Assessing the Universality of Human Rights in the Context of Health

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Abstract

This thesis looks to examine the contemporary potentiality of universal human rights. It begins by noting that within the modern context the idea of universal rights is increasingly challenged by a security dominated discourse. The era of the so called 'War on Terror' is defined by diminished appreciation of the concept of human rights, both in terms of government commitments and popular opinion. The central aim of this thesis is to determine whether the idea of universal human rights is justifiable within these contexts.

In accordance with this aim, this thesis will utilise important elements of critical jurisprudential accounts of human rights, centred on the work of Costas Douzinas. These elements, based upon challenging the accepted standards/interpretations of legal concepts, will be employed in an attempt to provide an objective appraisal of the sufficiency of prevailing interpretations of the concept of human rights. Through utilisation of Douzinas' authoritative body of work documenting the presence of human rights in the contemporary world, this thesis will ultimately look to challenge the perception that security and human rights are competing aims. This thesis will argue that the universality of human rights relates to their overarching purpose. In accordance with James Griffin, this thesis will propose that this purpose relates to the actualisation of 'normative agency'.

Through a critical examination of the modern construct of human rights, centred around issues of human healthiness, this thesis will identify the right to health as a foundational claim – in that its fulfilment (either directly or indirectly) is a pre-requisite for the meaningfulness of other protections (and the actualisation of normative agency). This thesis will conclude by examining this concept of human healthiness within the context of national security. Here it will be shown that as both national security and human rights are centred on considerations of subsistence, they are not incompatible, and that the universality of the idea of rights is absolute. Further, it will be shown that this absoluteness reflects a permanence of purpose rather than practical implementation.

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List of Abbreviations

CRC	Convention on the Rights of the Child (1989)
CESCR	Committee on Economic Social and Cultural Rights
DOI	American Declaration of Independence (1776)
DRMC	French Declaration of the Rights of Man and of the Citizen (1789)
ECHR	European Convention on Human Rights (1950)
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights (1966)
ICESCR	International Covenant on Economic Social and Cultural Rights (1966)
OHCHR	Office of the United Nations High Commissioner for Human Rights
PHEIC	Public Health Emergency of International Concern
UDHR	Universal Declaration of Human Rights (1948)
UN	The United Nations
UNCHR	United Nations Commission on Human Rights
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
WHO	World Health Organisation

Declaration

I hereby declare that no portion of the work that appears in this study has been used in support of an application of another degree in qualification to this or any other university or institutions of learning.

Statement of Copyright

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Dedication

For Mum and Dad.

1 Introduction

> "Human rights" is a term combining law and morality. Legal rights have been the building block of western law since early modernity.[1]

It is evident to state that, as Costas Douzinas maintains, the idea of universal human rights is not a novel one. Human history is replete with philosophical accounts which seek to justify an entitlement to basic claims or protections deemed fundamental to the human experience. Though the justificatory reasoning which is used to legitimise these claims has developed over time, the overarching purpose of such efforts has remained largely the same – to provide a means of protecting the ability for individuals to live a 'worthwhile life'.[2] Defining what, precisely, one can regard as being 'worthwhile' has itself been a complex and controversial undertaking.[3] Similarly, it is noteworthy that the meaning of 'universal' has itself changed throughout our history – originating with an interpretation which, contradictorily, excluded large sections of society from the capacity to claim.[4] However, despite an evident expansion of efforts to legitimate the concept of universal human rights during the modern period of international law – and specifically since the end of the Second World War[5] – the universal applicability of human rights remains highly contestable. Within the present context, it is clear that, whilst the idea of universal human rights persists in academic circles,[6] the human rights movement is becoming increasingly defined by the fact that reliable implementation of proposed normative claims has yet to be secured.

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[1] Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking <http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.
[2] See for example James Griffin, *On Human Rights* (Oxford University Press 2008) 147.
[3] ibid 183.
[4] For example, gradations of worth determined within (and between) different cultures, ethnicities, and social and economic classes. Human history is replete with examples of different peoples/states prioritising the specific interests of a subsection of society over others.
[5] See for example the Universal Declaration of Human Rights (UDHR 1948), the International Covenant on Civil and Political Rights (ICCPR 1966), and the International Covenant on Economic Social and Cultural Rights (ICESCR 1966).
[6] '[H]uman rights are "indivisible" … Although the history of the concept is Western, the concept itself is universal'. Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Polity Press 2002) 172.

Indeed, in contemporary times the level of international commitment from states to human rights is arguably declining. Strikingly, this appears to be true, not only in relation to states which have traditionally opposed this movement,[7] but also those who are regarded as having led such efforts.[8] In addition to traditional causes of resistance to the universal expansion of human rights such as cultural relativism,[9] difficulties stemming from the recent re-emergence of the prioritisation of national security initiatives have also certainly contributed to this development. A crucial concern for states in an era largely defined by the so called 'War on Terror' is how to balance seemingly conflicting interests of state security and individual human liberties.[10]

As consequence, there is an evident need to reassess the legitimacy of the concept of universal (absolute) human rights and their place in the modern world. Prevailing theoretical accounts of this concept purport that human rights are universal, not just in the sense that all peoples are entitled to them (based on various justifications as we will address in Chapter Two), but also in relation to the substantive content of individual claims.[11] In brief, protections such as freedom of expression, the prohibition of torture and slavery, freedom of religion, are to be afforded to all human beings, and are intended to mean the same thing in one jurisdiction as in

[7] For examples of such states, as Stephen Hopgood notes 'China and Russia … leads the way … followed by states as diverse as Sri Lanka, Cambodia, Uganda and Uzbekistan'. Stephen Hopgood, 'Challenges to the Global Human Rights Regime: Are Human Rights Still an Effective Language for Social Change?' (2014) 11 SUR – International Journal on Human Rights 67, 71.

[8] As example, various states, such as the United States of America (U.S.), who were heavily involved in the creation of the Universal Declaration of Human Rights (UDHR 1948).

[9] Principally, this school of thought posits that, as the concept of human rights (in its practical form) is Western in origin, it can have limited usefulness to states not based upon similar Western ideals. For more on this see Rhonda. E. Howard, *Human Rights and the Search for Community* (Harper Collins 1995).

[10] This sentiment was provocatively expressed by Michael Ignatieff when he declared 'The question after Sept. 11 is whether the era of human rights has come and gone … the claim that national security trumps human rights'. Michael Ignatieff, 'Is the Human Rights Era Ending?' *The New York Times* (New York, 5 February 2002) <http://www.nytimes.com/2002/02/05/opinion/is-the-human-rights-era-ending.html> accessed 18 May 2018.

[11] See for example Jack Donnelly, *Universal Human Rights in Theory and in Practice* (Cornell University Press 2002) 10.

all the others.[12] Thus, the idea of human rights is founded on the presumed universal applicability of such claims. Amongst many proponents of human rights there appears to be little scope for negotiation with regards to the legitimacy of this position, only the means with which their application is to be achieved (and balanced in accordance with other fundamental protections).[13]

However, in reflection of the apparent decline in support of the idea of universal rights within the global arena in recent years (in accordance with prioritising security), it would be fair to suggest that this approach has potentially undermined the purpose of such claims – as well as efforts to ensure their wide spread implementation. Specifically, this has occurred by reducing the task of determining the legitimacy of human rights provisions to discussions on the practicality (as well as the desirability) of their universal adoption and implementation. Consequently, the authenticity of rights is questioned, with growing scepticism, the longer it takes for their universal applicability to be acknowledged (resulting in widespread implementation).[14] In addition, a restrictive approach to determining which 'human' interests are worthy of protection (which is heavily based on Western interpretations and which ignores arguments supporting the potential cultural contingency of such rights), ensures that traditional resistance (e.g. cultural relativism) behind such efforts persists.[15] In addressing the potentiality of universal human rights in contemporary contexts, therefore, it is relevant to consider whether

[12] This is persuasively articulated by Jack Donnelly when he stated that 'one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all)'. ibid.

[13] See for example the concept of the 'margin of appreciation' which affords member states of the European Convention on Human Rights (ECHR) some flexibility when balancing so called conditional rights – such as Respect for Private and Family Life (Art. 8), Freedom of Thought, Conscience and Religion (Art. 9), and Freedom of Expression (Art. 10). For a detailed examination of this concept see Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Human Rights Files No. 17) (Council of Europe Publishing 2000) <http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf.> accessed 18 May 2018.

[14] See for example Michael Ignatieff, 'Human Rights: The Midlife Crisis' (1999) 46 The New York Review of Books 58.

[15] As an example of this, Nhina Le explains that '[d]ominant Muslim groups in Saudi Arabia still do not adequately promote marriage and religious freedoms … These groups claim that doing so contradicts their religious beliefs, which do not recognise marriage freedom for women and do not allow people to change their religions'. Nhina Le, 'Are Human Rights Universal or Culturally Relative?' (2016) 28 Peace Review 203, 205.

this universality should be held to be dependent upon absolute interpretations of the substantive content of specific claims. To put it simply, are contemporary definitions and interpretations of human rights definitive? If so, then the legitimacy of human rights can in fact reasonably be seen to rest solely on determining the practicality of securing universal implementation (as suggested above). If not, however – as this thesis proposes - then there is a need to identify an alternative means of testing this legitimacy and establishing the basis with which we can justify the universal applicability of such protections (which is not solely contingent upon accepting prevailing accounts/interpretations). This thesis proposes that this can be fulfilled by refocusing the discourse towards the purpose of such rights.

In contemporary times, an enduring acceptance of the absoluteness of these claims stems from the historical legacy of the idea of such protections. Despite obvious differences with these historical accounts, it remains clear that the modern concept of human rights is significantly influenced by traditional natural rights and natural law theories.[16] From Cicero to Aquinas to Locke, these theoretical accounts were all heavily influenced by a presupposed legitimacy – the idea that, like nature itself, such rights were self-evident. The modern construct of human rights has been shaped upon such theoretical foundations.[17] In this way, modern human rights are effectively a product of history - an amalgamation of overlapping aspects of influential moral and political ideals. Throughout human history, the continual affirmation (and reaffirmation) of these ideals has strengthened perceptions of their legitimacy.

Indeed, as a modern means of authenticating this legitimacy, contemporary legal scholarship has attempted to identify a definitive lineage of human rights – to discover the

[16] An insightful summary of this process can be found in Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century (Hart Publishers 2000)* 7-15.
[17] Samuel Moyn, *The Last Utopia* (Belknap Press 2012) 212-230.

genesis of these ideals.[18] A significant objective for such studies is to explain the *legitimacy* of rights by demonstrating their historical – and thus contemporary – significance. Such accounts purport that Human rights are important, not only because of what they have already accomplished, but because their eventual universal adoption is destined to be achieved. The perceived inevitability of human rights has been at the centre of contemporary efforts to justify their universal applicability. This is exemplified with Francis Fukuyama's bold (and now infamous) prediction that, at the end of the Cold War, future human history would mark the expansion of democracy (and the corresponding fulfilment of human rights).[19]

However, as previously discussed, global affairs have witnessed significant changes in the years since this claim was originally made. As Douzinas asserts, 'The end of history and the dawn of a 'new world order' was announced in 1989. If it was a 'new' order, it was the shortest in history'.[20] Crucially, many of the Western powers whose initial commitment to human rights did much to solidify their perceived validity on the international stage in the latter half of the twentieth century have now refocused their efforts towards the supposedly competing aim of combatting acts of international terrorism. These efforts have unavoidably resulted in conflicts emerging where states have attempted to balance national security initiatives with the fundamental interests of individuals.[21] Simultaneously, the threat of terrorism has, to date, shown no real signs of abating,[22] despite the legitimacy of this issue achieving near global consensus (and a commensurate level of national and international

[18] For a detailed account of this see Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalisation Era* (University of California Press 2008).
[19] Francis Fukuyama, *The End of History and the Last Man* (Free Press 2006) 328-339.
[20] Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013) 77.
[21] Within the context of the United Kingdom (U.K.), this was perhaps best personified by the Anti-Terrorism Crime and Security Act 2001. As Ipek Demirsu notes in his recent study of the impact of count-terrorist initiatives on human rights protections, this act was defined by 'the notorious provision of indefinite detention for non-nationals'. Ipek Demirsu, *Counter-Terrorism and the Prospects of Human Rights* (Palgrave Macmillan, 2017) 1.
[22] This is evidenced with multiple terrorist attacks in recent years. For example, with the attacks which took place at the Ataturk Airport in Istanbul, Turkey on the 28th of June 2016, and at the Promenades de Anglais in Nice, France on the 14th of July 2016.

attention).[23] This, in turn, has encouraged state efforts to adopt more robust counter-terrorist measures which either seek to limit or interfere with human rights in increasingly disproportionate ways,[24] or simply ignore them all together.[25] Moreover, this refocusing of the priorities of states has facilitated a diminishment of public support for the idea of universal rights/protections.[26]

These recent developments illustrate a significant challenge for human rights in modern times – how to demonstrate universal applicability in a historical context in which their relevance is increasingly threatened. Claims pertaining to the 'End of History' and the inevitable expansion of rights evidently appear premature in the light of this conflict. As previously discussed, the amalgamation of similar historical ideals has helped to shape the modern concept of human rights. This process has resulted in a purported universality which is alleged to be represented in both the substantive content and scope of such protections.[27] The uncompromising nature of this approach is motivated by the need, not only to ensure that the

[23] International support for global counter-terrorist initiatives is personified by numerous United Nations Security Council Resolutions. As example, UNSCR 1373 (2001) which, among other things, called on member states to 'work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism'. United Nations Security Council, 'On Threats to International Peace and Security Caused by Terrorist Acts' (28 September 2001) UN Doc S/RES/1373 (UNSCR 1373) <http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf> accessed 18 May 2018.

[24] The controversial so-called 'Pre-emptive Anti-Terrorism Law' recently passed in Japan is a relevant contemporary example of this process. For more on this see Robin Harding, 'Japan Passes Pre-Emptive Anti-Terrorism Law' *Financial Times* (Tokyo, 15 June 2017) <https://www.ft.com/content/75130598-5181-11e7-bfb8-997009366969?mhq5j=e1> accessed 18 May 2018.

[25] See for example the discussion on the legality of unmanned drone strikes as a legitimate counter-terrorist measure. For more on this see Milena Sterio, 'The United States' Use of Drone Strikes in the War on Terror: The (Il)legality of Targeted Killings Under International Law' (2012) 45 Case Western Reserve Journal of International Law 196.

[26] In the context of the United States of America (U.S.), this is evidenced with enhanced public support for the torture of terrorist suspects as means of protecting the state. As Zachary Carpino explains, the use of torture for this purpose has been legitimised 'by convincing the public that torture is a necessary evil to protect the masses and deter potential threats'. Zachary W Carpino, 'Terrorising the Terrorists: Reconstructing U.S. Policy on the Use of Torture in the Global War on Terror' (2013) 4 Global Security Studies 10, 17.

[27] The purported universality of human rights is encapsulated within Article 1 of the Universal Declaration of Human Rights (1948) wherein it is stated that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) <http://www.un.org/en/universal-declaration-human-rights/> accessed 18 May 2018.

significance of these rights is respected, but also that individual claims are protected from unjustifiable interference and abuse. Considering the historical context of their emergence,[28] it is reasonable to imagine that, at least at the outset, a less forceful attempt at justifying the universal relevance of human rights would have risked undermining the purpose of such efforts. However, given that the concept of human rights has now achieved global recognition – even if not international application or adherence – it is perhaps worthwhile to reassess the means with which we communicate these ideals.

Such a task should be accepted as worthwhile if we are prepared to acknowledge that previous attempts to justify the universality of rights have proven to be insufficient. This, in turn, can be supported by referencing the apparent difficulty in actualising human rights on a global scale as well as diminishing support for such protections amongst states where some form of implementation has already been achieved (e.g. in the context of the War on Terror). Furthermore, as previous attempts have been based upon a presumptive position of absoluteness – one which gave only limited consideration to the legitimacy of cultural interpretations of specific claims – it could be argued that their effectiveness was unnecessarily diminished.[29] Through a theoretical reassessment of the universality of human rights claims, this thesis will consider the advantages of reimagining the justificatory foundation of such protections as an underlying *purpose*. By reconceptualising the substantive content of rights within this context it will be shown that, in a practical sense, it is preferable to accept all rights as foundational claims - open to interpretation, development and evolution.

[28] Specifically, the atrocities and mass loss of life witnessed in the Second World War. More precisely, as Michael Ignatieff stated when referring to the creation of the Universal Declaration of Human Rights (1948); 'the holocaust made the declaration possible'. Michael Ignatieff, 'Human Rights: The Midlife Crisis' (1999) 46 The New York Review of Books 58, 58.

[29] For example, a good analysis of the inherent similarities between the Western conception of human rights and the teachings of Islam is provided by Abdullah Ahmed An-Na'im. Of particular interest is idea that the Qu'ran itself is founded on an understanding of humanity which is 'equal in worth and dignity, regardless of gender, religion, or race'. Abdullah Ahmed An-Na'im, 'Human Rights in the Muslim World' in Patrick Hayden (ed), *The Philosophy of Human Rights: Readings in Human Rights (*Paragon House Publishers 2001) 331.

For this thesis, foundational claims can be understood to represent both fundamental interests – grounded in what Griffin defines as 'personhood'[30] - as well as the adaptable substantive content of relevant protections. Specifically, having reassessed the theoretical foundations of the modern concept of human rights and the limitations of prevailing efforts to achieve universal application, our conclusions will then be considered within the context of the human right to health. The right to health has been chosen as the site for investigation for several reasons. Firstly, as a highly controversial protection,[31] it enables us to directly question the legitimacy of the idea of universal rights (as well as the historical hierarchisation of human rights claims along 'generational' lines).[32] This will be accomplished initially by considering the validity of prioritising first generation protections over others. It will then invert this discourse to propose that human healthiness is *the* foundational, fundamental interest (due to its importance for actualising normative agency and thus making other protections meaningful). Finally, it will look to address the significance of human healthiness within the national security paradigm (and specifically state security) – itself understood by states as the most fundamental and thus foundational concern.[33]

Secondly, and as alluded to in the previous paragraph, the right to health allows us to reconsider both the relevance and scope of fundamental rights within broad national security contexts. These incorporate developments relating to both traditional threats – such as the

[30] James Griffin, *On Human Rights* (Oxford University Press 2008) 33.
[31] As Jonathan Wolff notes, whilst civil and political rights have been 'very widely ratified …economic and social rights, including the right to health, [have] encountered more resistance …'. Wolff attributes this resistance to various factors, including the fact that economic and social rights are (erroneously in his view) regarded as being more expensive to enforce. Jonathan Wolff, *The Human Right to Health* (W. W. Norton & Company 2013) 13-14.
[32] Inherent problems with attempting to categorise rights into different generations were effectively addressed by Jim Ife when he exclaimed '[u]sing the term "generation" suggests a historical lineage … with first-generation rights being seen as somehow more important and taking precedence …'. Jim Ife, *Human Rights from Below: Achieving Rights Through Community Development* (Cambridge University Press 2009) 114.
[33] As Ben Golder notes, the alleged primacy of national security has allowed states to justify the erosion of human rights and civil liberties as 'the debate on counter-terrorist legislation has proceeded on the assumption that the demands of national security and the protection of human rights are opposed'. Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Response of Common Law Nations to the Threat of Terrorism' (2006) 8 Journal of Comparative Policy Analysis 43, 50.

weaponisation of disease[34] – as well as those not necessarily predicated on human motives or actions – such as pandemics.[35] Here, the examination of the securitisation of health will determine that the absoluteness of human rights protections should not be seen to relate to practical implementation. Indeed, it will be shown that such a conclusion may be reached when either the non-application or active derogation of such principles is more consistent with their underlying aim of actualising normative agency (by securing state subsistence). Consequently, this analysis will seek to identify a means by which a major dichotomy of human rights is capable of being resolved. Ultimately, the primary purpose of this research is to demonstrate the contemporary universality of human rights.

