Bell, *Communitarianism and its Critics*. (Oxford University Press 1993) 4.

⁶⁹ *ibid.*

⁷⁰ Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society*.

that neither human existence nor individual liberty can be sustained for long outside the interdependence and overlapping communities to which we all belong. Nor can any community long survive unless its members dedicate some of their attention, energy, and resources to shared projects.⁷¹ But for Etzioni, another important communitarian principle, which is particularly relevant to this piece, is redressing the balance between liberalism's emphasis on personal autonomy and social responsibilities, otherwise society will continue to be 'self-centred and driven by self-interests'.⁷²

Rights talk, especially in the United States where Etzioni lives, is particularly silent on responsibilities. As an example, Etzioni refers to the opposition to seat belts and wearing motorcycle helmets. These people do not absorb the consequences of their acts. They are more likely to die and leave their children 'for society to attend to and pick up the pieces', as well as ignore the drain on public resources this will cause.⁷³ Thus, for Etzioni, rights talk seemingly condones acceptance of the benefits of living in a social welfare state, without accepting the corresponding personal civic obligations. This is a view shared by Mary Ann Glendon. Glendon also believes that rights talk, particularly in America, captures a devotion to individualism and liberty, but omits America's traditions of hospitality and care for the community.⁷⁴ But this is not to reject human rights completely: a right, which is less individualistic and more responsive to collective ideals, is, for Glendon, Article 29(1) of the UDHR. Article 29(1) states: 'Everyone has duties to the community in which alone the free and full development of his personality is possible.'⁷⁵

(Basic Books 1996); Amitai Etzioni (ed), *The Essential Communitarian Reader*. (Rowman and Littlefield Publishers 1998).

⁷¹ Amitai Etzioni, 'The Responsive Communitarian Platform: Rights and Responsibilities' in Amitai Etzioni (ed). *Rights and the Common Good: The Communitarian Perspective*. (St Martin's Press 1995), 11-23, 11.

⁷² Amitai Etzioni, 'Old Chestnuts and New Spurs' in Amitai Etzioni (ed), *New Communitarian Thinking: Persons, Virtues, Institutions and Communities*. (University of Virginia Press 1995) 22.

⁷³ Amitai Etzioni, *The Spirit of Community: The Reinvention of American Society*. (Touchstone 1994) 6.

⁷⁴ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*. (Free Press 1991) xi-xii.

⁷⁵ *ibid* 13.

The 'communitarian' African Charter on Human and Peoples' Rights

The recognition of duties and responsibilities within human rights law is particularly developed in the African region: the African Charter on Human and Peoples' Rights (ACHPR), for example. In relying on criticisms of liberalism, one can advance the ACHPR as a way of, not only a human rights re-engagement with the critical readership of the *Daily Mail*, but redressing, to some degree, indictors of terrorism such as inequality and unemployment.⁷⁶ The author has already noted that grounding his approach in rights via CLS, for example, and especially Mark Tushnet, may seem like an obvious contradiction. However, CLS criticisms of rights, and communitarian ones to a lesser degree, are founded on a hostility towards a liberal bias within the law, of which the natural, negative, 'freedoms' from the state are a principal target – the approach to rights adopted within the ACHPR is much less individualistic and much more progressive than classic models of rights.⁷⁷ The ACHPR includes a group of articles on socio-economic rights, as well as duties. The primary reason was that the founding states wished to put forward a distinctive conception of human rights in which civil and political rights were seen to be counterbalanced by duties of social solidarity.⁷⁸

Before proceeding, however, a qualification: it is commonly accepted amongst human rights commentators that many of the rights contained within the ACHPR lack definition.⁷⁹ Indeed, one commentator goes as far as to say: 'The duties [for example] are of such breadth and so ambiguous in their connotations that a regime of serious enforcement without some degree

⁷⁶ For more discussions about communitarianism and the ACHPR in general, see, for example: Thaddeus Metz, 'African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter' (2013) *African Legal Theory and Contemporary Problems*, 131-151.

⁷⁷ For criticisms of attaching too much weight to first generation rights in the African human rights debate, see, for example: Claude Ake, 'The African Context of Human Rights' (1987) 34 *Africa Today*, 5–12; and Josiah Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly*, 309-331.

⁷⁸ Javid Rehman, *International Human Rights Law*. 2nd ed. (Pearson Education 2009) 311.

⁷⁹ See, for example, Rhona Smith, *International Human Rights Law*. 8th ed. (Oxford University Press 2017) 141; and Rehman (n 78) 327.

of prior elaboration is difficult to imagine.⁸⁰ Thus, in the absence of a significant body of human rights law – other than the Charter itself – developed and refined by relevant institutions within the African region such as the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights, the author of this chapter is free to propose an interpretation and application of the ACHPR of his own.