1.1 Key Claims and Thesis Route Map

As discussed, the primary purpose of this thesis is to demonstrate that the concept of universal human rights can be defended, even in the contemporary, security dominated climate. In looking to validate this position, the thesis will draw from a wide selection of academic and theoretical works, as well as relevant substantive law (e.g. in the form of case law and international treaties). There are six main claims to be advanced by this thesis. These are as follows:

1. The first main thesis claim is that the idea of universal human rights can be defended effectively. However, traditional attempts to provide a universalisable foundation for human rights (e.g. based on dignity) have proven to be sub-optimal. This is because they invite interpretations which are counter-intuitive to the aim of such protections (e.g. where entitlement to claim must be earned).[36] Instead a robust theoretical

[34] See for example Larry Lutwick and Suzanne Lutwick (eds), *Beyond Anthrax: The Weaponisation of Infectious Diseases* (Humana Press 2009).
[35] See for example Catherine Lo Yuk-Ping and Nicholas Thomas, 'How is Health a Security Issue? Politics, Responses and Issues' (2010) 25 Health Policy Plan 447.
[36] See for example Makau wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evolution of the Language of Duties' (1995) 35 Virginia Journal of International Law 339.

foundation for the concept of universal rights may be more appropriately provided by referencing the justificatory purpose of such protections. This purpose is argued to be accurately represented by James Griffin's account of human rights. Specifically, the idea that genuine human rights are those that enable normative agency – that which Griffin terms 'a functioning human agent'.[37]

2. The second main thesis claim is that human rights are non-definitive in relation to both their substantive content and the existence of potentially relevant claims. It is argued that they must be regarded as non-definitive because they retain the capacity to legitimately evolve (enhancing the standard of protection which is provided). This is evidenced, not only throughout the historical development of the concept of human rights itself (e.g. as represented by various human rights treaties), but also within existing case law relating to the European Convention on Human Rights (ECHR 1950).[38]

3. The third main thesis claim is that we can utilise the theoretical work of Ronald Dworkin to construct a framework by which we can effectively determine the legitimacy of developing interpretations of the law (as well as of legal concepts). This is based upon the proposed 'perfectibility of law', which suggests that the correct answer to a legal problem will be contextually contingent, and will be identifiable to us as the approach which most optimally reflects the 'general principles which underlie and justify the settled law …'.[39] In the context of human rights, it is argued that these

[37] James Griffin, *On Human Rights* (Oxford University Press 2008) 35.
[38] Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No.11 and No.14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 18 May 2018.
[39] Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 143.

general principles are represented by the underlying justificatory purpose of such protections (e.g. to enable normative agency).

4. The fourth main thesis claim is that in order to facilitate optimal development/evolution of law, we can utilise a 'critical' approach to its study in accordance with the theoretical outlook of Friedrich Nietzsche.[40] This outlook advocates for a scrutinous appraisal of prevailing accounts of relevant concepts so as to determine the merits of our continuing commitment to them. In the context of human rights law, it is argued that a 'critical' approach to developing interpretations of the content and scope of such protections allows us to ensure that the concept evolves in a legitimate manner (by confirming conformity with the justificatory purpose behind such claims). Ultimately, this establishes that existing accounts of human rights (however effective/complete they may appear to be at present) cannot legitimately be accepted as being definitive or absolute (as doing so precludes the possibility of necessary development).

5. The fifth main thesis claim is that the benefits of the 'perfectibility of law' framework, as well as of a 'critical' approach to studying the development of human rights law itself, can be further demonstrated with an examination of the right to health. Here it will be argued that this protection relates to more than the provision of a sufficient level of health care (but is instead actually comprised of an expansive number of physiological, psychological, and social elements). Accordingly, it is suggested that this claim is best understood as a right to human healthiness (requiring the protection of a sufficient level of subsistence – centred on securing the enablement of normative agency). Due to its evident relativeness in relation to securing a satisfactory level of fulfilment (e.g. depending on contextual/financial circumstances within each state), it

[40] See Friedrich Nietzsche, *The Use and Abuse of History* (Macmillan for the Library of Liberal Arts 1957).

will be argued that the right to health is ultimately representative of the concept of universal human rights in general, in that it is, in practical terms, a foundational claim (open to legitimate interpretation and evolution). Moreover, it is argued that this fact further evidences the non-definitiveness of human rights, and reinforces the benefits of a 'critical' approach to determining the sufficiency of prevailing accounts - by providing means of ensuring the scope of the claim continues to progressively evolve.

6. The sixth main thesis claim is that human rights and security are not competing aims. This is evidenced by the fact that both interests require the fulfilment of different forms of subsistence (e.g. human and national/state). The compatibility (and mutual-fulfillability) of security and human rights are to be reinforced further through an examination of health-based threats to the continuance of the state (e.g. a hypothetical pandemic). Here it will be seen that the fulfilment of the purpose of human rights (e.g. actualising normative agency) may be more optimally served through interference/violation in certain exceptional circumstances. As such, it is argued that no right can truly be absolute in terms of practical implementation, and all rights must be accepted as being derogable (though with varying degrees of derogability). To suggest otherwise, it is argued, is to inhibit the fulfilment of the justificatory purpose of such protections. For interference of this sort to be justifiable, it requires that such conduct accurately represent the most optimal means by which the purpose of such protections is fulfilled. In this way, it will be argued that, despite the fact that they are open to legitimate interference, human rights are still effectively absolute, but that this absoluteness relates to a permanence of purpose (rather than of certainty of practical application).

Having established the main claims of the thesis, it is next useful to clarify the route-map for how they are to be presented. It should be noted that each chapter will provide a detailed overview of its structure and aims. This will include explanations as to the purpose for each section and sub-section. For the purposes of the introduction, it is important to simply establish the general approach of each chapter with a clear indication of how they will contribute towards consideration of the abovementioned claims. In addition to the introduction (Chapter One) and conclusion (Chapter Six), this thesis will be comprised of four substantive chapters:

(Chapter Two) A Critical Appraisal of the Concept of Universal Human Rights; Chapter Two will look to contextualise and defend the idea of universal human rights.[41] This chapter will consider various ways in which the supposed legitimacy of the concept of human rights has been articulated, as well as the adequacy of historical attempts to justify the universal nature of such protections (e.g. grounded on the concept of dignity). Ultimately, this chapter will contribute towards the first main thesis claim. It will do this by establishing that prevailing attempts to legitimate the universality of human rights have proven to be insufficient, and then propose that the account offered by James Griffin – centred on actualising 'normative agency' – is a preferable alternative which is capable of providing a universalisable foundation for the concept of human rights in contemporary times.

(Chapter Three) Justifying Universal Rights: Historical and Contemporary Perspectives; Chapter Three will build upon this analysis by examining the limitations of anchoring the validity of the concept of human rights to either traditional consequentialist

[41] Principally, this will address traditional rights scholarship represented by the works of H.L.A. Hart, Joel Feinberg, Alan Gewirth, John Rawls, and Jeremy Waldron. In addition, it will also draw from more contemporary rights theory such as the works of James Griffin, Costas Douzinas, and William Talbott.

or deontological approaches exclusively. It will then make proposals for a more effective approach to justifying the concept of universal human rights. Thus, this chapter will contribute towards the second, third, and fourth main thesis claims. It will contribute towards the second main thesis claim by establishing the non-definitiveness of human rights. This is to be evidenced in relation to developments within historical accounts of the concept itself - as represented by the American Declaration of Independence (DOI 1776),[42] the French Declaration of the Rights of Man and of the Citizen (DRMC 1789),[43] and the Universal Declaration of Human Rights (UDHR 1948)[44] et al. It will contribute towards the third main thesis claim by constructing a theoretical framework based upon the work of Ronald Dworkin. The practical benefits of this framework will be demonstrated within an examination of the jurisprudence of the European Court of Human Rights (ECtHR). Having established the 'perfectibility of law' and legal concepts (thus reinforcing the second main thesis claim once again), this chapter will next consider how the misuse of history - which encourages prevailing accounts/interpretations to be regarded as definitive - inhibits the universal realisability of human rights in contemporary times. It is from this analysis that this chapter will contribute towards the fourth main claim, centred upon an examination of the theoretical approach of Friedrich Nietzsche. Chapter Three will conclude with the proposal that human rights represent a contextual vehicle for actualising an absolute ideal (e.g. to protect fundamental interests necessary for actualised autonomous agency).

[42] American Declaration of Independence, July 4 1776 (DOI) <http://uscode.house.gov/download/annualhistoricalarchives/pdf/OrganicLaws2006/decind.pdf> accessed 18 May 2018.
[43] Declaration of the Rights of Man and of the Citizen, 26 August 1779 (DRMC) <https://www.americanbar.org/content/dam/aba/migrated/2011_build/human_rights/french_dec_rightsofman.authcheckdam.pdf> accessed 18 May 2018.
[44] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) <http://www.un.org/en/universal-declaration-human-rights/> accessed 18 May 2018.

(Chapter Four) Human Rights as Foundational Claims: Re-Conceptualising the Right to Health as a Right to Healthiness; Chapter Four will provide a detailed examination of the theoretical concept of the right to health.[45] In doing so, this chapter will contribute towards the first, second, and fifth main thesis claims. It will contribute towards the first main thesis claim by demonstrating that the concept of universal human rights can be defended (even in the contexts of expansive/socio-economic protections). Moreover, as it is to be determined that the right to health does not require a universally consistent level of application (but can instead be legitimately applied at varying different levels depending on the economic/social circumstances of each state), this chapter will contribute towards the second main thesis claim by further demonstrating the non-definitiveness of human rights protections. Finally, this chapter will contribute towards the fifth main thesis claim by utilising the theoretical frameworks of Dworkin and Nietzsche (addressed in Chapter Three) in order to assess the sufficiency of modern accounts of the human right to health in relation to its conformity with the justificatory purpose of such protections (e.g. to actualise normative agency). The results of this investigation will also reinforce the first main thesis claim by demonstrating the advantages of grounding the universality of human rights on their underlying purpose. This chapter will conclude by contributing to the fifth main thesis claim once again with the suggestion that, due to the evolutive nature of their substance, all rights are best understood as foundational claims.

(Chapter Five) Health, Security, and Subsistence: Assessing the Absoluteness of Universal Human Rights; Chapter Five will consider the relevance and universality of the concept of human rights in the context of the contemporary national security paradigm.

[45] This will draw from various international treaties and conventions - such as the Universal Declaration of Human Rights (1948) and the International Covenant on Economic Social and Cultural Rights (1966) – as well as contemporary academic commentary provided by scholars such as Lisa Foreman, Aoife Nolan, J. P. Ruger, Upendra Baxi, Jonathan Wolff, Steven D. Jamar, Paul Hunt, and Briget C. A. Toebes.

This chapter will contribute towards the first, second, third, fourth, fifth, and sixth main thesis claims. It will contribute towards the first main thesis claim by demonstrating that the idea of universal human rights can be defended effectively in the modern (security dominated) context as the justificatory purpose of such protections is better served through intervention in certain exceptional circumstances. This conclusion will also contribute towards the second main thesis claim by demonstrating that rights are non-definitive (e.g. open to legitimate evolution), as well as the sixth main thesis claim by establishing that rights and security are not competing aims (and that rights themselves cannot be absolute in practical terms). As our examination into health based threats will reinforce the fact that rights are open to development (as it pertains to interpretations of their absoluteness/derogability), this chapter will also contribute towards the fifth main thesis claim in demonstrating that rights are foundational claims. The legitimacy of developments will be seen to depend upon ensuring that changes correspond with the purpose behind such protections, thus contributing towards the third main thesis claim, which is argued to relate to the objective of actualising normative agency, therefore contributing towards the first main thesis claim once again. Finally, it is proposed here that continual affirmation of the legitimacy of such developments can be ascertained with a critical appraisal of the sufficiency of prevailing accounts (contributing towards the fourth main thesis claim). Ultimately, this chapter will represent the culmination of the six main thesis claims and will conclude with proposals to reconceptualise the absoluteness of human rights as representing the permanence of their justificatory purpose.

1.2 Theoretical Framework

The theoretical foundation of this thesis will be centred on a critical legal approach to human rights.[46] Principally, critical legal studies aim to challenge accepted positions with the purpose of furthering and bettering understanding. A general starting point for such studies is to appreciate that all accepted legal knowledge is inherently imperfect or incomplete.[47] This is because the shaping of legal norms and theories are unavoidably influenced by, and cannot easily be separated from, non-legal matters (such as political and social circumstance) and other historical contingencies. In attempting to assess the true validity of any legal concept, therefore, critical legal theory suggests that it is important to firstly strip away all contingent and contextual knowledge which contributes to our understanding. In this way, a fundamental aim of a critical legal approach is to attempt to establish an unfiltered, objective appreciation of specific legal concepts:

> It appears, therefore, that the presentation of law as a unified and coherent body of norms or principles is rooted in the metaphysics of truth rather than the politics and ethics of justice … (t)he task of critical jurisprudence is to deconstruct this *logonomocentrism* in the texts and operations of law.[48]

Ebrahim Moosa[49] explains that the concept of 'logonomocentrism' is grounded in the premise, and interdependency, of an absolute rational truth existing between reason and law. It is the presumption of determinable correctness and rightfulness of law; principles which may objectively legitimise its processes and applications. Accordingly, critical jurisprudence represents an attempt to remove subjectivity and bias when considering the persuasiveness of

[46] A concise definition of the general purpose of critical legal studies (CLS) is provided by J. S. Russell when he explains that 'CLS writers not only examine the fundamental assumptions of law and the relationship between legal ideas and social action, they go further, attempting to create a "transformative" legal vision for the future through their ideas of alternative legal practice and theory'. J. S. Russell, 'The Critical Legal Studies Challenge to Contemporary Mainstream Philosophy' (1986) 18 Ottawa Law Review 1, 3.
[47] ibid.
[48] Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Hart Publishing 2005) 9-10.
[49] Ebrahim Moosa, 'Tensions in Legal and Religious Values in the 1996 South African Constitution' in Mahmood Mamandi (ed), *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (New York: St. Martin's 2000), 133.

philosophical or legal arguments. The aim of such an approach is to forcefully challenge and confront accepted narratives, but only so as to correct (or perfect) our understanding of them. In this way, critical legal theory suggests that the integrity of law is better served through robust critique and re-appreciation (demystification) of ideas/ideals.[50] It is in this manner that this thesis will employ a critical jurisprudential approach – based on an acceptance of the need to challenge the legitimacy/validity of pre-existing interpretations of relevant legal concepts (specifically relating to the concept of human rights) so as to better our own understanding of them (and thus enhance their ultimate realisability).

There are notable benefits with grounding an examination on the concept of universal human rights – and in particular their purported universality and absoluteness - on critical legal scholarship. Indeed, in recent years critical legal studies have prompted us to question the legitimacy of various claims relating to the concept of universal rights. In essence, such works look to challenge the practical realisability of universal human rights. This objective is of course not exclusive (or restricted) to critical jurisprudence. However, the reason such scholarship is to be preferred over alternative criticisms of human rights stemming, for example, from cultural relativist[51] or duty based[52] critiques, is due to unique advantages provided by the theoretical foundation of a critical legal approach. As previously mentioned, this relates to the idea that the validity of legal concepts should not automatically be accepted as definitive or pre-determined, but may instead only be established through robust challenge and (re)examination. Thus, with critical legal studies, there can be no legitimate, pre-supposed, or fixed, correct answer in the absence of a rigorous investigation. Ultimately, therefore, grounding the thesis in critical legal scholarship allows for the consideration of optimal

[50] For more on this see Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Hart Publishing 2005).
[51] See for example Adamantia Pollis and Peter Schwab, *Human Rights: Cultural and Ideological Perspectives* (New York; Praeger 1979).
[52] See for example Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 International Affairs 427.

alternatives to prevailing interpretations of human rights - rather than simply promoting one specific alternative (e.g. duty based) – or rejection (e.g. cultural relativism) – of the concept itself. This approach therefore allows for the consideration of a greater number of criticisms (drawing from cultural relativist, duty based critiques et al) in seeking to reach objective, robust conclusions.

For the purposes of this thesis, these studies will be utilised in order to refocus the discourse towards the *purpose* of the idea of such protections rather than the practical implementation of modern interpretations of the concept itself. It is suggested that such an approach can ensure that the process of determining the validity of universal human rights is not restricted to a sober assessment of the successfulness of contemporary attempts to apply them. Moreover, it could encourage better consideration of the definitiveness of the concept as well as alternative means of fulfilling their legitimising purpose. Essentially, critical legal scholarship will be utilised within this thesis in order to assess notable historical and contemporary challenges for the concept of universal human rights through a dissimilar interpretative lens. By looking at known issues from an alternate perspective, the aim of this research is to identify potential resolutions to the aforementioned challenges which could result from the re-conceptualisation of universal human rights as foundational claims.

This thesis will be centred on the work of one critical legal scholar in particular; Costas Douzinas. Having written extensively on the concept of human rights from a critical legal perspective over the past two decades,[53] Douzinas' body of work on this topic is authoritative.

[53] See for example Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000); Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007); Costas Douzinas, 'What Are Human Rights?*' The Guardian* (London, 18 March 2009); Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51; Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013); Costas Douzinas and Conor Gearty (eds), *The Meaning of Rights: The Philosophy of Social Theory and Human Rights* (Cambridge University Press 2014); Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking.

This thesis will employ these works throughout as means of highlighting the significance of particular challenges confronting the idea of human rights in modern times. It is proposed that the collective works of Douzinas are suitable for this purpose for a number of reasons. Importantly, and as noted by Douzinas himself, his work on human rights has been denounced by both proponents and critics of this concept.[54] It is therefore clearly representative of the 'spirit' of critical legal jurisprudence in that it attempts to reach objective, unfiltered conclusions. Indeed, it would be accurate to state that the purpose of these aforementioned works is not to defend or condemn the concept of rights – but is rather to reflect upon their significance. Additionally, Douzinas' collective works on human rights cover important developments within the human rights discourse throughout the emergence of the era of the War on Terror (and are reflective of changing perceptions during this time). They are therefore well-suited to the task of providing a theoretical foundation for considering the contemporary relevance – and universality - of human rights. In brief, therefore, the works of Douzinas are important to this study for two specific reasons: (a) Firstly, as mentioned, they are representative of a critical legal approach useful to the task of clarifying particular issues relating to the concept of human rights and; (b) Secondly, as they effectively identify several recurring challenges that the human rights movement is currently faced with and, it is suggested, which must be addressed if the validity of the idea of universal rights is to be sustained. Fundamentally, these interconnected challenges signify the collective diminishment of the realisability of human rights in modern times. The most significant challenges Douzinas identifies can generally be held to fall within one of three broad categories; ambiguity,

[54] Douzinas expresses this as the general perception that 'as he is attacked from both the right and the left he must have struck the right balance'. Although Douzinas did not necessarily endorse this view (as be believed it presented him as a 'middleman' of the discourse), it is useful in signifying the critical value of his collective works (in that this work does not seek to serve a particular agenda). Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 8.

politicisation, and protective disparity. It is useful here to provide a brief explanation of each one:

1) Ambiguity of human rights: This is argued to have contributed to both the conflation of rights (as any interest that can be articulated as a right 'can certainly become the object of rights')[55] and the pervasiveness of rights (in that they are now 'synonymous to being human').[56] The practical purpose and feasibility of universal rights has been diminished through the over-saturation of the utilisation of the idea (see point two below) as well as the prevalence of bogus or contradictory claims. In addition, this reflects the view that rights mean different things in different parts of the world (e.g. two different interpretations of the 'subject' of rights). Whilst in many Western states these represent actionable claims to various standards of protection (e.g. the political construct subject), in many non-Western states they define an entitlement to claims which exist only as an aspiration at this point in history (e.g. the abstract man subject). In brief, the 'ambiguity of rights' suggests that the concept of human rights is convoluted and that this compromises its universal relevance.

2) The politicisation of rights: This is argued to have undermined the legitimacy of the concept as it results in disingenuous commitment by states to human rights norms which is incapable of assuring the practical fulfilment of their ideals (i.e. by turning such protections into tools of political expediency). Moreover, it perpetuates the fact that 'the recognition of humanity is never fully guaranteed to all'[57] (see point three below). Similarly, the politicisation of the human rights discourse has facilitated public dissatisfaction with the movement itself. This is achieved through the implementation

[55] ibid 56.
[56] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 255.
[57] ibid 372.

or promotion of populist initiatives counter-intuitive to the idea of universal entitlements to basic human needs (i.e. the progressive, expansive nature of state interference with rights which is premised on the grounds of national security).

3) The disparity of protection: This represents the prioritisation of access (and status) to fundamental human rights claims – both (a) *within jurisdictions* in the comparison of innocent and criminal and; (b) *between* in the form of protected and unprotected citizens (see point one above in relation to the 'subject' of rights) – as well as the consequences of such practice. Essentially, this is indicative of the fact that 'Human rights do not belong to humans, they construct a graded "humanity"'.[58] This also shapes international law by elevating the significance of the interests of some peoples (e.g. human rights states) over others.[59] In effect, the disparity of protection represents the non-universality of the practical benefits of universal human rights.

With his collective works, Douzinas suggests that these issues compound a growing level of cynicism (both political and public) towards the notion of human rights. Based on his research it is reasonable to suggest that a simple continuation of current approaches to achieving the actualisation of human rights would be successful only in undermining them. Without variation or modification, such action can only perpetuate (or contribute to) inherent flaws with the concept of universal rights. This is because, through such measures, the discourse of human rights has become the language of political negotiation[60] and the

[58] Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking <http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.
[59] For example, the inconsistent utilisation of the principle of 'the responsibility to protect': most notably in the form of humanitarian intervention. Many commentators have noted that, historically, intervening states have predominantly been Western powers acting against specific non-Western nations. For a more detailed analysis of this see Mojtaba Mahdavi, 'A Postcolonial Critique of the Responsibility to Protect in the Middle East' (2015) 20 Perceptions 7.
[60] This is expressed as the suggestion that 'rights have mutated from a relative defence against power to a modality of its operations'. Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 51.

representation of the excess of political correctness.[61] It turns the various positive benefits (and justifications) of practical implementation against each other, allowing rights to be accentuated as protections of criminals and criminality to the detriment of society at large. Deliberate manipulation of the public perception of the cause of human rights by both the media and politicians ensures that the justificatory purpose which legitimates the relevance of the universality of human rights is lost.[62]

With this in mind, there is a need to ground future discussions of universal human rights in more objective understanding. By seeking to reflect key aspects of a critical jurisprudential approach, this thesis will address concerns identified in the categories described above with the aim of developing a clearer comprehension of the universality of human rights through a new appreciation of knowledge. This new appreciation will be developed by subjecting various concepts relevant to accepted understanding of human rights to additional scrutiny through the alternative application and interpretation of specific theoretical works. In addition to the critical legal scholarship noted above, these works will incorporate traditional legal theory pertinent to the discourse on human rights - such as the works of H.L.A. Hart, Alan Gewirth, Ronald Dworkin and Jeremy Bentham - as well as non-traditional texts including philosophers Friedrich Nietzsche and Michel Foucault. A notable advantage of looking to utilise important components of a critical jurisprudential approach – such as the need to challenge accepted narratives in order to enhance understanding/develop more objective appreciation of legal concepts – rather than simply adopting a critical jurisprudential approach in its entirety

[61] According to Douzinas, this has resulted from the separation of international law and practical realities and its representation through 'well-oiled diplomatic lunches and obscure academic seminars …'. Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 198.
[62] It is through the manipulation of the human rights discourse that the concept of universal protections becomes decontextualised. The deliberate distancing of the practical realities of the various applications of rights from their legitimising cause enables their effective marginalisation. They become something unintended, and undesirable. In essence, as Douzinas notes, 'they lose their utopian end'. Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 380.

(wherein the possibility of definitively – and morally - correct legal solutions is always to be questioned),[63] is that it allows for consideration of prominent theoretical works which a purely critical legal approach would be unable to accept as valid (such as the legalistic outlook of Ronald Dworkin).[64] It therefore encourages a more robust/objective appraisal of the sufficiency of prevailing theoretical accounts of human rights.

Principally, our critical approach will utilise each of the aforementioned works in order to test the contemporary universality (and absoluteness) of the concept of human rights. Through the use of such texts this thesis makes an original contribution to the discourse. Specifically, this is accomplished through the utilisation of international law, legal theory, philosophy, and political science in conducting an examination of the universality of human rights centred on health (in the form of a foundational claim) within the context of security. To further emphasise the significance (and potential importance) of a critical legal appraisal of the universality of the human rights concept, this thesis will test the findings of the theoretical re-evaluation within the contexts of a specific claim – namely the right to health. The practical benefits of centring substantive analysis on this particular right were addressed at the start of this introductory chapter. Therefore, this section of the introduction does not look to retrace them, but rather to clarify the manner within which the investigation is to take place. The chapters relating to the right to health and other implications of health considerations to the human rights discourse (chapters four and five) will also adopt a critical legal approach. The

[63] Andrew Altman explains that, for critical legal scholars, one of the reasons for an inherent scepticism of the sufficiency of law stems from the observation that 'all of those ideological controversies which play a significant part in the public debate of our political culture are replicated in the argument of judicial decision. In other words, the spectrum of ideological controversy in politics is reproduced in the law … As a patchwork quilt of irreconcilable ideologies, the law is a mirror which faithfully reflects the fragmentation of our political culture'. Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15:3 Philosophy & Public Affairs 205, 222.

[64] For an excellent review of the complete philosophical works of Ronald Dworkin see Imer Flores, 'The Legacy of Ronald Dworkin (1931-2013): A Legal Theory and Methodology for Hedgehogs, Hercules, and One Right Answers' (2014) Georgetown Law Faculty Publications and Other Works <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2466&context=facpub> accessed 18 May 2018.

purpose will once again be to deconstruct accepted understanding of the concept of health, and specifically the right to health, as means of better appreciating the practical realisability of its protection as an actionable claim.

A critical jurisprudential approach to this issue will allow us to reconsider the purpose of a universal right to health as well as the implications of considerations of human healthiness to matters of national security. This will thus look to further accentuate the results of the theoretical examinations conducted earlier in the thesis. The right to health is well-suited to the objective of reassessing the contemporary universality of human rights as it is itself a largely under-appreciated protection (often incorrectly reduced to a purported right to health care).[65] As such, its significance to foundational interests such as security has been largely ignored. However, a critical re-appreciation of the purpose of this protection allows for the reversal of the contemporary hierarchisation of the human rights discourse by establishing the right to health as an enabling right (in that its fulfilment provides others with meaning) – which must therefore also be accepted as a *foundational* claim (e.g. no less important than any other legitimate human right). This, in turn, enhances the credibility of the concept of human rights by ensuring that the prioritisation of the implementation of such protections cannot legitimately be based upon the definitive ranking of specific interests (e.g. with some rights regarded as being inherently superior to others), but instead requires acknowledgement of the fact that all valid human rights – those capable of securing the fulfilment of the overarching purpose of such protections (e.g. to actualise human agency) – deserve equal consideration. Moreover, as discussed, the diminishing value of rights is facilitated by an apparent 'securitisation' of such protections. This pertains to the manner in which fundamental claims are interfered with in

[65] See for example Jennifer Prah Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 Yale Journal of Law & the Humanities 273, 275.

order to protect national security.[66] Human health is itself securitised in contemporary times and has become something which governing powers increasingly utilise in order to protect their own state interests.[67] As such, health is an appropriate foundation for an examination of the absoluteness and universal realisability of human rights in contemporary times. Ultimately, this investigation seeks to demonstrate how a critical examination of the right to health is able to provide important insights into the idea of universal human rights in general (e.g. by reinforcing the justificatory purpose of such protections, as well as the non-definitiveness/evolutiveness of their substantive content).

The focus of this thesis will be on assessing the sufficiency of the *idea* of universal/absolute human rights. It will therefore be centred primarily on legal philosophy. Whilst the investigation undertaken with this thesis is principally theoretical (e.g. addressing the *concept* of rights), it will also draw from some substantive human rights law at various stages in order to reinforce (and contextualise) its relevant arguments and conclusions. Consideration of this substantive law will allow us to test both the practical benefits of various theoretical proposals made within this thesis (e.g. the perfectibility of law), as well as to examine the sufficiency of the implementation of existing human rights machinery in accordance with these proposals (e.g. the ECHR/ECtHR). Moreover, whilst it will make reference to some relevant historical developments within the wider theoretical discourse (e.g.

[66] Rita Taureck explains that '[t]he main argument of securitization theory is that security is a (illocutionary) speech act, that solely by uttering "security" something is being done'. Ultimately, this concept intends to establish a need for 'exceptional' measures to secure against perceived threats. Rita Taureck, 'Securitisation Theory and Securitisation Studies' (2006) 9 Journal of International Relations and Development 53, 54.
[67] As Stefan Elbe notes, '[t]he leader of a political party … or … leaders of international organisations can choose whether they portray health issues as a public health concern, as a development concern, or, as they have done more recently, as an international security concern'. Stefan Elbe, *Security and Global Health: Toward the Medicalisation of Insecurity* (Polity Press 2010) 12.

natural law theory)[68] this thesis does not intend to make extensive use of these influential works (preferring instead to prioritise more contemporary scholarship). Despite this, it is still useful to briefly clarify how this thesis is to be positioned alongside the legal philosophy widely regarded as being initiatory of the idea of contemporary human rights. On this point, it should be noted that this thesis considers itself as an extension of such precursory works in the sense that it draws inspiration from significant arguments advanced within this discourse. Most significantly, perhaps, the idea that there are discoverable (and inherently legitimate) means by which we can assess the evolution and application of law.[69] This thesis argues that the contemporary concept of human rights is representative of a particular manifestation of the foundational idea which once legitimated natural law.[70] In this way, natural law theory is to be understood as previous evolutionary stage of the legitimising purpose of human rights. Essentially, the validity of ideas established within this discourse is to be confirmed

[68] For an excellent critical legal account of natural law theory see Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 23-68. Here Douzinas explains that the origins of natural law can be traced back to the philosophers of ancient Greece (e.g. Aristotle) and Rome (e.g. Cicero), with this theory then subsequently developed further in medieval times (e.g. St. Thomas Aquinas) and again in early modernity (e.g. Thomas Hobbes, John Locke). In essence, the theory of natural law was based upon the understanding that certain universal truths were inherent in nature (originally understood to derive from a Divine design), and that this fact ensured that morally correct legal rules existed and could be accurately identified through the exercise of human reason. Moreover, this theory maintained that the validity of legal rules was not dependent exclusively on the determinations of sovereign states (e.g. what they held to be correct), but rather their conformity with this natural law. Whilst Douzinas confirms that there were different interpretations of natural law theory, the general foundation of this theory was the idea that '[n]ature became the source of a definite set of rules and norms, of a legal code …natural law was the expression of divine reason which pervaded the world and made human beings one of its aspects … The law, human institutions, rules and all worldly order proceeded from a single source, all-powerful nature … Nature commands, it is a moral precept which orders men to obey the sovereign *logos* which rules history'. Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 50-1.

[69] Samuel Moyn provides an effective summary of how the proposed basis for making a correct determination regarding the sufficiency of law changed and evolved when natural law theory was replaced by that of natural rights. Ultimately, this is personified by replacing an external basis for making the correct determination (e.g. nature itself) with an internal one (e.g. humanity). As Moyn explains, '[n]atural law was originally one rule given from above, where natural rights came to be a list of separate items. Natural law was something objective, which individuals must obey because God made them part of the natural order he ordained: illegitimate practices were deemed *contra naturam* or "against nature". But, natural rights were subjective entities "owned" by humanity as prerogatives'. Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press 2012) 21.

[70] Specifically, the idea established in natural law theory of 'a common human nature that unites all people, irrespective of their individual characteristics and cultural or social determinations … [that] men share a common humanity which gives empirical men the same essential needs and characteristics …'. Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 196.

within a contemporary context (drawing from modern legal scholarship) and the consideration of substantive human rights law.

In effect, this thesis intends to address two propositions which are advanced in accordance with a critical jurisprudential approach to human rights. The first is that the concept of absolute, universal human rights has proven to be an impossibility. This position is made in the light of the aforementioned securitisation of the rights discourse and the apparent prioritisation of collective interests (e.g. national security) over individual liberties. The second is that – in addition to such protections being contextually contingent/relative (see point one) – the illegitimate expansion of the human rights discourse (where all desires can become claims) has resulted in a need to restrict the scope of 'valid claims' to various civil and political interests (e.g. first-generation rights). Ultimately, by establishing the right to health (or human healthiness) as a foundational protection, and the purpose of such rights as securing human subsistence, this thesis will argue that human rights are universal – and that the absoluteness of such protections relate to a permanence of purpose, rather than the practical enforcement of definitive accounts of these basic claims. As such, it will be suggested that the apparent conflict between collective and individual interests – centred on national security concerns – can be resolved in a manner which supports the idea of universal human rights. Namely, by accepting that such protections are simply a contemporary (imperfect) account of an enduring (and universal) ideal, and that interference with the enjoyment of such protections is therefore legitimate when such action is necessary to securing the continuation of this ideal.

2 A Critical Appraisal of the Concept of Universal Human Rights

2.1 Introduction

It is no exaggeration to suggest that the concept of human rights has greatly influenced the development of modern human history. In contemporary times, the idea of human rights is pervasive and elicits responses of both condemnation and praise in seemingly equal measure. One of the most contentious issues of all appears to be the purported universal nature of the various claims included under the umbrella of 'human rights'. Specifically, the idea that such rights are not only universally relevant, in the sense that they represent fundamental protections all human beings need regardless of their cultural background (and irrespective of whether various cultures acknowledge the legitimacy of this need), but that they are also universally applicable and ultimately realisable in a practical sense. Douzinas encapsulated this sentiment within the statement:

> The modern laws of nature are universal, immutable and eternal, a set of regularities or repeated patterns … a set of norms that both is and ought to be obeyed by people.[71]

Irrespective of whether this was ever truly universally accepted, a tangible souring of attitudes towards this concept has been evidenced in recent years. Within the United Kingdom, for example, the promise of a desire to reduce both the scope and reliability of human rights is consistently utilised by politicians to various ends. This was most recently witnessed in the aftermath of the terrorist attack in London[72] when Prime Minister Theresa May promised to

[71] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 23-24.
[72] The attack took place on London Bridge and in London Borough Market on the evening of June 3rd 2017, and led to the death of eight individuals. It followed a terrorist attack in Manchester Arena on May 22nd 2017, which resulted in twenty-two deaths.

'change' human rights law which hindered national security efforts.[73] A driving factor for this is, as many scholars have noted, undoubtedly the heightened sense of public panic which has emerged since the terrorist attacks of September the 11th (2001).[74] This in turn has resulted in a growing sense that – due to their perceived inherent conflict with national security - human rights, as absolute protections, are untenable (and undesirable). On this point, Philip Ruddock suggests that is epitomized by the fact that 'the debate on counter-terrorism issues has been dominated by traditional analysis of protecting either national security, or civil liberties …[this] implies that counter-terrorism legislation is inevitably at odds with the protection of fundamental human rights'.[75]

2.1.1 Contemporary Challenges for the Idea of Universal Human Rights

From this we can identify two direct challenges for modern proponents of the idea of universal human rights. The first is whether the concept of human rights, as absolute claims, can be justified (in theoretical terms). In order to effectively respond to this issue, it is imperative to establish precisely what human rights are (or, indeed, what they ought to be understood to be). This chapter will begin by looking to address this issue. Of course, this task could itself be the subject of a doctoral thesis. As such, it should be noted that the analysis conducted within this chapter will not be exhaustive. The primary purpose of this is to draw from prominent works on this issue as a means of identifying significant recurring

[73] This position was expressed during the General Election campaign in a speech given on June 6th 2017. During this speech, the Prime Minister vowed to toughen counter-terrorist laws so as to make them more effective, and then declared 'if human rights laws stop us from doing it, we will change those laws so we can do it'. For an insightful summary of public views surrounding this see Edward Dracott, 'What the Public Have to Say About Theresa May's Wish to Change Human Rights Laws to Fight Terror' *The Independent* (London, 22 June 2017) <http://www.independent.ie/world-news/and-finally/what-the-public-have-to-say-about-theresa-mays-wish-to-change-human-rights-laws-to-fight-terror-35798133.html> accessed 18 May 2018.

[74] On September 11th 2001, 19 individuals associated with Al-Qaeda hijacked commercial airliners and then used these aircraft to perpetrate terrorist attacks in the U.S. cities of Washington and New York. These attacks led to the deaths of approximately 2,750 people and subsequently prompted then President George W. Bush to declare a 'War on Terror'.

[75] Philip Ruddock, 'A New Framework: Counter-Terrorism and the Rule of Law' (2004) 16 The Sydney Papers 112, 117.

characteristics for the theoretical concept of human rights itself. These will then be utilised in order to provide a robust summary of the idea of human rights.

The second issue concerns whether human rights claims are universally realisable. It has previously been established that a prominent critique of the human rights relates to the practical difficulties of securing the implementation of such protections. However, for our purposes, the investigation of the realisability of universal human rights will largely be restricted to the *desirability* of such implementation (as a more contextual issue). The desirability of universal/absolute claims has been increasingly challenged by the emergent national security narrative which personifies post 9/11 attitudes to balancing fundamental interests. The second issue will be tackled in greater detail in subsequent chapters of this thesis (namely chapters three and five). In responding to these issues, the key question that will guide our analysis will be 'is the idea of universal human rights, in the contemporary context, justifiable?' It should be acknowledged that for reasons mentioned above, an affirmative response will not be contingent upon the identification of a practically realisable framework for human rights (i.e. how to secure their universal implementation). Instead, the focus will be on looking to establish the theoretical integrity of the *idea* of universal human rights in modern times. It is suggested that this determination is a necessary pre-requisite before considerations are afforded to questions of practical implementation.

However, it is also important to contextualise the purpose of this investigation by confirming that is relevance is heavily influenced by the fact that a practical framework of ensuring that human rights are reliably applied on a universal basis (or, indeed, even a regional one) has yet to be secured. To briefly respond to this point it is worth affirming that the maxim of 'ought implies can'[76] does not require that the 'can' in question needs to be immediately

[76] Immanuel Kant, *Critique of Pure Reason* (Penguin Classics 2008) 473.

identifiable. Indeed, the fact that something may appear to be unobtainable in a certain time, and within specific historical contexts, does not conclusively prove this determination to be true (or that a specific position will always be accepted).[77] For this reason, this thesis will propose that it is acceptable to prioritise the objective of providing a robust philosophical justification for human rights in the first instance, with the understanding that a practical means of enforcement (even if not immediately identifiable) may be developed in the future. As such, chapters two and three will attempt to provide a strong theoretical justificatory account of the idea of universal human rights. This account will look to establish a philosophically justifiable foundation which is ultimately universally realisable within the modern (national security dominated) context.

2.1.2 Chapter Two Structure: Key Aims and Objectives

As mentioned, the purpose of this chapter is to establish a clear understanding of the contemporary value of the idea of universal human rights. To do this, the chapter will be structured into several smaller examinations. Essentially, there are three key outcomes to be achieved:

1. This chapter will begin by defining the concept of human rights. The starting point for this will be to contextualise rights as valid claims (before briefly considering the merits of will and interest theories of rights respectively). Next, this chapter will provide an examination of various prominent contemporary theoretical accounts of the concept of human rights itself. This will conclude by proposing that James Griffin's approach – centred on actualising normative agency - is preferable to other accounts as it seeks to limit the scope of valid claims to only those things needed to secure a 'functioning

[77] History is full of relevant examples for this, such as the Women's Suffrage movement which began in the nineteenth-century, and the U.S. Civil Rights movement of the mid-twentieth-century. In both cases, the positive achievements these initiatives secured were, at their commencement, viewed by many to be impossible.

human agent',[78] and as it also effectively encapsulates the justificatory purpose of universalisable human rights – to protect those things necessary for securing the 'capacity to choose and to pursue our conception of a worthwhile life'[79] (2.2);

2. To reinforce this point, this chapter will then consider the sufficiency of traditional conceptual foundations for grounding the universality of human rights - specifically with an examination of the concept of dignity. This examination will identify significant limitations with attempts to establish the universality of human rights based on dignity. Namely, the fact that the concept of dignity is contextually contingent (with some interpretations – such as those which see dignity as something which must be earned - seemingly counter-intuitive to the idea of universal rights). Due to inconsistencies which result from its evident relativeness (a point reinforced with reference to various judicial interpretations), it will be argued that the concept of dignity is sub-optimal for providing a universalisable foundation for human rights in contemporary times. Instead, it will be suggested that a more effective conceptual foundation for universal human rights is provided by its justificatory purpose (as addressed above) (2.3);

3. Finally, this chapter will address the contemporary universality of the actual 'subject' of rights. Here it will be argued that subject of rights is itself multi-faceted and comprises of separate categories for those who are entitled to claim (e.g. humanity) and those who are actually capable of benefitting from claiming (e.g. political constructs/law-abiding citizens). This chapter will then consider means by which the modern process of determining the 'legitimate' holders of actionable claims is susceptible to abuse (namely in pursuit of national security initiatives) in a manner which unjustifiably limits the scope of such protections (and precludes the possibility

[78] James Griffin, *On Human Rights* (Oxford University Press 2008) 35.
[79] ibid 45.

of universal rights). This is arguably achieved by restricting the enjoyment of such rights through the exclusion of those who are perceived to be undeserving of protection (e.g. refugees/terrorist suspects). Ultimately, it will be established that the universality of human rights is actually represented by an absolute entitlement to claim such protections as well as the inherent potentiality of their fulfilment (2.4).

2.2 Defining Human Rights

To begin our examination, it is worth briefly establishing the value in providing a robust philosophical foundation for the concept of human rights. On this point, we will echo the argument provided by Joel Feinberg in the *Nature and Value of Rights*.[80] Here, Feinberg explained that a theoretical foundation was important because, if protections are automatically afforded without acknowledgement of the justification behind the need for them (i.e. an indication of *why* they are important) individuals would have no guarantee of such protection because they would have no way of articulating the legitimacy of their claim to it.[81] A robust philosophical foundation is therefore a necessary means by which the contextual legitimacy of accounts of human rights (in relation to the scope of individual protections as well as the concept itself) may be continually assessed and reaffirmed. As we have established, many of the controversies surrounding the idea of human rights stem from the issue of legitimacy. To contextualise the importance of philosophical foundations further we can illustrate two forcefully persuasive warnings about the nature of such accounts which personify opposite ends of the debate.