The ACHPR begins with ‘negative’ human rights from the liberal tradition: the right to life, Article 4; the prohibition of torture and cruel, inhuman and degrading treatment, Article 5; the right to personal liberty and protection from arbitrary arrest, Article 6; and the right to a fair trial, Article 7, for example. But it proceeds to socio-economic, ‘positive’, ‘rights to’, such as the right to work, Article 15; the right to health, Article 16; and the right to education, Article 17. More progressively, the ACHPR also includes rights more associated with ‘communitarian’ ideals, conferring rights on ‘peoples’, not just individuals: the right of all peoples to equality and rights, Article 19; the right of all peoples to economic, social and cultural development, Article 22; and the right of all peoples to national and international security and peace, Article 23.⁸¹ Lastly, seemingly mirroring communitarian thinking towards responsibilities, there are ‘duties’ of the individual, rather than rights, which one human rights commentator has described as ‘unprecedented in so far as human rights treaties are concerned’:⁸² every individual shall have duties towards their family and society, the state and other legally recognized communities and the international community, Article 27; and every individual shall have the duty to respect and consider their fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance, Article 28. Indeed, Article 29 also states that each individual shall have the duty: not to compromise the security of the State whose national or resident

⁸⁰ Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 2012) 520. For further reading on the language of duties within the ACHPR, see, for example: Makau Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ 35 (1995) *Virginia Journal of International Law*, 339-380.

⁸¹ Rehman (n 78) 327. For a discussion of whether peoples’ rights can actually legitimately claim to be human rights, since, for example, they are not rights of human beings, see: Peter Jones, ‘Human Rights, Group Rights, and Peoples’ Rights’ (1999) 21 *Human Rights Quarterly*, 80-107.

⁸² Rehman (n 78) 311.

they are; to preserve and strengthen social and national solidarity, particularly when the latter is threatened; and to preserve and strengthen positive African cultural values in their relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society.

In addressing the criticisms of human rights from, say, readers of the *Daily Mail*, the ACHPR does contain rights that some would naturally see as inhibiting the state's attempts to counter terrorism: the right to personal liberty and protection from arbitrary arrest, Article 6; and the right to a fair trial, Article 7. But the ACHPR does attach much less weight to the rights of the individual terror suspect, in conferring rights on 'peoples'. Article 23 of the ACHPR, the right of all peoples to national and international security and peace, is one such right which could certainly divert significant attention away from the so-called undeserving terrorist towards those of the deserving victim. Moreover, there are also ACHPR rights that could inevitably address some of the indicators of terrorism outlined above, such as unemployment and poor educational opportunities: the right to work, Article 15; and the right to education, Article 17. The significance of the duties within the ACHPR, in preventing terrorism, for example, cannot be overstated either. Article 28, it will be recalled, imposes the obligation on individuals to maintain relations with their fellow human beings to promote, safeguard and reinforce mutual respect and tolerance. Of course terrorists could be in violation of this obligation but they would not be the only ones upon whom this duty was imposed: everybody could have a responsibility to look out for others in their community, particularly the young who are much more susceptible to exploitation, to avoid the perils of social isolation. Where there was a suspicion that a person had been radicalised, then Article 29 could be engaged, in imposing obligations on individuals not to compromise the security of the state. Again, terrorists could be in violation of this Article, but in this instance the individual, upon whom this duty could also be imposed, would not be the individual extremist, but could be someone else, perhaps a religious leader schooled in a counter jihadist narrative, or a community youth worker with an expertise in techniques of diversion.

Conclusion

In the so called 'War on Terror' many, particularly those in the media, see human rights merely as a vehicle to secure the 'undeserving' rights of terror suspects over the 'deserving' rights of victims. The idea that human rights protect the 'few' over the 'many' has arguably contributed to a disengagement with the topic of rights. But human rights are not the preserve of the classic liberal tradition, with its emphasis on protecting the individual from the state, as security is being compromised much more by non-state actors. Indeed, human rights law is more far-reaching than liberalism suggests, as the rights of 'peoples' within the ACHPR signify. In particular, there is Article 23 of the ACHPR, the right of all peoples to national and international security and peace. A greater understanding of this right, for example, or a wider acceptance of it beyond the African region, should reassure a nervous populace, post 9/11, and redress the apparent bias within human rights towards an 'unworthy' minority. At the same time, the related liberal suspicions about increases in state power have seemingly ignored primary indicators of terrorism. Noting the nature of recent Islamist terrorists in the West – many are recent Muslim converts, with a criminal history – and the factors affecting their recruitment – inequality, marginalisation, unemployment etc – perhaps, within current discussions of human rights, we should prioritise this apparent isolation and lack of educational opportunities and attach greater weight to collective ideals such as the positive, 'rights to' work and education? Such an approach is consistent with critical legal approaches to the law, and human rights in particular, since, for that tradition, the balance falls too much in favour of negative freedoms. However, a wider acceptance of rights, beyond the first and second generations, to those freedoms that are more socially inclusive, that foster a *communal* sense of duty and responsibility, along the lines of, say, Articles 28 and 29 of the ACHPR, are surely a significant, additional way forward in re-engaging with the topic of rights, particularly in times of crisis?