[80] Joel Feinberg, 'The Nature and Value of Rights' in Joel Feinberg, *Rights, Justice and the Bounds of Liberty, Essays in Social Philosophy* (Princeton University Press 1980).
[81] ibid 145-150.

The first is the famous rebuttal to the idea of universal, inalienable rights provided by Jeremy Bentham.[82] A more detailed examination of the value of this critique will be conducted in Chapter Three.[83] It is useful to us here simply as means of demonstrating the reasoning behind a particularly critical school of thought. Specifically, this is personified by attempts to illustrate the *excess* of the idea of human rights. The second argument we will address is one provided by Costas Douzinas.[84] This approach is much more contemporary, and critiques perceived limitations with the actual construct of human rights (seen as separating from the justifiable idea of such protections). In this way, this argument does not focus on the excess of rights, but instead warns about the dangers of reducing their *ambition*.

Bentham's account was based upon various logical assessments. In particular, the fact that meaningfulness of rights is first dependent upon there being some reliable manner in which they could be fulfilled. In practical terms, and within the context of nation states, this translates as the need for governing powers to both acknowledge the legitimacy of your claim, and also to possess the ability (and political will) to respond to it.[85] The idea of rights which existed 'anterior' to these conditions was regarded, by Bentham, as 'nonsense upon stilts'.[86] Instead he argued that any benefit that rights seek to secure is only obtainable if a state chooses to bestow it (and not because you have a 'right' to such results). For Bentham, the danger of the idea of inalienable, 'natural; rights related to its capacity to promulgate dissent amongst a population and disrupt the rule of law - ultimately undermining the very interests they seek to protect.[87]

[82] Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843).
[83] See Chapter Three, section 3.2.2.
[84] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000).
[85] Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843) 500-501.
[86] ibid 501.
[87] Jeremy Bentham described this as 'the spirt of resistance to all laws – a spirit of insurrection against all governments …'. ibid.

From this analysis, we see that the excess of the philosophical foundation of human rights is represented in its impracticality. As an important aspect of its purpose is to articulate the legitimacy of various provisions (and protections), it encourages the adoption of language which conflates the resulting claims beyond what is actually possible. Its promise is utopian. Whilst this may make the idea of rights attractive, it does not assist the prospect of securing their application.

In contrast, Costas Douzinas critiqued the restrictive nature of modern accounts of human rights which he argued had lost their 'utopian end'.[88] According to Douzinas, the 'utopian end' reflects that which Bentham readily dismissed, the philosophical identity representative of the purpose of such protections. Douzinas saw the value of this purpose in its reflecting the reactionary, rebellious core of the human rights concept. This is the *idea* which attracts the support of those who suffer injustice at the hands of the state and compels them to take action as means of rectification. Historically, Douzinas suggests, this has provided the catalyst for the American Declaration of Independence (DOI 1776), the French Declaration of Rights of Man and of the Citizen (DRMC 1789) and the Universal Declaration of Human Rights (UDHR 1948).[89] However, Douzinas argues that the contemporary focus of the human rights movement has stagnated. Through the process of their widespread integration into national and international law their 'revolutionary and dissident purposes …their end [has become] obscured in ever more declarations, treaties and diplomatic lunches'.[90] Douzinas suggests that the growing acceptance of the idea of human rights, evidenced in their present integration in the global arena, results in insufficient attention to the means by which this integration is regulated. Specifically, those states who have 'proclaimed the triumph of human

[88] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 380.
[89] ibid 85-145.
[90] ibid 380.

rights'[91] fail to ensure that such protections are reliably protected (within their own state or within the world at large). The idea of human rights has become banal. They are accepted, discussed, promoted and critiqued principally in accordance with how they are presently defined. Douzinas suggests that his approach is flawed, because it lacks ambition – in particular the ambition to continually renew itself through the identification of injustice within the status quo. Yet, through the process of their international integration, and as, Douzinas notes, their subsequent transformation into a modality of politics,[92] human rights have become the status quo. Ultimately, Douzinas illustrates the inherent dangers with abandoning the 'utopian' ideals which represent their philosophical foundations.

2.2.1 Conceptualising Rights: Will and Interest Theories

Having contextualised conflicting ends of the discourse surrounding the philosophy of human rights, we can now move on to examine their form and functioning in greater detail. To begin, it is useful to conceptualise human rights as individual claims (although it should be noted that the terms claims, rights, and protections will be used throughout this thesis interchangeably). As we have already discussed with appreciation of the overarching legitimacy of the concept itself, the specific nature of human rights protections is also heavily debated. The starting point for this debate is recognition that, in practical terms, 'all rights are claims.'[93] In effect, this purports that rights are claims to certain provisions or protections (actions or inactions) to which individuals are held to possess an entitlement. The corresponding duty bearers are to be either the state itself, or simply other individual members of society. Whilst most rights theorists generally agree up to this point, an underlying disagreement defines the discourse and establishes the direction different approaches take. In

[91] ibid.
[92] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 51.
[93] Wesley Hohfeld, *Fundamental Legal Conceptions* (Yale University Press 1919) 36.

effect, this disagreement rests on the supposed *purpose* of these claims. If we accept that human rights are, as Feinberg hypothesised, 'valid claims',[94] then we must address the source of their validity. There are two prominent schools of thought to this issue known as the 'will theory', and the 'interest theory' respectively. In accordance with the aim of establishing a robust theoretical foundation for further analysis on the concept of universal human rights, it is important to briefly address each account in turn.

In essence, where 'interest theorists' argue that the legitimacy of human rights stems from recognition that they are claims to things instrumental to securing human well-being, 'will theorists' maintain that the source of their legitimacy is the fact that they are claims to things *necessary* for ensuring autonomous action in pursuit of a worthwhile life (as determined by each individual).[95] Interest theorists hold that rights exist to serve the interests of the right holder, and, as such, only beings capable of having interests are potential right-holders.[96] They are claims grounded in the objective of protecting fundamental interests (discernible as those which further enhance the well-being of the right holder). As prominent interest theorist Neil MacCormick asserts, 'having a right is having one's interests protected in certain ways by the imposition of normative constraints on the acts and activities of other people with respect to the object of one's interests'.[97]

Whilst will theorists may also accept that all rights require an identifiable right-holder, they maintain that one must possess the power to waive or enforce the correlating duty to qualify.[98] In addition, for such theorists, it is the autonomy of the individual which serves as

[94] Joel Feinberg, 'The Nature and Value of Right' (1970) 4 Journal of Value Inquiry 243, 257.
[95] H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford University Press 1982) 183.
[96] Jeremy Waldron, *Liberal Rights: Collected Essay Papers 1981-1991* (Cambridge University Press 1993) 204.
[97] Neil MacCormick, *Children's Rights: A Test Case for Theories of Rights* (Oxford University: Clarendon Press 1982) 154.
[98] 'A promisee has a right because she has the power to demand performance of the promisor's duty, or to waive performance, as she likes'. Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy and Public Affairs 223, 238.

the justification for these rights, rather than the idea that claimants are simply 'better off' when certain things are protected.[99] For will theorists, the possession of a right ultimately affords the right-holder an opportunity to make significant choices, in the sense that it allows them to pursue a worthwhile life.[100] As H. L. A. Hart explains, in this way rights transform a right-holder into 'a small scale sovereign'.[101]

Notable limitations with each approach are well documented. The will theory appears incapable of covering non-autonomous human beings (such as the infants and the disabled) or incapacitated normative agents (e.g. individuals in a coma).[102] In contrast, the interest theory is seemingly too individualistic, with the underlying purpose simply to enhance the well-being of the individual right-holder specifically (rather than society as a whole).[103] Furthermore, it also appears susceptible to justifying a conflation of claims to provisions grounded in identifiable interests but not actually consistent with legitimate needs.[104] The concept of inalienable, unwaivable protections is also apparently inconsistent with the idea that rights are a means of affording right-holders the opportunity to choose how to live their own life (in accordance with their individual conceptions on the best way to do so) as will theorist's purport. Indeed, MacCormick notes that a problem with this approach is that it excludes the ability to protect against voluntary enslavement or, indeed, the decision to accept employment in unsafe working conditions.[105] For interest theorists, rights provide means of protecting individuals, and their fundamental interests, from all *potential* threats, including the actions of right-holders

[99] ibid 240-1.
[100] James Griffin defined this as the 'capacity to choose and to pursue our conception of a worthwhile life'. James Griffin, *On Human Rights* (Oxford University Press 2008) 45.
[101] H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford University Press 1982) 183.
[102] Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy and Public Affairs 223, 240.
[103] '[T]he rights of man … are nothing but the rights of egoistic man, man separated from other man and the community'. Karl Marx, 'On the Jewish Question' in Patrick Hayden (ed), *The Philosophy of Human Rights: Readings in Human Rights (*Paragon House Publishers 2001) 127-136.
[104] '[E]verything becomes actually or potentially a right …'. Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007).
[105] Neil MacCormick, 'Rights in Legislation' in P. M. S Hacker and J Raz (eds), *Law, Morality & Society* (Oxford: Clarendon Press 1977) 195-199.

themselves. Yet will theorists suggest that right-holders must possess the capacity to waive the protection rights afford them simply because the fundamental purpose of such claims is to protect the means of operating autonomously (and, as such, allow individuals to act in a manner which appears contradictory to their own self-interests). Will theorists regard this ability as the most fundamental interest of them all. In reflecting upon these differences, it would appear that will theory is better suited to providing a philosophical foundation for human rights which is compatible with the 'utopian end' proposed by Douzinas – as it is based on the value of individual autonomy. In developing this further, it is useful to consider several other influential theoretical accounts which can help us to develop a robust appreciation of the concept.

2.2.2 Modern Theories of Human Rights

As mentioned at the start of the chapter, there are two principal contextual issues pertaining to the concept of universal human rights; whether a robust theoretical justification is possible, and whether - either with or without such justification - they are universally realisable. A more detailed examination of the concept of human rights is required in order to effectively respond to each of these questions. The first thing to establish is what is, or ought, to be understood by the term human rights. On this, Douzinas suggests:

> Human rights are moral rights or claims by individuals, which may or may not be recognized by a particular legal system. They introduce certain minimum standards of treatment to which people are entitled and create a moral framework within which state policy, administration and the law should operate.[106]

This definition is uncontroversial, and reflects the fact that the term 'human rights' is generally accepted to refer to individual claims which all human beings are held to possess simply by virtue of their humanity.[107] In the modern world, and specifically in Western states, to have human rights is now, as Costas Douzinas suggests, increasingly 'synonymous to being

[106] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 9.
[107] James Griffin, *On Human Rights* (Oxford University Press 2008) 48.

human'.[108] In accordance with such sentiments, Jack Donnelly argued that the universality of human rights is clearly self-evident, simply because 'one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all)'.[109] Reviewing contemporary literature on human rights reveals that these approaches are far from uncommon. In fact, modern human rights theorists have consistently held that the legitimacy of rights (as well as their universal relevance) stems from aspects of human nature.[110] These qualities will be expounded upon in more detail in subsequent sections of the chapter. For now, it is enough to acknowledge that justifications for human rights are frequently built upon the apparent moral significance of the nature of human beings. This position is perhaps best personified in Francis Fukuyama proclamation that, 'when we strip all of a person's contingent and accidental characteristics away, there remains some essential human quality underneath that is worthy of a certain minimal level of respect …'.[111]

If the previous summary is relatively un-contentious, at least in relation to how human rights are commonly defined (claims human beings possess simply in virtue of being human), it is equally accurate to suggest that there is far less agreement in relation to *what* they ought to protect.[112] This is to be distinguished from the question of *why* certain interests should be protected, as discussed in relation to the will and interest theory debate above (and as we will consider once again in relation to the theoretical account proposed by James Griffin at the end of this section). With regards to the question of *what* to protect, consensus appears to be restricted to acknowledgement that they are rights to the protection of interests or benefits all

[108] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 255.
[109] Jack Donnelly, *Universal Human Rights in Theory and in Practice* (Cornell University Press 2002) 10.
[110] 'Nature is the latest in a long line (which includes religion, reason and law) to tantalise us with a certainty that must forever remain impossible'. Costas Douzinas and Connor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014) 2.
[111] Francis Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (Profile Books 2003) 149.
[112] Marcus Arvan, 'Reconceptualizing Human Rights' (2012) 8 Journal of Global Ethics 91.

human beings are held to *deserve* (for one reason or another). Despite the existence of differing approaches to justifying the legitimacy of such claims, their universal applicability is consistently argued to stem from an understanding that all humans share a universal need for the protection or provision of certain things (whether this need requires securing an alleged benefit or, contrastingly, to simply permitting a choice to be made).[113] Principally, the most obvious challenge resulting from this relates to determining what needs are inherently human. A relatively recent attempt to respond to this was formulated by William Talbott who, in *Which Rights Should Be Universal?* identified eight fundamental rights which he suggests exemplified necessary human interests.[114] Broadly speaking, Talbott suggested that these rights seek to protect those interests crucial to autonomous living, self-determination, and equality. The determining factor for Talbott was that 'human' rights ought to be those which 'constitute the social basis for autonomy'.[115] For this reason, he argued that matters of physical security, physical subsistence, as well as freedoms of press, thought and association should be prioritised. Arguably, Talbott identified the rights which are inherently *human* by considering the interests that make possible the development and exercise of human subsistence (understood to be a quality of life 'worthy' of a human being).[116] On this note, his guiding philosophy was as follows:

> What is the ground of basic human rights? I believe it is the capacity for making reliable judgments about one's own good. All normal human beings have this capacity. Basic human rights provide the background conditions that enable them to develop and exercise it.[117]

Similarly, in his seminal work *'Law of the Peoples'*, John Rawls argued that human rights represent the basic elements required for individuals to be able to effectively engage in

[113] For example, as Hart proposed in relation to the 'small scale sovereign'. H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford University Press 1982) 183.
[114] William J Talbott, *Which Rights Should Be Universal?* (Oxford University Press 2005) 135.
[115] ibid.
[116] ibid.
[117] William J. Talbott, *Which Rights Should Be Universal?* (Oxford University Press 2005) 17.

social interaction.[118] For this reason alone, he asserts, all societies are required to protect such interests. The underlying purpose of such claims is therefore to set a 'necessary, though not sufficient, standard for the decency of domestic political and social institutions'.[119] Rawls asserts that these claims are universal in the sense that 'they are binding on all peoples and societies'.[120] Indeed, their universal relevance seemingly disqualifies the apparent need to justify them with specific religious, philosophical or moral doctrines. Instead, Rawls suggests, it is sufficient to acknowledge that all may be capable of doing so.[121] Like Talbott, Rawls stressed that human rights stem from a need to protect and ensure individual subsistence and security - as well a series of correlating freedoms and liberties necessary to effectively accomplish this task – (such as from slavery, or of conscience).[122] For Rawls, as Wilfred Hinsch and Markus Stepanians have noted, the significance of human rights relates to their capacity to 'limit … a regime's internal autonomy',[123] specifically so as to protect the means by which individual members of the state may actualise their own.

Alan Gewirth provided another well-reasoned approach when declaring that the universal nature of human rights is legitimised by the fact that 'all human beings, by virtue of their humanity, recognise in themselves and others rights to freedom and well-being'.[124] This argument posits that all agents (i.e. potential right holders) possess certain inherent qualities and capabilities (such as the ability to reason and to operate autonomously) which allow them, not only to make claims for the protection of certain interests, but to recognise the relevance of the claims of other agents (or potential agents).[125] In essence, Gewirth suggests that all agents

[118] John Rawls, *Law of the Peoples* (Cambridge Press 1999) 80.
[119] ibid.
[120] ibid.
[121] ibid 87.
[122] ibid 65.
[123] Wilfried Hinsch and Markus Stepanians, 'Human Rights as Moral Claims' in Rex Martin and David Reidy (eds) *Rawls Law of Peoples: A Realistic Utopia?* (Wiley-Blackwell 2006) 118.
[124] Alan Gewirth, *Reason and Morality* (University of Chicago Press 1992) 3-8.
[125] For more on 'ostensible agents' see Shaun Pattinson and Deryck Beyleveld, 'Defending Moral Precaution as a Solution to the Problem of Other Minds: a reply to Holm and Coggon' (2012) 23 Ratio Juris 258.

are capable of appreciating the importance of well-being, and of pursuing a life in accordance with whatever particular values or ideals they possess. If a person accepts that they, as an agent, have the right to pursue a worthwhile life, and to certain protections or provisions that will allow them to do so, logically, if they hold that facts of their agency legitimise these claims, they must also accept the claims of other agents to the same. Failing to do so, Gewirth argues, would ultimately result in them undermining the legitimacy of their own claims.[126] Jeremy Waldron has articulated this argument slightly differently by asserting that as a direct result of the nature of human rights, any individual who claims one must logically recognise that the exact same claim could also be made by anyone else.[127] In this way, he concludes, such rights are necessarily 'universalistic and universalisable'.[128]

In *On Human Rights*, James Griffin confirms that rights must, to some extent, logically correlate with concept of individual interests, but notes that it is the *nature* of the interest that legitimises a claim to its protection. Griffin accepts that there is a temptation to suggest that justifiable claims are those which are grounded in 'basic human needs'.[129] Such needs are defined as 'what human beings need in order to avoid ailment, harm, or malfunction—or, to put it positively, what they need to function normally'.[130] Whilst this would appear to be a reasonable starting point for the discussion, Griffin suggests that it lacks precision, and is susceptible to conflation. For this reason, he argued that it was better to proceed with the understanding that we possess human rights to 'what is needed to function as a normative agent'.[131] This was defined as those interests that all normative agents evidently require the protection or provision of in order to be able to live autonomously (in pursuit with a worthwhile

[126] Alan Gewirth, *Reason and Morality* (University of Chicago Press 1992) 3-8.
[127] Jeremy Waldron, *Nonsense on Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge 1987) 197.
[128] ibid.
[129] James Griffin, *On Human Rights* (Oxford University Press 2008) 88.
[130] ibid.
[131] ibid 90.

life). Notably, this approach attempts to limit the scope of interests capable of giving rise to a right. In effect, the task is presented as determining what needs (and therefore interests) are universally fundamental to human subsistence (rather than the more subjective question of what needs are inherently *human*), and then assigning corresponding rights capable of ensuring these interests are fulfilled. In promoting this position, Griffin suggested that human rights should be grounded in the concept of 'personhood'[132] as this would provide them with a more substantive foundation:

> Grounding human rights in personhood imposes an obvious constraint on their content: they are rights not to anything that promotes human *good* or *flourishing*, but merely to what is needed for human *status*. They are protections of that somewhat austere state, a characteristically human life, not of a good or happy or perfected or flourishing human life.[133]

Due its capacity to refocus the discourse towards more objective (and thus universally defensible) means of determining and justifying legitimate human rights, it is proposed that Griffin's approach is preferable when considering the universal realisability of human rights within the modern contexts. As such, the philosophical justification for human rights presented within this thesis acknowledges that legitimate rights are claims to the protection of interests which further the well-being of the right-holder, but, as Griffin suggests, they are to be understood only as those interests which enable 'a functioning human agent'.[134] Moreover, it is accepted that the most fundamental need (and interest) is the protection of autonomous agency (e.g. human subsistence). Whilst rights are arguably important simply because they protect fundamental interests (and provide means of enhancing the quality of living), they are primarily justifiable because of the nature of the claimants whose interests they protect (i.e. normative agents). The ultimate purpose of human rights is, therefore, to protect the vital

[132] ibid 33.
[133] ibid 34.
[134] According to Griffin, it was because such 'functioning' was dependent upon certain 'especially important interests that rights can be derived from them; rights are strong protections, and so require something especially valuable to attract protection'. James Griffin, *On Human Rights* (Oxford University Press 2008) 35.

interests/needs which allow individuals to operate autonomously in pursuit of their conception of a worthwhile life. This position will be further developed in Chapter Four with the proposal that human health should be regarded as the foundational component of such agency.

In summary of our examination of relevant theoretical accounts, it is clear that attempts to justify the universality of human rights are consistently based on the belief that there are numerous interests that are worth protecting, either for the benefit of society as a whole, or the well-being of the individual (or both). Acknowledging this fact logically leads us to consider how best to protect them. This in turn leads to the realisation that they cannot truly be protected, or guaranteed, unless individuals are able to hold states to account. As such, it could be argued that they must form the basis of various claims *against* the state (but which the state itself must fulfil), to both actions and inactions. At this point the legitimating process must shift to identifying universally relatable grounds which may be effective in communicating the validity of such needs. In contemporary times, this is often attempted through the concept of human dignity. This chapter will now move on to address the merits and limitations of this approach.

2.3 The Foundation of Contemporary Rights: Human Dignity

> Dignity is immediately connected with the idea of rights - as the ground of rights, the content of certain rights, and perhaps even the form and structure of rights.[135]

The idea of dignity is so appealing to this purpose precisely because of its apparent universal relevance. All cultures appear to understand the concept of dignity. However, ultimately, it restricts the idea of rights as embodiments of universal principles, because the idea of dignity is culturally specific. Further, the concept of 'universal dignity' is demonstrably limited in practice; as evidenced by various declarations of rights (in both past and present times). The aforementioned DOI and the DRMC proclaimed rights entitled to 'all men' and

[135] Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2015) 14.

'all citizens' respectively. Indeed, the term 'all' implies totality and suggests universality. As Douzinas notes, 'the French Declaration of Rights started a trend by proclaiming (human) rights as "natural, inalienable and sacred"'.[136] Yet to fully understand the intended scope of these declarations it is necessary to examine the contexts in which they were drafted.[137]

It could be argued that the 'universal' aspect of such declarations was contextually contingent on the circumstances of those who proclaimed them. The universality of these rights pertained to contextualised interpretations of the concept itself, and not to the scope of its practical applicability. In this way, such rights were held to be 'universally applicable', but only to relevant individuals within a specific 'universal' sphere. This is demonstrated by intentional exclusivity with regards to who was held to be entitled to their protection. For example, in neither declaration was the issue of slavery effectively addressed.[138] The implication of this is that 'slaves' were intentionally excluded from claiming the protection of such rights. Similarly, in the DRMC the rights were specifically proclaimed on behalf of all 'citizens', a social status which, at that time, women were unable to possess.[139] It is apparent that these rights were 'universal' only in the sense that they applied to all within certain circumstances. Principally, in both instances this was specifically all free white males.[140] This highlights an apparent paradox with the use of dignity as a foundational component of attempts to legitimise the idea of universal rights. Indeed, as Waldron notes, '[d]efenders of natural rights would say that men are born free, but would then go on to complain in the name of rights

[136] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 13.
[137] Paul Gordon Lauren, *The Evolution of International Human Rights* (University of Pennsylvania Press 2003) 15-36.
[138] Isiah Berlin, *Slavery and Freedom in the Age of the American Revolution* (Perspectives on the American Revolution) (University of Virginia Press 1983) 64-65.
[139] For more on this see Jane Abray, 'Feminism in the French Revolution' (1985) 80 American Historical Review 62.
[140] Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking <http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.

that so many were born into slavery'.[141] Further to this, within initial declarations of rights the 'universal' scope was also restricted to specific national experiences. In practical terms, they were intended to be applicable only to appropriate individuals within the nation making the proclamation. The primary purpose with each of these declarations was therefore to address how certain individuals ought to treat each other within a particular national sphere. In contrast, and partly out of recognition of the increasingly global scope of individual human experience, modern declarations of rights also planned to regulate how individuals treated each other on an *international* scale.

2.3.1 The Use of Dignity in Modern Human Rights Treaties

The first, and arguably most significant of these, was the UDHR.[142] In combination with the Nuremberg trials which preceded it,[143] the UDHR was a direct response to the atrocities committed during the Second World War.[144] As Douzinas explains, the 'international law of human rights was a response to Hitler and Stalin, to the atrocities and barbarities of the War, and to the Holocaust'.[145] These were reactive measures which instilled the idea of human rights and human dignity as objective, legally enforceable standards. Moreover, they established precedent for holding authorities accountable for their actions on both national and international levels. In conjunction with the assertion that there are basic standards human beings are held to deserve by nature of their humanity, was the assertion that there are basic standards governments must adhere to in relation to how they treat their citizens, as well as citizens from other states they are effectively responsible for.[146] Interestingly, however, it must

[141] Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2015) 16.
[142] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) <http://www.un.org/en/universal-declaration-human-rights/> accessed 18 May 2018.
[143] See Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (Oxford University Press 2008).
[144] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 116.
[145] ibid.
[146] 'An endless process of international and humanitarian law making has been put into operation, aimed at protecting people from the putative assertions of their sovereignty'. ibid.

be mentioned that the 'universal' aspect of this new framework for holding leaders accountable for 'crimes against humanity' remained contextually relative in one important aspect: it was used as justification for prosecuting the defeated Axis powers exclusively, and did not address the commensurate atrocities perpetrated by the allies.[147] As such, despite the fact that the scope of universal was intentionally expanded, in application it was still somewhat contextually contingent.

In contrast, with the European Convention on Human Rights (ECHR 1950),[148] the International Covenant for Civil and Political Rights (ICCPR 1966),[149] and the International Covenant for Economic Social and Cultural Rights (ICESCR 1966),[150] the scope was deliberately focused towards establishing universal standards of protection (at least in theory). With each of these modern declarations the concept of human dignity was utilised to ground the authenticity of their 'universal' applicability. Historically, as with the scope of human rights, the scope of dignity was itself a contextually contingent concept. As seen with the DOI and DRMC, individuals proclaimed the relevance of rights in the name of dignity; but a dignity initially afforded only to themselves (i.e. determined on factors such as sex, race, and social class).

Starting with the UDHR, the scope of human dignity was purposefully expanded to provide a foundation which would allow *all* individuals to make legitimate claims for the protection of rights. The concept of dignity was chosen because it is one which has universal

[147] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 68.
[148] Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No.11 and No.14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 18 May 2018.
[149] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> accessed 18 May 2018.
[150] International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force January 3 1976) 993 UNTS 3 (ICESCR) <http://www.un-documents.net/icescr.htm> accessed 18 May 2018.

recognition (and was thus deemed appropriate for the universalising objective of human rights). Moreover, due to its inherent malleability, grounding rights in 'dignity' afforded the drafters of these declarations/treaties an opportunity to legitimise the universality of such protections without the need to produce a robust philosophical (or legal) justification. It was arguably an attempt to circumvent potential obstacles to the validity of the idea of fundamental human claims. In effect, it was also a deliberate attempt to avoid exposure to cultural relativist critiques, and thus increase the appeal of such protections.[151]

However, a crucial limitation in relation to attempts to achieve the universal application of human rights stems from efforts to universalise the concept of dignity. Indeed, although the idea of human dignity is arguably relevant to all cultures and all peoples,[152] it is important to note that there are many different interpretations of this concept and no interpretation is accepted universally. As a direct result of the fact that the Western drafters of the UDHR mistakenly assumed that the meaning of 'human dignity' was self-evident, little attempt was made to consult on this with the representatives from non-Western states.[153] Consequently, it was arguably a purely Western understanding of the concept of dignity that was proclaimed as the legitimising source for the universal relevance of the earliest modern accounts of human rights. Douzinas notes that this specific 'Western' interpretation was broadly based on Kantian

[151] Susan Waltz notes that this desire to refrain from precluding the possibility of securing international support is reflected in the fact that '[t]he birth of the UDHR was nothing less than a political event, and its legitimacy as a standard for good behavior by states derives not so much from its intellectual lineage as from the political recognition of its birth'. Susan Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights' (2001) 23 Human Rights Quarterly 44, 72.

[152] This is reflected in John Gardiner's observation that '[t]o respect human dignity is simply to treat human beings as human beings, to treat them in ways consistent with their humanity'. John Gardner, "Simply in Virtue of Being Human": the Whos and Whys of Human Rights' (2008) 2 Journal of Ethics and Social Philosophy 1, 22.

[153] It is worth noting here that the suggestion that the drafters of the UDHR were entirely Western – and thus the declaration itself reflects Western bias - is inaccurate. Indeed, this position was persuasively rejected by Adrienne Anderson when she stated '[t]he perceived dominance of Western attitudes is often attributed to the drafting process. However, this is arguably refutable … over half of the members … were Asian, African and Latin American'. Adrienne Anderson, 'On Dignity and Whether the Universal Declaration of Human Rights Remains a Place of Refuge After 60 Years' (2009) 25 American University International Law Review 115, 121.

philosophy.[154] At the basis of this interpretation was the idea that all human beings have an innate right to ethical treatment by virtue of their being human. Thus, in practical terms, this understanding of dignity entitles all individuals to certain standards of living commensurate with a life worthy of a human being. This interpretation clearly influenced the UDHR, a fact which is reflected in the language used within the preamble and the content of the declaration itself. Indeed, the very first article looked to establish the universal legitimacy of this concept: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.[155]

Subsequent declarations continued this practice with each firmly proclaiming that the universal relevance of rights derived specifically from an inherent dignity possessed by all human beings.[156] However, in relation to efforts to universalise the application of human rights, there are two primary concerns worth highlighting here. The first of these relates to (i) the interpretation of the theory of human dignity and the second relates to the resulting (ii) legal implication of this interpretation. In effect, it is evidently difficult, for the reasons mentioned above, to universalise any theory of human dignity. The concept is open to interpretation and as such any system of legal protection which is based upon this concept is likely to have some element of cultural specificity at its core. For this reason, any given interpretation is unlikely to be applicable to all other states or allow for a consistent level of realisable universal protection. Indeed, this is demonstrated in practical terms by highlighting differing judicial interpretations of the concept.

[154] See Immanuel Kant, *the Metaphysics of Morals* (Cambridge University Press 1996) xviii.
[155] Article 1 of the Universal Declaration of Human Rights (1948 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) <http://www.un.org/en/documents/udhr/index.shtml#a25> accessed 18 May 2018.
[156] See for example the Preamble of the International Covenant on Civil and Political Rights (1966) wherein it is stated 'these rights derive from the inherent dignity of the human person'. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> accessed 18 May 2018.

2.3.2 The Relativeness of Human Dignity

Whilst the concept of dignity is 'universal' in the sense that it has historically retained a certain degree of relevance within all cultures,[157] it is important to note that many interpretations of this concept are completely disconnected from the idea of individual rights. This is crucial because in many non-Western cultures the implications of this concept would not always seem conducive to the notion of individual entitlements. Makau Mutua explains that in African states the traditional interpretation of human dignity is of something which must be *earned*.[158] In this way, it is similar to the traditional Confucianist belief that 'human dignity' is something which individuals acquire through their personal conduct.[159] With such an understanding dignity is not inherent, and is universal only in the sense that all have the opportunity to earn it. This interpretation is commensurate with that of many Islamic states where dignity has traditionally been understood to extend only to practicing Muslims. In *Human Dignity in Islam*, Mohammed Hashim Kamali explains that, historically, there have been two prominent Islamic schools of thought; the universalist and the communalist approach.[160] As the name suggests, the former approach advocates that dignity ought to be afforded to all human beings regardless of race, sex, or religious creed. Conversely, the second purports that dignity be afforded only to practicing Muslims and cannot be extended to cover non-Muslims unless or until they embrace the teachings of Islam. Kamali notes that support for the universalist approach, which was once predominant, has steadily declined in the latter half of the twentieth century, and is conspicuously absent in the modern discourse of human

[157] See Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 American Political Science Review 303.
[158] See Makau wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evolution of the Language of Duties' (1995) 35 Virginia Journal of International Law 339.
[159] See Qianfan Zhang, 'The Idea of Human Dignity in Classical Chinese Philosophy: A Reconstruction of Confucianism' (2000) 27 Journal of Chinese Philosophy 299.
[160] Mohammad Hashim Kamali, 'Human Dignity in Islam' (2012) International Institute of Advanced Islamic Studies <http://www.iais.org.my/e/index.php/publications-sp-1447159098/articles/item/36-human-dignity-in-islam.html> accessed 18 May 2018.

rights in the Muslim world. He argues that colonialism, globalisation and the recent wars waged on Muslim soil have all contributed to this decline.[161]

It is therefore clear that the understanding of 'human dignity' purported in the UDHR, and which necessitates a minimum level of respect for the individual, is unfamiliar to many cultures. In such communities, dignity is to be afforded *only* to those whose conduct warrants this benefit. Clearly such an interpretation would seem incapable of providing a framework for absolute, universal protections (although it would appear to be consistent with the pragmatic, populist approach to such rights that is emergent in many Western states in contemporary times). As such, Waldron was seemingly correct when suggesting that '[if] you glance quickly at the way in which "dignity" figures in the law, you will probably get the impression that it's usage is seriously confused'.[162] Essentially, and despite the fact that the concept is universal in one important sense, it would seem that the contextual contingency of the theory of human dignity jeopardises its ability to provide a universally applicable foundation for human rights.

This point has been further emphasised by Christopher McGrudden who asserts that 'the use of 'dignity' … does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions'[163]. In a similar manner to the contextually contingent approaches of Islamic states, McGrudden suggests that two judicial schools of thought dominate the West; the individualistic and the communitarian approaches.[164] The defining characteristic of the individualistic approach to dignity is that it seeks to further individual autonomy above all else.[165] A key aspect is advancing individual

[161] ibid.
[162] Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2015) 15.
[163] Christopher McGrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 The European Journal of International Law 655, 655.
[164] ibid 699.
[165] ibid.

liberty based upon the choice of the individual. McGrudden explains that this approach is adopted by the US Supreme Court,[166] the Canadian Supreme Court,[167] and the Hungarian Constitutional Court. In stark contrast, the communitarian approach to dignity relates to respect within a specific social and political community. In this capacity, the concept of dignity is used, amongst other things, to hold the individual and the community to shared social values so as to maintain public order.[168] Indeed, societies of this kind use dignity to explain shared social values. Naturally, different communities will have different understandings of dignity, but each will specifically relate to an understanding of what is valuable to their society. McGrudden highlights that this approach is adopted by the German Constitutional Court.[169] The key aspect to this approach is finding a working balance between respect for dignity of the individual and respect for community. Indeed, with such an understanding respect for the individual cannot be unlimited. Instead, as Douzinas asserts, a communitarian approach 'accepts human rights only to the extent that they help submerge the *I* into the *We*'.[170]

2.3.3 Universalising Human Rights: Limitations with the Use of Dignity

As mentioned, a fundamental issue with the concept of dignity is that it can be interpreted broadly and allow communities to determine for themselves what emphasis to attribute to this concept in different circumstances. In this way, they can adhere to dignity without having to accept a specific and universally applicable interpretation of the concept. The obvious appeal of this approach is that it appears to encourage universal participation regarding the protection of human rights (i.e. by allowing for variation in relation to how much protection any given state is required to provide). However, in practice, whilst this would

[166] See *Rice v Cayetano* (98-818) 528 U.S. 495 (2000).
[167] See *Gosselin v. Quebec* (2002) SCC 84.
[168] Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 Notre Dame Law Review 183, 223-224.
[169] See *'Lifetime Imprisonment Case' BVerfGE* 45 187 (1977).
[170] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 59.

seemingly enhance their universal applicability, this approach cannot guarantee that human rights will be protected.[171] This is particularly true in cases where the communitarian interpretation alone is adopted. The fundamental drawback of which relates to the fact that it appears to place significant emphasis on allowing states to democratically determine which interests ought to be protected.[172] Such an approach is endorsed, at least to some extent, by many states under the jurisdiction of the ECHR. This seemingly allows for the infringement of supposedly inalienable protections, not only when such action is held to be necessary for national security reasons,[173] but also when it is deemed to be in the wider 'interests of the community' at large.[174] Indeed, as Laurence Lustgarten highlights, a fundamental aspect of the ECHR is that it actively promotes the need to consistently balance individual and social interests in a manner which amounts to '"balancing away" individual rights'.[175] In order to consistently strike this balance, a communitarian approach must articulate the 'need' to set limitations on the enjoyment of rights in democratic or societal terms.[176] Yet, as Douzinas highlights, 'human' rights by their very nature ought to be *undemocratic* – able to protect the interests of all and not favour the protection of the interests of the majority.[177] These rights are

[171] A pertinent example of this would be the decision to ban the use of the Islamic veil in France in the name of 'dignity' as discussed by Sofie G. Syed, 'Liberté, Egalité, Vie Privée: The Implications of France's Anti-Veil Laws for Privacy and Autonomy' (2017) 40:2 Harvard Journal of Law & Gender 301.
[172] Governments, as elected representatives of both the political will and accepted social standards of the majority of the population (or at least, rather, the majority of eligible voters prepared to vote), are deemed to be well placed to determine which interests ought to be protected (and which deserve more protection than others) in a manner consistent with the inherent values of the state (i.e. its national identity).
[173] As example see *A and Others v. the United Kingdom* (2009) 49 EHRR 29. Whilst the ECtHR did ultimately find against the state in this case (holding that the interference with Article 5 was disproportionate), the Court did still reaffirm that member states of the ECHR have the right to interfere with Convention rights in times of emergency (so long as the interference is compatible with the Convention) [173-4].
[174] For example, allowing religiously conservative states to restrict the right to Freedom of Expression (Art. 10 ECHR). See *Otto-Preminger-Institut v. Austria* (1994) 19 EHRR 34.
[175] Laurence Lustgarten, 'National Security, Terrorism and Constitutional Balance' (2004) 75 The Political Quarterly 4, 14.
[176] This approach is accommodated by the ECtHR through its use of the 'margin of appreciation' doctrine. This doctrine essentially provides the Court with means to afford member states of the ECHR an element of flexibility and discretion when looking to fulfil their Convention obligations in a manner consistent with their own specific cultural/national values. For a more detailed examination of this concept see Chapter Three, section 3.3.1.
[177] Costas Douzinas, 'What Are Human Rights?*' The Guardian* (London, 18 March 2009) <http://www.guardian.co.uk/commentisfree/libertycentral/2009/mar/18/human-rights-asylum> accessed 18 May 2018.

supposed to be guaranteed protections to those vital human interests without which a human life cannot be enjoyed. As such, they surely need to be beyond arbitrary interference from those in power - indeed, they ought to be protections against them. A framework for universally applicable human rights grounded in a communitarian interpretation alone would not adequately be able to guarantee such protection. This is not to say that abuse of this system would itself be certain. It is simply to acknowledge that the capacity for such abuse exists and, indeed, is a necessary component of the communitarian model (i.e. this flexibility is part of its appeal).

In contrast, the individualistic approach to dignity seeks to afford rights to individuals based purely on their inherent worth as human beings and not the designated value of their interests to society at large (at least in theory).[178] The focus with such an understanding seems to be on maximising individual autonomy and self-determination in a manner which necessitates non-interference from the state. In this way, it would appear to be more consistent with a traditional philosophical interpretation of human rights; protections necessary to ensure deserved minimum standards needed for human subsistence. For this reason, the individualistic interpretation of dignity is arguably more appropriate for establishing a theoretical framework for the protection of human rights. Whilst on practical terms it would not appear to be as conducive to universal applicability than the communitarian approach - by denying flexibility and establishing stricter standards - it is seemingly the most likely of the two approaches to lead to guaranteed protection. Essentially, then, as McGrudden notes, the major distinction between the individualistic and communitarian approach appears to rest on the fact that, whilst the former relates specifically to individual dignity, the latter embodies collective dignity (e.g. of humankind):

[178] '[D]ignity bestowed to a person on account of their humanity'. Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 40.

> [With] a communitarian approach … [T]he obligation on the state to protect human dignity may justify limiting the rights of the person whom the state seeks to protect, irrespective of the preferences of the individual.[179]

Notably, however, the individualistic approach is itself open to robust critique which can be centred on its apparent abusability. For example, it may encourage states to adopt contextually relative justifications for such rights (which either limit the scope of protection, or deny the entitlement to claim). As witnessed with both the DOI and DRMC, an individualistic approach can result in the validation of 'non-universal' coverage based upon individual dignity. For Douzinas, this marks a fundamental flaw of individualism; it rejects the fact that 'being in common is an integral part of being self'.[180] From this analysis we see that the interpretability of dignity can be conceptualised as establishing two primary narratives – assessing the applicability of Western and non-Western interpretations of this concept respectively. As we have seen, a significant conclusion usually drawn from this is the suggestion that non-Western interpretations are incompatible with the idea of universal human rights. In contrast, Western interpretations of dignity are generally presented as being instrumental to attempts to actualise universal claims. In discussing the limitations of Western interpretations of dignity, focus is usually given to the apparent conflict existing between individualism and communitarianism (as addressed above). However, this approach is fundamentally flawed. In modern times, the concept of human rights has evolved to such an extent that these interpretations are inter-connected and inter-dependent.[181] Rather, the limitation of Western interpretations of dignity arguably relates to the evidentiary impossibility of individualism as universalism (in that this concept now allows for the prioritisation of collective interests over individual liberties). This is witnessed in the gradation of human value

[179] Christopher McGrudden, *Human Dignity and Judicial Interpretation of Human Rights* (2008) 19 Journal of International Law 655, 705.
[180] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 59.
[181] Douzinas suggests that this is because 'universal morality and cultural identity express different aspects of human experience'. ibid.

and worth that leads to determining the beneficiaries of rights (e.g. lawful citizens) and the 'othering' of undeserving claimants (criminals, suspected terrorists, refugees)[182] – which we will shortly move on to address in more detail. It is therefore representative of an implicit (if not explicit) acceptance of the legitimacy of non-absolute (and non-Western) interpretations of human dignity – whereby it is acknowledged that dignity must be earned and is also ultimately forfeitable. It is, contradictorily, the appropriation of principles which are argued to be incompatible with absolute, universal rights as means of securing them. This position is untenable to the prospect of achieving universal protection of human rights claims. In looking to examine this further it is useful to consider the aforementioned process of determining the 'subject' of human rights in the modern context.

2.4 The 'Subject' of Human Rights

On first inspection, the 'subject' of human rights would appear to be self-evident: human beings. However, as Douzinas explains, the issue of determining precisely who (and what) can be regarded as *human* has proven to be far from straightforward:

> The "man" of the "rights of man" has no concrete characteristics, except for free will, reason and soul ... Yet the empirical man who actually enjoyed legal rights was literally a man — a well-off, white, Christian, urban male. He condenses the abstract dignity of humanity and the privileges of the powerful.[183]

The question of whom such exceptional protections ought to be bestowed upon is as old as the discourse of rights itself. The apparent synonymy of having human rights and being regarded as human in modern times has already been illustrated within this chapter.[184] These protections are increasingly regarded, not only as an extension of our core humanity, but as a contributing factor to it. As Douzinas suggests, '[t]he greatest achievement of rights is ontological; rights

[182] Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking <http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.
[183] ibid.
[184] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 157.

contribute to the creation of human identity'.[185] Indeed, the referent subject of rights discourse has consistently been perceived (and presented) in this way; as a basic human entity, the moral significance of which legitimates corresponding protections. This entity is relatable to us as a manifestation of ourselves, as well as of those sufficiently similar (in relation to species membership).[186] However, in practice, the subject of rights is evidently much more complex. Although this 'subject' has been interpreted and discussed in various forms, the two identified by Douzinas above are of special importance to our comprehension of this issue; (a) as an abstract concept; and (b) as a political construct.

2.4.1 Two Types of Subject of Universal Human Rights: Abstract and Political

The abstract concept is the embodiment of the utopia of human rights. From the genesis of these protections in the form of declarations of revolutionary individuals, through to their modern incarnation as international regulations on the conduct of states, this abstract concept of the subject of rights has grounded the discourse in a sense of shared commonality.[187] As Douzinas suggests, the 'man' presented as the authenticating cause of these protections is non-existent. 'He' is simply an idealised entity onto which the individual traits and characteristics of *all peoples* could be projected. The abstract man of these declarations is universal purely in the sense that he represents, to each of us individually, a reflection of our own selves. Historically, the purpose of this abstract concept was simply to provide a template with which to promote the legitimacy (and relevance) of certain political or legal aims.[188] It is thus deliberately context-less; in the sense that it is designed to transcend historical relativism. In its abstract form, the subject of rights validates the possession of individual claims for all

[185] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 7.
[186] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51.
[187] ibid.
[188] As evidenced with the American Declaration of Independence (DOI) and the French Declaration of the Rights of Man and of the Citizen (DRMC), which represented demands for future conduct rather than actionable claims of the present (e.g. at the time they were drafted).

human beings. However, the actionability of such claims is available only to a certain type of human subject; the political construct.

If we accept that it is possible for rights to theoretically belong to all individuals, it must also be acknowledged that, if only in a practical sense, they evidently may only be claimed by a certain type; a citizen. The 'subject' of rights as a citizen is represented in the form of the political construct. The political construct represents 'the end' point of the abstract concept as the means by which the benefits of these claims are to be enjoyed. The result of which is to replace the universal abstract 'man' with one of absolute (and relative) specificity. The 'subject' of rights as a political construct was comprehensively addressed by Jacques Ranciere in *Who is the Subject of the Rights of Man?* With this piece Ranciere discussed the philosophical approach of Hannah Arendt to the issue of human rights; which will later be useful to our attempt to determine a referent subject for the bestowment of certain universal claims. A significant contribution made by Ranciere was the confirmation that the 'subject' of rights is multifaceted. Crucially, this work highlighted an inherent duality with the concept of a 'universal subject':

> The Rights of Man are the rights of the demos, conceived as the generic name of the political subjects who enact—in specific scenes of dissensus the paradoxical qualification of this supplement.[189]

This represents the view that the political construct is the human subject capable of making actionable claims. Specific claims, such as those of human rights, are held to be of such importance that they are regarded as being applicable to all subjects. Put simply, the significance of the interest that these rights seek to protect or guarantee to any individual can be used to extend their relevance beyond themselves. The collective appreciation of the validity of this position enables individuals to promote the legitimacy of these claims. Such promotion

[189] Jacques Ranciere, 'Who is the Subject of the Rights of Man?' (2004) 103 The South Atlantic Quarterly 297, 305.

can lead to violence if the validity of the collective entitlement to individual claims is not recognised by the state. Consequently, individual action taken to legitimise such claims results in the disqualification of the possibility of guaranteed protection. It was for similar reasons that Bentham famously denounced natural rights as 'a bastard brood of monsters … *anti-legal rights*, the mortal enemies of law, the subverters of government, and the assassins of security'.[190] For Ranciere, the practical subject of the rights of man was a political construct capable of making individual claims for the collective protection of universally relevant interests who, in the process of actualising these claims, could undermine the justification of their possession.[191]

The impossibility of a 'universal subject' for the rights of man was perhaps most famously addressed in the works of Hannah Arendt (whom as mentioned above, Ranciere was responding to in his article). Writing in the context of the perception of one who is 'stateless', Arendt criticised the (in)accessibility of such rights for those who have insufficient means by which to action them.[192] The process of actualising these protections was dependent upon a specific (restrictive) status; namely of being accepted as a citizen of an accepted (and acceptable) state.[193] Their purported universality (whether defensible or not) is rendered redundant by this fact. The qualification of 'man' for the purposes of rights was, in a practical sense, to be determined purely by matters of bureaucracy. According to Arendt, the humanity of the declarations of the rights of man was, in actuality, not one grounded in a sense of shared commonality, but designated functionality. In essence, the purpose of the rights of man was to

[190] Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843) 524.
[191] Jacques Ranciere, 'Who is the Subject of the Rights of Man?' (2004) 103 The South Atlantic Quarterly 297, 297-310.
[192] Hannah Arendt, *On the Origins of Totalitarianism* (Harcourt, Brace, Jovanovich 1973) 230.
[193] 'In the name of the will of the people the state was forced to recognize only "nationals" as citizens, to grant full civil and political rights only to those who belonged to the national community by right of origin and fact of birth ... human rights were protected and enforced only as national rights and that the very institution of a state, whose supreme task was to protect and guarantee man his rights as man, as citizen'. ibid.

protect those individuals who had a purpose for the state. The 'subject' of the enjoyment of rights was therefore *wholly* a political construct. The ability to depend upon the protection of rights was contingent upon having a status which was, in the view of the state, worthy of protecting (or of protecting against).

In this sense, Arendt seems to suggest that the rights of man are distinctly *alienable*; obtained through a bureaucratic process - that of securing, by specific means (namely citizenship), a sufficient level of recognition. Ironically, the bureaucratisation of entitlement to such protections through this process results in the depiction of a 'subject' which is arguably more intangible and less relatable than the abstract concept of declarations. This is because the shared commonality of humankind is not represented by arbitrary definitions or the obtainment of lawful status – but through the perceived moral worth of the 'human condition' itself:

> For Arendt, the human condition is characterised by the distinctness and uniqueness of each individual (reflected in the love for distinction), the plurality within which the uniqueness always already finds itself (reflected in the love of equality), and the loneliness that ensues when plurality is replaced with radical isolation (reflected in impotent fear and the will to dominate).[194]

In reflection, the 'universal subject' of human rights is effectively humanity; all human beings capable of making a claim (or having a claim made on their behalf) to certain special protections and considerations. However, the recipients of such protections are political constructs, those whose legitimacy to such claims is officially acknowledged and appreciated. Thus, for a significant number of human beings the rights of man remain a purely abstract concept (at least as it pertains to practical enjoyment). This represents an implicit (and paradoxical) gradation of humanity and human worth. Modern human rights declarations inform us that all human beings are entitled to certain fundamental protections. They possess

[194] Peg Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* (Indiana University Press 2006) 16.

this 'right to have rights',[195] as Arendt might call it, unconditionally and absolutely simply on account of being human. Yet, the mechanisms for enforcing such rights demonstrate that their protection is accessible only to those with sufficient recognition to have their claims heard.[196]

2.4.2 Humanity as Subject: Human Rights in Contemporary Times

This pursuit of gradation paradoxically stems from the universalising abstractness of the rights of man.[197] All peoples can identify the subjects of such protections as a reflection of themselves. This provides the concept with universal relevance thus legitimating the idea of universal rights. However, it also results in the creation of an implicit gradation of worth (by encouraging individuals to interpret the subject of rights as precisely themselves and those like them (nationally, ethnically, religiously) excluding or rejecting those who fall outside of this self-reflective view. The abstract concept thus provides rights with a source of universal validity, in a theoretical sense, but restricts the practical enforcement of such rights to a specific, relative, definitive number of people (through the process of 'othering').[198] Thus, the abstract nature of the rights of man is causative of their non-universal application. Declarations of rights encourage us to ground their legitimacy in the identification of various universal aspects of the human experience, which in turn, enables us to recognise a collective entitlement to these claims. However, having accepted these rights as universal, our human nature (the human condition) still compels us to interpret them as *individuals*. Put simply, although the

[195] '[T]he right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself'. Hannah Arendt, *On the Origins of Totalitarianism* (Harcourt, Brace, Jovanovich 1973) 298.
[196] Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking <http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.
[197] For Arendt, this was exemplified by the fact that, in modern times, the concept of humankind had become 'emancipated' from a unifying 'essence' in either history or nature. For more on this see Hannah Arendt, *On the Origins of Totalitarianism* (Harcourt, Brace, Jovanovich 1973) 298.
[198] 'Othering refers to a process by which individuals and society view and label people who are different in a way that devalues them'. Susan J. Stabile 'Othering and the Law' (2016) 12 University of St. Thomas Law Journal 381, 382.

universality of rights is rooted in a perception of shared humanity, the nature of humanity precludes the possibility of a truly universal 'subject':

> (T)he ontological unreality of the abstract man of rights inexorably leads to their limited usefulness. Abstract rights are so removed from their place of application and the concrete circumstances of the persons who suffer and hurt that they are unable to match their real needs.[199]

Indeed, a critical approach to this issue could conclude that the concept of humanity is transient and ungrounded because the concept of humankind is itself distinctly abstract. As Douzinas notes, '[h]umanity has no foundation and no end; it is the definition of groundlessness'.[200] This abstractness ensures that the concept of humanity is consistently reimagined. Arendt and Douzinas both highlighted this when asserting that peoples have constructed their own definition of what it means to be human throughout history,[201] with the term 'human' itself understood in terms of the highest form of civilisation.[202] As such, we see that the task of determining a definitive 'referent subject' of human rights is practically unattainable. Humans, as 'abstract subjects', are represented as the universal entitlement to fundamental liberties. The possessors of justifiable claims – of the 'right to have rights'. However, the 'political subject' of rights is the actual beneficiary of these claims. They represent the 'highest form' of humanity only in the sense that the possession of actionable claims provides them with elevated status and recognition. This status is obtainable only by those who are 'subjectified' in so much as they are 'created in schools and workshops, factory floors and barracks in ways that serve the functional needs of … systems of power'.[203]

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[199] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 154.
[200] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 59.
[201] For example, with the concept of 'legal humanism' consistently utilised as a 'discourse of exclusion'. Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 211-2.
[202] Principally, this results in different peoples depicting themselves - the *true* reflection of humanity - as a 'superior race'. As discussed by Hannah Arendt, 'Organized Guilt and Responsibility' in Peg Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* (Indiana University Press 2006) 8.
[203] Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Hart Publishing 2005) 57.

Ultimately, as mentioned above, the 'political subject' is one whose possession of actionable claims is obtained through the construction of an individual identity with discernible worth to the collective interests of the state. Therefore, in effect, the function of the concept of humanity 'lies not in philosophical essence but in its non-essence, in the endless process of re-definition and the necessary but impossible attempt to escape external determination'.[204]

Consequently, as with dignity, it appears as if the concept of humanity is incapable of providing a reliable foundation for the concept of universal rights. This is despite its obvious qualities in validating the universality of such claims (as discussed earlier in this section). Interestingly, both points appear to be the result of the malleability and transience of the concept of humanity itself. The temporality of the idea of humanity is an integral factor of its enduring appeal. This historical idea can be shaped to fit the purposes of present generations. As Douzinas explains, this is possible because '[t]he "human" in rights is a "floating signifier", "human rights" is a thin, undetermined concept'.[205] For philosopher Michel Foucault, the desire to shape the definition of ourselves in such a manner was a natural (and unavoidable) component of humankind. In seeking to validate ones' own worth, we naturally identify the 'moral goodness' of humanity from our own personal biases and perspectives. This process of shaping and reshaping understanding of human identity is interpreted as a progressive perfecting of humanity. A process which, per Foucault, humankind is destined to continue:

> [I]n the course of their history, men have never ceased to construct themselves, that is, to continually displace their subjectivity, to constitute themselves in an infinite, multiple series of different subjectivities that will never have an end and never bring us in the presence of something that would be ''man.'' Men are perpetually engaged in a process that, in constituting objects, at the same time displaces man, deforms, transforms, and transfigures him as a subject.[206]

[204] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 59.
[205] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 7.
[206] Michel Foucault, 'Interview with Michel Foucault' in Robert Hurley et al (eds), *Essential Works of Foucault* (Vol 3, Power) (New Press 2001) 274.

Thus, a foundational aspect of the concept of humanity is the formative action of birth and rebirth of the definition of human identity. The power to reinterpret or redefine our understanding of what it means to be human is partnered with the desire to ensure that the present is represented, not only as a reflection of ourselves, but as a 'progression' on previous interpretations: 'in history, values unravel inexorably towards their perfection in the future'.[207] In the context of universal rights this is ideally to be personified by an expansion of the scope of the definition of universal – ultimately bridging the gap between abstract and political subjects. However, in contemporary times this is arguably characterised by the modern preoccupation with 'refocusing' their referent subject as a specific form of human being – a *law abiding citizen*. Whilst this is clearly evolutionary, it is only of our understanding of the traditional 'political construct'. A significant implication of this contemporary refocusing is the expansion of the process of 'othering', of disqualifying greater numbers of human beings from the protections regarded as fundamental to humankind. This incorporates the obvious distinction between 'political subjects' and those who presently lack this recognition, as well as with those who are seen to forfeit it (such as criminals).[208] Such change of focus was itself arguably prompted by progress in the form of various scientific advancements which have enabled us to comprehensively conceptualise the human being as a physiological, biological construct.[209] Indeed, in light of these developments it is now unproductive for peoples to attempt to draw moral distinctions between themselves and others based upon biological differences. Instead, these distinctions are to be made within the law. As Peter Cane explains,

[207] Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Hart Publishing 2005) 54.
[208] Essentially, this idea is grounded in the belief that rights are conditional, and that their enjoyment is dependent upon appropriate conduct. Christopher Wellman explains that this theory purports that 'human beings qualify for rights that can be forfeited by bad behaviour'. Christopher H Wellman, 'The Rights Forfeiture Theory of Punishment' (2012) 122 Ethics 371, 377.
[209] This is encapsulated with modern attempts to define the very nature of humanity in prescriptive terms. In accordance with this task, Francis Fukuyama suggests 'human nature is the sum of the behaviour and characteristics that are typical of the human species, arising from genetic rather than environmental factors'. Francis Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (Profile Books 2003) 130.

'[l]egal personality is an artefact of legal rules … all human beings are recognised by the law, [but] not all human beings have the same legal status, or the same legal rights and obligations'.[210]

It has been mentioned several times within this thesis that to have human rights in modern times is synonymous with being human. Centring the gradation of worth of human beings within the context of the law – and more precisely lawful status – is consistent with the perpetuating practice of reinterpreting the human identity addressed by Foucault. It is representative of a supposed evolutionary approach to the political construct of humankind. The progressive development of knowledge and understanding has largely settled perceptions of our biological identity.[211] By confirming a shared commonality of species membership, at least in a physiological sense, this knowledge has greatly reduced the feasibility of determining the moral worthiness of different members of our species through prejudicial distinctions within the species itself. Thus, the centring of worth within the law provides an alternative method for its eventual gradation. Although this too could be regarded as prejudicial (by valuing some individuals over others), it is perhaps more fatal to the possibility of absolute, universal protections due the enhanced legitimacy which is naturally afforded to determining criteria centred within the law. Indeed, the perceived objectivity of law ensures that any gradation of human worth based upon it is more likely to be accepted as valid (irrespective of whether it is truly defensible). Historical attempts to validate the gradation of human worth have been heavily influenced (and grounded) on perceptions of worthiness established by ethnic and/or cultural differences.[212] They are thus easier to dismiss as being unjustifiable than differences established and legitimated exclusively within the law itself (as the language of law

[210] Peter Cane, *Responsibility in Law and Morality* (Hart Publishing 2003) 147.
[211] Francis Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (Profile Books 2003) 130.
[212] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 184-188.

provides validation). This is accomplished by ensuring that the process of gradation is not based on subjective factors stemming from our humanity. Indeed, it is now readily accepted that all human beings are entitled to, and ought to have, such protections.[213] Instead, individual worth is determined in accordance with the practical value of others. Those who do not pose a significant threat to either the interests of others or of the state are seen as being more 'valuable' than those who do. This gradation can therefore be perceived as being more objective in that its operation ignores potential biological or physiological distinctions. The persuasiveness of an ostensible 'shared humanity' is irrelevant to its determinations. In this sense, the state is not denying lawful recognition, but suspending the protections this provides when our personal conduct (past or future) merits such a response.

In the case of the 'stateless', the refugees, this 'suspension' of protection is justified by the state on the basis of lack of certainty in relation to this personal conduct. The potentiality for posing a threat to security is used to justify the devaluing of human worth (as it pertains to the political construct capable of enjoying rights). However, this suspension is not necessarily indefinite and should only last so long as such uncertainty persists. In contrast, in the case of criminals, the suspension is based on actual knowledge of the harm caused and the threat posed to the security of the interests of others as well as the state. In accordance with supposedly non-Western accounts of dignity, this devaluation has therefore been 'earned' in that it is directly based upon personal conduct of individuals.[214] It is in this way that, whether morally correct or not, the qualification of human worth within the law can be regarded as more damaging to the concept of universal/absolute rights – as it is one which individuals are more likely to be prepared to accept as justifiable. Indeed, as Douzinas reminds us, the 'law's main job is to

[213] This is reflected in the fact that to have human rights is 'synonymous to being human'. ibid 255.
[214] For more on this see Stephen Kershnar, 'The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing' (2002) 29 Philosophia 57.

provide order not to support morality'.[215] Ultimately, therefore, this apparent evolution of the concept of human worth is clearly open to abuse – providing scope for unjustifiable restrictions on access to such protections which will too readily accepted as being necessary.

The classification of subjects would also appear to highlight a dichotomy at the centre of the concept of human rights: that whilst all human beings are entitled to such protections, only a few can actually make an actionable claim. This realisation seemingly undermines the universal nature of rights in any meaningful sense. In this context, meaningful can be understood as regarding reliable provision. On reflection, this is perhaps only true of historical attempts to qualify the entitlement to rights based on prejudicial determinations which are themselves inconsequential to the legitimacy of the idea behind such protections. However, gradations of worthiness to such protections based within the law *may* be justifiable. This is so because such deliberations would not seek to permanently deny affording such protections to specific individuals. Instead, they would aspire to regulate the enjoyment of rights within a framework which acknowledges variations of the idea of universality itself. For the 'right to rights', the abstract concept of man, this universality is represented in the idea of a universal entitlement; a right to make legitimate claims. For the political construct, the possessor of actionable claims, universality relates to the inherent potentiality of this status; that all individuals have the capacity to obtain such recognition. Indeed, this potentiality is reflected within the concept of human rights itself because, as Douzinas notes 'the prime purpose of rights is to construct the individual person as a subject (of law)'.[216]

[215] Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking <http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.
[216] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 7.

If we accept that the purpose of human rights is to protect fundamental interests,[217] then the subject of such rights is thus both universal and relative. It is universal in that the possession of fundamental claims is entitled to all of humankind, simply on account of our shared humanity. It is relative in that the actionability of such claims is contextually contingent, their validity dependent upon the possession of sufficient recognition. Crucially, the universality of the concept of human rights is not necessarily invalidated with this conclusion. Rather, it could be seen to be indicative of the sublimation of the idea of universal protections; tethering the justification for these claims to both humanity *and* the law. Specifically, by acknowledging that, in practical terms, an absolute entitlement to such protections may only represent the universal potentiality of their provision (and obtainment). Similarly, such sublimation could be demonstrated by highlighting that acknowledgement of the existence of this inherent potentiality (and the process of determining human worth within the law) makes universal application more likely by reducing the possibility of the acceptance of historically unjustifiable exclusions (e.g. based on ethnic, cultural, or biological differences). Put simply, if the concept of humanity, of the moral significance of shared experiences, provides us with a way of communicating the authenticity of the idea of universal rights, then the law can provide us with the practical means of legitimating it (e.g. by validating this idea through the act of codification).[218] Whilst this might not immediately result in the universal application of such protections, this realisation cannot conclusively undermine their universality. They are universal, even if only conceptually, in the sense that all are held to possess an entitlement to such claims (as well as the capacity to obtain means of actualising them). The challenge for

[217] This was succinctly explained by Louis Henkin with the proposition that 'the human rights idea declares that every individual has legitimate claims upon his or her own society for certain freedoms and benefits'. Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 The Annals of the America Academy 10, 11.

[218] In establishing the power of law (and legal language), Costas Douzinas expressed '[l]aw, the principle of the polis, prescribes what constitutes a reasonable order by accepting and validating some parts of collective life, while banning, excluding others, making them invisible'. Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 66.

contemporary proponents of human rights is to ensure that development of this concept does not reduce its scope or meaning to unnecessary degrees. Whilst gradations of worth based within the law can be justifiable, this process is also open to abuse. Specifically, by empowering governing powers to interfere with fundamental protections in an overly aggressive or arbitrary manner (allegedly justified by pragmatic, results-based approaches to balancing interests).[219] This potential scenario developing is made more likely in the contemporary international climate, where more states are prepared to suggest that security and individual liberties are competing objectives. In looking to address this issue, it is useful to consider various strengths and limitations of consequentialist or results-based approaches to defending the concept of universal human rights. This examination will take place in the following chapter.

2.5 Conclusion

In response to the questions established at the start of the chapter, it appears as if universal human rights can be justified if instead of focussing on establishing and promoting present interpretations as the definitive account, it is the foundational purpose behind them which is emphasised. Further, this task requires a reconsideration of how the universal nature of human rights is to be justified and defined. Through consideration of both will and interest theories, it has been suggested that rights may be conceptualised as individual claims to the protection of certain vital interests which, when fulfilled, ensure individual and societal conditions conducive to the development of autonomous agency. That is to say, their

[219] Within the context of the U.K., a famous example of this can be seen in the case of *A (FC) and others (FC) v. Secretary of State for the Home Department; X (FC) and another (FC) v. Secretary of State for the Home Department [2004]* UKHL 56. This case concerned the legality of the indefinite detention of nine foreign nationals without trial, under the Anti-Terror Crime and Security Act 2001. As the provision in question (Section 23) only affected foreign nationals, the Court ultimately found it to be incompatible with the European Convention on Human Rights (1950). For an excellent summary of this see Mark Elliott, 'United Kingdom: Detention Without Trial and the "War on Terror"' (2006) 4 International Journal of Constitutional Law 553.

application should provide circumstances capable of providing all normative agents with the opportunity to live a worthwhile life as determined by their own individual standards. It has further been demonstrated that, historically, the purported universality of rights has been used to justify efforts at securing their universal implementation. This is achieved by using the image of an abstract humanity, one which is absolutely representative of all peoples in its abstractness, whilst remaining infinitely changeable (and restrictively atypical):

> The "man" of the rights of man appears without gender, colour, history, or tradition … he is an empty vessel united with all others through three abstract traits: free will, reason, and the soul (now the mind) — the universal elements of human essence.[220]

The malleability of this foundation has facilitated efforts to justify the universal applicability of such protections as well as directly contributing to the creation of contradictory interpretations of the purpose of human rights claims. In response, the concept of dignity is widely utilised by contemporary proponents of rights to highlight the legitimacy of the universal relevance of such protections.[221] The primary limitation with using any interpretation of dignity to highlight the universal relevance of human rights is that no definition is universally accepted. Moreover, the broadness of the scope of dignity invites the adoption of an overly restrictive communitarian approach by any given state (which cannot guarantee protection) and results in judicial inconsistency amongst those states where human rights protections are presently enforced.[222] This ultimately undermines the legitimacy of the universal applicability of human rights as *guaranteed* protections of vital human interests. Thus, it is clear that the concept of dignity is sub-optimal to the objective of providing a universalisable foundation for human rights. Instead, it has been argued that it is preferable to maintain that the foundational

[220] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 56.
[221] For an effective summary of this position see Marina Svensson who explains 'notions of dignity, however defined, can be found in all societies, which saves the universalism of human rights'. Marina Svensson, *Debating Human Rights in China: A Conceptual and Political History* (Roman & Littlefield Publishers 2002) 33.
[222] See Christopher McGrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 The European Journal of International Law 655.

principles of the individualistic approach to dignity are capable of validating the idea of universal human rights, whilst accepting that a pragmatic approach to balancing interests is necessary to afford the concept legitimacy in practical terms. This identifies a need to communicate these principles in a more accessible way than presented in existing international human rights treaties. This can most obviously be accomplished by focussing on the purpose of the protections they promote. As mentioned, this chapter has suggested that this purpose relates to actualising normative agency in accordance with the account proposed by James Griffin. This approach is argued to be preferable to alternative theoretical accounts as it looks to focus the discourse towards securing only those interests necessary for a 'functioning human agent',[223] rather than seeking to enable 'a good or happy or perfected or flourishing human life'.[224] It has therefore been suggested that Griffin's approach is more appropriate in terms of providing a realistically universalisable foundation for human rights (as it effectively encapsulates the justificatory purpose of such protections in a manner less prone to illegitimate rights inflation). In accordance with this, the pressing need for contemporary proponents of human rights is therefore to rearticulate the idea of human rights in a manner more capable of encapsulating the principles which justify their universal significance and applicability. That is, to formulate human rights as entitlements to specific vital interests; as claims to those things which are necessary to effectively enable or protect normative agency. As Waldron suggests, 'protecting rights *vindicates* our normative agency'.[225] It is further suggested that this may be accomplished by reimagining human rights as foundational claims (as we will address in greater detail in subsequent chapters).

It has also been determined that the 'subject' of rights is multifaceted, comprising two forms; those who are entitled to claim (the abstract concept) and those who are actually capable

[223] James Griffin, *On Human Rights* (Oxford University Press 2008) 35.
[224] ibid 34.
[225] Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2015) 20-21.

of doing so (the political construct). Whilst, historically, attempts to establish a gradation of human worth (and thus access to protections) was based on alleged racial, social, or biological distinctions, in modern contexts this gradation arguably takes place within the law (e.g. based on distinctions between law-abiding citizens and actual or suspected criminals). A security dominated discourse affords greater opportunity to sovereign powers to exclude individuals from having access to human rights protections (e.g. for those suspected to be involved in terrorist activity). It has therefore been suggested that gradations based within the law are arguably more fatal to the concept of universal rights (as they are more defensible than gradations based on the prejudicial distinctions of the past). However, it has been reasoned that the process of regulating access to human rights protections based on genuine security concerns is not incompatible with the idea of universal rights (a point which will be developed further in subsequent chapters). In defence of this conclusion in accordance with the purpose of this thesis (i.e. to defend the idea of universal human rights in contemporary contexts), it was suggested that the universality of rights actually refers to an absolute entitlement to claim, alongside the universal potentiality of their fulfilment.

Having defined the concept of universal human rights - and as a means of reaffirming our conclusions - starting with the next chapter this thesis will consider how to construct a universally realisable account of human rights within the modern context.

3 Justifying Universal Rights: Historical and Contemporary Perspectives

3.1 Introduction

The preceding chapter examined general philosophy underpinning the idea of universal human rights. This concluded by suggesting that - in accordance with the concept of universality - it is appropriate to adopt the approach proposed by Griffin and interpret human rights as entitlements to the protection of those interests which enable 'a functioning human agent'.[226] These interests were themselves loosely defined as being those which seek to enable or ensure autonomous human agency. In building on this analysis, Chapter Three explores the evolution of the practical implementation of the concept of human rights in greater detail. As noted previously, the modern era is defined by a perceived conflict between universal rights and national security. Contextual circumstances relating to this development have rendered a theoretical or philosophical defence of the idea of absolute claims increasingly difficult. Of paramount significance is the challenge of identifying a 'universalising' foundation for such claims which elevates them beyond other individual/state needs or interests. Primarily, as we discussed in the previous chapter, many of these efforts have focused on the idea of a universal human dignity (the limitations of which have previously been addressed). As consequence of these developments, Marina Svensson notes:

> Many scholars have thus abandoned the search for a foundation to human rights since they believe that a satisfactory justification is impossible and that one can do quite nicely without it.[227]

Instead, modern proponents of human rights can attempt to justify the legitimacy of this concept purely on the practical results of their implementation (and thus abandon their

[226] James Griffin, *On Human Rights* (Oxford University Press 2008) 35.
[227] Marina Svensson, *Debating Human Rights in China: A Conceptual and Political History* (Roman & Littlefield Publishers 2002) 32.

philosophical/theoretical roots). An additional advantage of adopting a result based approach is that it is, by definition, pragmatic. There is therefore greater scope for reducing the implementation of fundamental protections as well as providing greater means of interfering with them in the event that they are seen to conflict with other fundamental national interests (such as security).[228]

3.1.1 Chapter Three Structure: Key Aims and Objectives

The purpose of this chapter is to consider potential means of avoiding the adoption of such an overly restrictive approach to implementing human rights. Once again, this will be structured into several smaller investigations. Ultimately, there are four key outcomes to be achieved in this chapter:

1. This chapter will begin by contextualising two prominent theoretical justifications for the concept of human rights known as deontological and consequentialist approaches respectively. Through this investigation this chapter will consider various limitations with each approach and argue that reliance on either one exclusively inhibits the prospect of universalisable human rights. The conclusions of this analysis will establish that, whilst a consequentialist approach may be more practical – in the sense that it is easier to support – it provides no guarantee of protection for human rights in practice (as a results-based approach can be used to prioritise the interests of the state exclusively). In contrast, it will be seen that, whilst a deontological approach is more appropriate for the purpose of justifying human rights as universal *claims*, it is less capable of ensuring commitment to achieving their practical application (as it does not need to actually address the issue of their effective implementation). To reinforce these

[228] See Philip Ruddock, 'A New Framework: Counter-Terrorism and the Rule of Law' (2004) 16 The Sydney Papers 112.

conclusions, this chapter will next examine the famous rebuttal to the idea of inalienable rights by assessing the critique of Jeremy Bentham (3.2);

2. In looking to address these limitations and critiques with the objective of providing a more optimal justification for the idea of universal rights, this chapter will then consider the proposed 'perfectibility of law' with reference to some of the important philosophical works of Ronald Dworkin. In effect, this section will use Dworkin's proposal of objective moral truths[229] in order to establish a basis for accepting the perfectibility of the idea of human rights. Here it will be suggested that this idea is represented by accepting that law is evolutive, non-definitive, and contextually relevant. As such, the correct approach to legal issues is susceptible to change. It will be proposed that legitimate changes are those which conform to the underlying purpose of the law – that which Dworkin terms the 'general principles that underlie and justify the settled law …'.[230] In the context of human rights – and in accordance with the account of James Griffin addressed in Chapter Two – it is suggested that this purpose is reflected in attempts to actualise normative agency. Potential practical benefits of adopting this approach will then be considered in the context of the jurisprudence of the ECtHR. In essence, this section will determine that the legitimacy of the idea of human rights cannot be definitively disqualified (due to the contextual contingency of any prevailing interpretation). Moreover, this concept is also understood to be open to

[229] This is based upon Dworkin's 'right answer' hypothesis which suggests that there are objectively right answers to legal problems. In determining the nature of the 'objective answer' Dworkin maintained that the judiciary 'should try to identify general principles that underlie and justify the settled law … and then apply those principles …'. Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 143. The concept of legitimating principles will be used to justify the validity of prevailing interpretations of legal norms (including human rights) which are based upon sufficient contextual knowledge/understanding. Moreover, as this concept implies that 'right answers' may be contextually contingent, it acknowledges a need to continually assess the legitimacy of current interpretations/accounts, and thus the perfectibility of such norms.
[230] ibid.

further evolution and development in accordance with seeking more optimal fulfilment of its justificatory purpose (3.3);

3. To reinforce the benefits of this alternative approach, this chapter will then examine the history of human rights and the apparent acceptance of the definitiveness of prevailing interpretations of this concept (as well as the anticipated inevitability of the universal application of such protections). The dangers of adopting such a historicist outlook (where the eventual fulfilment of human rights is presupposed) will then be considered in the context of contemporary developments (centred on failed revolutions). These findings will be strengthened with an examination of Friedrich Nietzsche's proposed 'abuse of history'.[231] This denotes the idea that history is consistently utilised by present generations in order to further contextual objectives of the time (but in a manner which crucially distorts or misapprehends the contexts in which historical achievements were actually secured). This chapter will propose that the 'abuse of history', in the context of human rights, is represented by an oversimplification of the historical development of this concept as well as general acceptance of the definitiveness of contemporary accounts (as represented in relevant international treaties). In accordance with the theory of Nietzsche, this chapter will propose that ensuring the continuing relevance and sufficiency of the concept of human rights (as it pertains to universal realisability) is contingent upon adopting a 'critical' appraisal of the sufficiency of prevailing interpretations (in accordance with the justificatory purpose of this concept) (3.4);

4. This chapter will conclude by proposing that human rights are best understood as foundational claims (open to evolution and legitimate interpretations). In accordance

[231] Friedrich Nietzsche, *The Use and Abuse of History* (Macmillan for the Library of Liberal Arts 1957).

with the results of our investigation of the works of Dworkin, it will be proposed that no account of human rights may be regarded as definitive, and that legitimate evolution of this concept is dependent upon ensuring that any changes conform to the underlying justificatory purpose. Finally, and in accordance with the theory of Friedrich Nietzsche, it will be proposed that this legitimate evolution can also be ensured by consistently adopting a critical approach to assessing developments relating to changing interpretations of the concept of human rights itself (3.5).

3.2 Justificatory Foundations for Human Rights

Having outlined the concept of human rights in general terms with the preceding chapter, it is next important to address the issue of their purported universality in greater detail. Here, once again, it is notable that the idea of universal is multifaceted. This can take many different forms, covering issues as diverse as entitlement, substance, and application. When speaking of the universality of human rights, however, one is generally discussing their potential scope (which incorporates their entitlement and application).[232] The issue of a universality of substance (as it pertains to the substantive content of human rights) is in some sense underappreciated. Indeed, there appears to be a supposed obviousness in relation to this matter. Rights, once defined, are expected to mean the same thing for all peoples (and in all jurisdictions).[233] The practicalities of this are then brought into question when considering socio-economic protections (such as the right to education or to health) – as we will address in Chapter Four. The apparent unfeasibility of universally consistent application with regard to the standard of afforded protection can be appreciated with only a rudimentary understanding

[232] Jack Donnelly provides an effective summary of this approach when noting that human rights are understood to be 'held "universally" by all human beings … [with] near-universal applicability in contemporary society'. Jack Donnelly, *Universal Human Rights in Theory and in Practice* (Cornell University Press 2002) 1-2.
[233] 'Human rights are *equal* rights … [everybody] has the same human rights as everyone else …'. ibid 10.

of the economic (and technological) differences that exist between states.[234] A common conclusion from such analysis is to question the legitimacy of these protections as fundamental human rights. Or, indeed, is to adopt an approach similar to that of Talbott's, where the idea of 'fundamental human needs' is conceptualised in narrower terms (and where seemingly impossible/unfeasible claims – such as health – are rejected or ignored).[235]

The most essential objective for every account of human rights (or indeed natural rights) is to provide a sufficient justification for the universal entitlement attached to such protections (as addressed in Chapter Two). As example, the belief that human rights belong to all human beings equally by virtue of their being human.[236] However, in modern times this discussion has progressed to the consideration of more practical concerns. Namely, the question of how we are to secure the implementation of universal claims which are now largely accepted as being legitimate.[237] It is clear that for modern proponents of human rights it is no longer sufficient for the legitimacy of the concept to be acknowledged internationally. There is a further (superior) need of ensuring that such recognition is followed with firm commitments to protect these claims. Yet, the starting point still rests with supposing the legitimacy of the justificatory foundation of these protections.

3.2.1 Deontological and Consequentialist Accounts of Human Rights

Contemporarily, there appears to be two principal forms that a defence of the universal legitimacy of human rights may be expressed. Through either (a) deontological or; (b) consequentialist means respectively. Deontological accounts simply relate to many of the

[234] Jonathan Wolff, *The Human Right to Health* (W. W. Norton & Company 2013) 13-14.
[235] William J Talbott, *Which Rights Should Be Universal?* (Oxford University Press 2005) 135.
[236] Jack Donnelly articulates this point persuasively when he explains that human rights 'are *universal* rights in the sense that today we consider all members of the species *Homo sapiens* "human beings", and thus holders of rights'. Jack Donnelly, *Universal Human Rights in Theory and in Practice* (Cornell University Press 2002) 10.
[237] 'Human rights are universal in another sense: they are almost universally accepted, at least in word, or as ideal standards'. ibid 1.

theoretical/philosophical arguments we have previously examined within this thesis. It is fairly safe to suggest that amongst self-regarded human rights proponents the deontological approach has historically been the more frequently adopted of the two (a point reflected in the language of human rights treaties).[238] In contrast, the emerging influence (and attractiveness) of consequentialist accounts is a relatively recent development – and a reflection of the difficulties encountered with traditional deontological explanations. Notably, proponents of the consequentialist account do not need to support the concept of inalienable universal protections at all (or, indeed, recognise any underlying justification for their provision beyond their practical benefits). Instead, they simply have to acknowledge that individuals are better off when certain conditions are protected.[239] The merits (and limitations) with each approach will now be assessed in greater detail so as to determine their sufficiency in providing the concept of human rights with a robust philosophical foundation in modern times. We will begin by establishing the fundamental differences that exist between each approach:

i) A typical deontological (non-consequentialist) approach would assert that the universal applicability of rights can be philosophically justified, regardless of whether various cultures disagree with this assessment.[240] It would maintain that cultural disagreements are not justifiable, and cannot override the underlying legitimacy of the concept of universal rights, because they are intended to authenticate (and perpetuate) cultural, societal, and economical inequalities beneficial to those who make them.[241] Further it would hold that human rights represent morally objective claims, and refusal to acknowledge this fact is to deny self-evident truths. Ultimately, it would conclude that

[238] For a detailed account of this see Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalisation Era* (University of California Press 2008).
[239] Willian J Talbott, *Which Rights Should Be Universal?* (Oxford University Press 2005) 16.
[240] '[I]f we have good grounds or ascribing certain rights to human beings indifferently, there is no reason why we should forfeit or modify our commitment to those rights merely because others do not share it'. Peter Jones, *Rights (Issues in Political Theory)* (Palgrave Macmillan Press 1994) 28.
[241] Abdullah Ahmed An-Na'im, 'Human Rights in the Muslim World' in Patrick Hayden (ed), *The Philosophy of Human Rights: Readings in Human Rights (*Paragon House Publishers 2001) 327.

the universal applicability of human rights should be acknowledged as a worthwhile objective, irrespective of various objections to this position, because of the intellectual and moral integrity of their cause.

ii) Contrastingly, a typical consequentialist approach would assert that, irrespective of the effectiveness of philosophical justifications for human rights, they are legitimised simply due to the fact that individuals (and societies) are evidently better off when they are protected.[242] They would propose that discernible practical benefits of enforcement justify efforts to expand coverage, and would not need to accept or promote a particular list of rights as inalienable or philosophically justifiable protections. Instead, this account would be based on the assertion that certain interests, when protected, provide tangible benefits to both individuals and the state.[243] In this way, the content of protections is not fixed, in a definitive sense, but is instead adaptable to change dependent on the will of the state at any given time. Ultimately, proponents of this approach maintain that human rights are contextually valuable purely because they have practical benefits, and that no deontological justification is required.

Upon reflecting on this discourse, Richard Arneson suggested that a consequentialist approach is superior to philosophical accounts that are based on 'absolute' protections, not only because they are more practical, but because they provide greater protection to the interests of individuals:

> The proper doctrine that takes rights seriously would be a consequentialism of rights, not a deontology … as a consequentialist position assigns everyone the status of unignorability, meaning that when one is a potential beneficiary of an

[242] As Andrew Heard explains, for a consequentialist 'human rights are needed because they … prevent the awful repercussions of having no limits on the manner in which governments or groups may treat other human beings'. Andrew Heard, 'Human Rights: Chimeras in Sheep's Clothing' (1997) Simon Fraser University <https://www.sfu.ca/~aheard/intro.html> accessed 18 May 2018.
[243] Willian J Talbott, *Which Rights Should Be Universal?* (Oxford University Press 2005) 16.

> infringement of a right, one's interest may not be ignored in the moral calculation that determines what ought to be done all things considered.[244]

Indeed, a primary strength of a consequentialist approach is that it is seemingly easier to justify the worth of human rights when the legitimacy of such claims is founded on the tangible beneficial consequences of their application (or non-application). In practice, consequentialists identify a particular objective (e.g. a benefit they aim to secure) and work backwards to determine the best means of producing the desired outcome. When looking to balance competing interests, priority is generally to be afforded to those rights which will produce the greatest benefit. Thus, this position is influenced heavily by John Stuart Mills[245] and his seminal work *Utilitarianism*. As William Talbott confirms, for a consequentialist 'the reason that human rights should be universally protected is that a society in which human rights are guaranteed will do a better job of promoting well-being'.[246]

A negative implication of this stance is that, as addressed, the rigour of rights protection is determined by the level of benefit which results from their protection. As such it is possible that this protection will be restricted if and when greater benefit can be generated elsewhere. That is to say, if it is identified that protecting right X would generate a greater level of benefit than right Y, then efforts to protect right Y could be reduced. Indeed, the focus with this approach is to identify desired results, prioritise those which would produce the greatest level of benefit, and then distribute resources accordingly in order to provide the required protection.[247] An obvious critique here relates to the apparent vulnerability of rights protection that a purely consequentialist approach could provide. For example, a results-based approach would not seem to provide any *guaranteed* protection. Under such a model the commitment to

[244] Richard J Arneson, 'Against Rights' (2001) 11 Philosophical Issues 7, 19.
[245] John Stuart Mills, *Utilitarianism* (Hacket Publishing 2003).
[246] Willian J Talbott, *Which Rights Should Be Universal?* (Oxford University Press 2005) 16.
[247] A. J. Thomas classifies this as 'welfare consequentialism' and explains that such an approach is based on the 'differential distributions of scarce socio economic goods …'. A. J. Thomas, 'Deontology, Consequentialism and Moral Realism' (2005) 19 Minerva – An Open Access Journal of Philosophy 1, 17.

any given right must be impermanent to accommodate potential changes required by economic, political, or social developments. With limited resources, it would surely be the political climate of any given time – rather than the merits of the individual interests themselves – which would determine what benefits (and as such rights) are given precedence over others. Thus, as Douzinas might suggest, with this approach we essentially make 'the universal the handmaiden of the particular'.[248] The principal limitation of a consequentialist approach appears to be that when the legitimacy and applicability of an idea is determined solely by its practical benefits, it risks abandonment when these benefits are harder to identify, or become politically inconvenient to support.

Moreover, the decision to suspend rights will not necessarily be based upon appreciation of the wider interests of the right-holder, but, instead, can be justified in reference to the benefits such action provides to the governing powers of the state. Consequently, these protections would represent the purpose of human rights only superficially. Not only would the content of such claims be susceptible to alteration, but the commitment to enforce them would be entirely dependent upon the political will of the state. They would be open to democratic interference in the sense that particular rights could be suspended for political gain. Yet, as established in the preceding chapter, human rights, by definition, ought to be un-democratic in nature.[249] They are a means by which to keep state action from unjustifiably interfering with agency of individual members of society. They are not intended to provide a method of protecting certain interests only when it is politically convenient to do so. But rather, they

[248] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 138.
[249] Costas Douzinas, 'What Are Human Rights?*' The Guardian* (London, 18 March 2009) <http://www.guardian.co.uk/commentisfree/libertycentral/2009/mar/18/human-rights-asylum> accessed 18 May 2018.

represent a means of ensuring such interests are protected even when doing so is *inconvenient*.[250]

There is the further question of what the primary criteria for determining which rights ought to be prioritised should be. If right X provides direct benefit to *more people* than right Y but the *level of benefit* is greater with the latter, which of these would take precedence? For example, in the event of a conflict between freedom from torture and a right to health either one could seemingly be prioritised on the basis of *greatest* benefit. Whilst the former appears to represent a more serious protection - namely as a stalwart against tyranny[251] - it is arguably only relevant (in a purely practical sense) to a limited number of individuals in any given state (who are at risk of its violation). In contrast, whilst a right to health would have wide reaching implications and could provide some level of benefit to all individuals within the state, it is less cost effective and therefore arguably less practically realisable.[252] Therefore, with a consequentialist approach there appears to be continual (and uncertain) balancing act between the level of interest, the scope of benefit, and the cost of implementation. Consequently, this approach would seem to be inconsistent with the idea of universal human rights as guaranteed protections.

Conversely, a deontological (or non-consequentialist) position is one based on the belief that certain human features (such as autonomy, moral agency, and rationality) legitimise the universal relevance of rights.[253] A recurring critique of this approach relates to its inability

[250] ibid.
[251] Jeremy Waldron asserts that '[t]orture is seen as characteristic not of free, but of tyrannical governments … Torture may be something that happens elsewhere in the world, but not in a free country …'. Jeremy Waldron, *Torture, Terror and Trade-Offs: Philosophy for the White House* (Oxford University Press 2012) 224.
[252] In summarising this position Jonathan Wolff explained '[i]t does not seem plausible to think that every human being has the right to call on every other human to provide everything set out in the ICESCR, such as the right to education, or, indeed, the right to health [as] … most of these duties will fall on the state, and ultimately on the burdened tax payer'. Jonathan Wolff, *The Human Right to Health* (W. W. Norton & Company 2013) 13-14.
[253] James Griffin, *On Human Rights* (Oxford University Press 2008) 88.

to effectively limit the scope of the discourse. This, itself, results from the manner in which a deontological account attempts to justify human rights; personified by impressive, grandiose rhetoric and absolute claims. As Costas Douzinas and Conor Gearty explain:

> [The] ideological power of human rights lies largely in their ambiguity, the oscillation between real and ideal … [viewed] in this way, human rights are idealist, parts of a philosophy and practice of emancipation, the last great utopia of our age.[254]

By maintaining that certain aspects of humanity or human nature are, in and of themselves, capable of validating universal rights, deontological accounts seemingly discount the potential significance of the practical realisability of the resulting claims. Indeed, the immediate applicability of individual rights can have little relevance on the *strength* of a deontological approach. The merits of such a position are determined primarily by the veracity of the claims it makes in relation to the existence of universally relevant human traits or justificatory norms.[255] Therefore, the strength of a deontological position is compromised to the extent that, whilst proponents of this position will not necessarily ignore the significance that resulting benefits of the application of human rights could have on the legitimacy of the concept itself, they are not required to establish a practical means of achieving it. The relevance of rights would not be held to depend upon whether or not it is feasible to apply them – either with regard to economic or political concerns – but simply on whether the *interest* itself is legitimate and deserving of protection. As a result, a deontological account will not be invalidated simply by highlighting present incompatibilities with the concept of universal (or indeed regional) application. In this way, it is arguably easier to dismiss because it does not

[254] Costas Douzinas and Connor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014) 4-5.
[255] This is represented with the idea that all human beings have an equal entitlement to human rights simply on account of being equally human. See Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2002) 10.

need to directly address practical obstacles which prevent the implementation of individual claims.

3.2.2 Limitations with Theoretical Foundations: Rights as 'Nonsense Upon Stilts'

To develop this further it is useful to return to the work of Jeremy Bentham - a renowned utilitarian and sceptic of the concept of natural rights. In *Anarchical Fallacies*,[256] a direct response to the DRMC, Bentham attacked the idea of inalienable protections which could exist in the absence of a state. To his mind these rights were 'dangerous nonsense', because the ability to fulfil them (and protect the corresponding interests) was entirely dependent upon the commitment of state action.[257] Furthermore, and irrespective of this fact, as they were held to be inviolable (and as such no deviation from their enforcement was to be justifiable) they undermined the legitimacy of the idea that certain interests are worthy of protection by preventing the state from acting in times of emergency or war (thus risking the protection of all interests – universal or otherwise):

> And of these rights, whatever they are, there is not, it seems, any one of which any government can, upon any occasion whatever, abrogate the smallest particle.[258]

Bentham saw the idea of natural rights as a logical fallacy. Not only were they impossible in a practical sense – as their fulfilment was dependent upon both the existence of a state and a permanent commitment to enforce them (which itself was not desirable and could not be guaranteed in any event) – but they were contradictory. They made impractical demands

[256] Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843) 489-534.
[257] ibid.
[258] ibid 501.

for the protection of vital freedoms in an attempt to prevent the state from acting freely (even if doing so was actually in the interests of the population at large).[259]

Notably, Bentham's critique of natural rights specifically related to the concept of inalienable, universal protections as defined within the DRMC. The legitimacy of the *idea* that certain interests ought to be protected was not directly criticised. Rather, it was a specific means of attempting to realise their protection that was rejected. Bentham maintained that the language adopted within declarations of natural rights deprived them of legitimacy by expanding their scope beyond the possibility (or desirability) of fulfilment. As he suggests, this results from '[u]sing, instead of *ought* and *ought not*, the words *is* or *is not* – *can* or *can not*'.[260] Furthermore, Bentham explained that the identification of a significant need does not automatically give rise to a means of ensuring it is provided for: 'want is not supply - hunger is not bread'.[261] He saw the language of natural rights as being useful only in the sense that it could articulate desired actions (or inactions). It could identify social inequalities deserving of attention.[262] However, it could not, in Bentham's view, realistically represent legally enforceable moral claims. This is true simply because the law acts in accordance with the governing powers of the state. It was for this reason that Bentham concluded '*[r]ight*, the substantive *right*, is the child of law: from *real* laws come *real* rights …'.[263] Whilst it may be reasonable to suggest that governing powers ought to act in the interests of the state – including, but not entirely determined by, the well-being of the population, it is important to realise that the capacity of these powers to fully realise this well-being is restricted by various social,

[259] Bentham persuasively articulated this argument as follows: 'That in proportion as it is right or proper, i.e. advantageous to the society in question, that this or that right – a right to this or that effect – should be established and maintained, in that same proportion it is wrong that it should be abrogated: but that as there is no right, which ought not to be maintained so long as it is upon the whole advantageous to the society that it should be maintained, so there is no right which, when the abolition of its advantageous to society, should not be abolished'. ibid.
[260] ibid 524.
[261] ibid 501.
[262] ibid 524.
[263] ibid 523.

economic, and political limitations. As such, even in accepting a responsibility to redress starvation, such powers will not necessarily be capable of doing so. Identifying that all people need food to survive, and then declaring a right for all to such food on this basis (demanding the state provide it), cannot affect the realisability of this claim (as this is determined by political, social, and economic interests beyond their control). This would remain true regardless of whether the state was prepared to accept the legitimacy of this claim as a 'right' or not.

For Bentham, the fallacy of rights relates to the wilful ignorance accepting them demands with regard to the practical realities of securing their objectives.[264] They are demands to all and everything with no appreciation of how they are to be enabled. Moreover, as they are purely demands to things human beings are held to 'need', they instil in the hearts and minds of the impoverished, disenfranchised masses a desire to force change and revolt when their desires are not met (irrespective of whether a state is willing to accept a responsibility to meet them, but is incapable of immediately doing so due to a variety of other factors).[265] The contemporary significance of this critique can be appreciated when considering the ethereal, indefinable character of human rights in the context of the 'abstract subject'. They are, for many peoples, literally no more than claims to a hypothetical – an enhanced quality of life – which, even when accepted as a legitimate, cannot be guaranteed. In this way, as Douzinas explains:

> Human rights statements are therefore prescriptions: people are not free and equal but they ought to become so; people do not have a right to life, they ought to be granted the necessary means for their survival. Their success depends on political will and the social conditions within which the equality and life maxims are to be fought for. Equality is a call for action not a description of a state of affairs.[266]

[264] ibid 501.
[265] ibid.
[266] Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.

In summary, Bentham claimed that natural rights encourage impossible demands, which, when unrealised, cultivate a desire to enact violent upheaval toward these ends. The ultimate irony is that in encouraging the removal of state governance natural rights ultimately undermine the very interests they aim to protect. As mentioned, the protection of all interests, universal or otherwise, requires the existence of a stable government committed to the aim of protecting them. After a revolution, it cannot be certain that the new governing forces will accept such responsibility. Yet the interests of many individuals are certain to be violated during the conflict itself (including those of the revolutionaries).[267] In support of this, it is interesting to note that the French Revolution, purposed on the supposed legitimacy of natural rights, ultimately resulted in facilitating the transformation of France into an imperialistic state under the governance of Napoleon Bonaparte.[268] Natural rights as the manifestation of *liberté*, *égalité*, and *fraternité* had inadvertently helped to displace the Aristocracy only to replace it with an Emperor. Costas Douzinas suggests that this dichotomy was exemplified by the fact that 'imperialism in the Napoleonic wars, in which the French nation claimed to be the expression of humanity and to spread through conquest and occupation its civilising mission'.[269] Thus, a revolution which was premised on securing rights of individuals, indirectly made possible the conquest of other European states (with wanton disregard for the interests of the populations of these states).

[267] Jeremy Bentham famously suggested that idea of natural rights leads individuals to violence even 'against the government they themselves were pretending to establish – even that, as soon as their own reign should be at an end … Our will shall consequently reign without control …'. Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843)) 501.

[268] It is also interesting to note that it was in the aftermath of the French Revolution that the concept of 'terrorism' first emerged. During the so called 'Reign of Terror', Maximillian Robespierre famously exclaimed that '[t]error is nothing but justice, prompt, severe and inflexible; it is therefore an emancipation of virtue'. For an excellent account on evolution of the concept of terrorism see Michael Dunning, M, 'Terrorism and Civilisation: the Case for a Relational Approach' (2016) 28 Belvedere Meridionale 39.

[269] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 161.

3.3 Dworkin & the Proposed Perfectibility of Law

In considering alternative means of supporting the idea of the universality of human rights without the need to restrict the discussion to purely consequentialist or deontological approaches, it is helpful to examine the work of Ronald Dworkin. For our purposes, we are interested in an implication stemming from what is known as Dworkin's 'right answer' approach (discussed below) that legal knowledge is inherently perfectible. Principally, this approach discourages regarding the law as an objective instrument which is inherently moral. Instead, Dworkin proposes that laws moral goodness – and sufficiency - is contingent upon consistent application which reflects 'general principles that underlie and justify the settled law …'.[270] As legal knowledge and understanding are continually evolving, it is suggested within this section that these general principles may provide means by which the legitimacy of such progression can be determined. It is further suggested that legitimate progression/evolution can be seen to represent the 'perfectibility' of legal norms (and ideals). Ultimately, this section will argue that identifying the perfectible nature of legal norms allows us to insulate them from the possibility of complete disqualification. It will be shown that this insulation is a logical result of the contextual contingency of legal knowledge and social standards. In support of this position we will draw from another significant philosophical construct of Dworkin – 'Judge Hercules', which represents the idea of the perfect adjudicator. Judge Hercules was defined by Dworkin as 'a lawyer of superhuman skill, learning, patience and acumen'.[271] In effect, Judge Hercules can be seen to represent the judicial manifestation of the contextual perfectibility of law. He is wise and knowledgeable and, as he 'accepts the main uncontroversial constitutive and regulative rules of law in his jurisdiction',[272] it should also be understood that he has

[270] Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 143.
[271] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 132.
[272] ibid.

comprehensive appreciation of the moral and jurisprudential approaches of the present time. In addition, as his jurisprudential approach to deciding difficult or novel cases is to be based on 'refining the constitutional theory he has already used',[273] it is proposed that he must also have considerable appreciation for jurisprudential approaches of the past (in order to understand how the law has already evolved and is thus capable of being developed further).

In this way, his decisions may be interpreted as being objectively justifiable – in the sense that they are reflective of 'superhuman' knowledge and understanding, and as such represent the most optimal appreciation of the law (and its legitimate uses) possible at any given time. As previously established, when deliberating on any legal issues, Judge Hercules will seek to resolve them in a manner which is consistent with a contextually optimal level of understanding of accepted legal precedents/statutes (so far as it relates to conformity with established legal norms determined to be sufficient). His decisions would also entirely appropriate given the specific circumstances of the case. This is reflected in the fact that:

> Hercules does not first find the limits of law and then deploy his own political convictions to supplement what the law requires. He uses his own judgement to determine what legal rights the parties before him have, and when that judgement is made nothing remains to submit to either his own or the public's convictions.[274]

Finally, it should be noted that, whilst he would not be unduly influenced by popular public opinion when reaching his verdicts,[275] his decisions will reflect appreciation of the (evolving) social standards of the time. This is because, as Dworkin confirms, 'when Hercules fixes legal rights he has already taken the community's moral traditions into account'.[276]

In effect, comprehensive appreciation of the evolution of law (and legal principles), as well as of accepted social and political standards of the age, allows Judge Hercules to reach the

[273] ibid 144.
[274] ibid 153.
[275] Ronald Dworkin confirms that Judge Hercules 'will not submit to popular opinion …'. ibid 158.
[276] ibid 153.

'right' solution, even in difficult cases. It is reasonable to regard these decisions as being 'right' simply because, as we have seen, they will be based upon the most complete level of knowledge, skill, and understanding possible within the specific contexts with which they are made. This reflective approach is predicated on the presumption that there are no legal questions which cannot be answered in a satisfactory manner. As Dworkin attests, [f]or all practical purposes, there will always be a right answer in the seamless web of our law'.[277] Law is thus perfectible in the sense that it is open to evolution. This is evidenced through the creation of 'new' solutions or changing appreciation of known legal concepts. The legitimacy of these developments may be determined by assessing their conformity with the aforementioned principles that 'underlie and justify the settled law'.[278] Ultimately, this process contributes to the continual completion of law as it pertains to its sufficiency at responding to legal issues.

3.3.1 The Perfectibility of Law in Practice: Examining Approaches of the ECtHR

As an example of this approach within human rights law, and as way of further evidencing its relevance to this thesis, we can reference the evolution of the substantive scope and meaning of specific human rights claims. For our objectives, this will relate to a brief examination of Article 8 (Right to Respect for Private and Family Life)[279] in conjunction with Article 14 (Prohibition of Discrimination)[280] of the ECHR, in relation to the issue of homosexual adoption.

In *Fretté v. France* (2002),[281] the court determined that no violation of the aforementioned convention rights had occurred by France denying the claimant, who was a

[277] Ronald Dworkin, 'No Right Answer?' in P. M. S Hacker and J Raz (eds), *Law, Morality & Society* (Oxford: Clarendon Press 1977) 84.
[278] Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 143.
[279] Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No.11 and No.14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005 (ECHR) art 8 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 18 May 2018.
[280] ibid art 14.
[281] (2002) 38 EHRR 438.

single homosexual man, the ability to adopt. This is because the determination had been made in accordance with weighing the interests of the adoptable children (and thus a legitimate aim),[282] and reflective of the accepted views at the time (as it pertained to lack of consensus from psychiatrists and psychologists on the risks posed to children by this course of action).[283] However, in *E.B. v. France* (2008),[284] the court found that disallowing a homosexual woman who was living with another woman from adopting, when single heterosexuals were able to do so, did represent unjustifiable interference with the enjoyment of the claimant's convention rights. In reaching this decision, the court noted the fact that the claimant's sexual orientation had been the decisive determining factor in the denial of the opportunity to adopt, and that this therefore rendered the decision incompatible with the convention.[285]

Despite obvious factual differences between these cases, it is evident that changing social attitudes had also influenced the contrasting verdicts of the court (as evidenced by their referral to the 'living instrument' principle – which we will examine below). Importantly, as both decisions were reflective of accepted understanding of the law when they were delivered, according to the approach of Judge Hercules, it is reasonable to regard them as representing the 'right' solution. Indeed, the apparent development of law embodied with *E.B.* does not invalidate the legitimacy of the decision in *Fretté*. This is because, as we have established, the

[282] This relates to the concept of proportionality and the matter of permissible interference with convention based protections. In essence, this holds that any interference must be prescribed by law, in pursuit of a legitimate objective (e.g. protection of public morals/the rights of others), and necessary in a democratic society (e.g. proportionate). An effective summary of this has been provided by Yukata Arai-Takahash who confirms that '[the] Strasbourg organs have consistently held that the principle of proportionality is inherent in evaluating the right of an individual person and the general public interest of society. This means that a fair and reasonable balance must be attained between those two countervailing interests'. Yukata Arai-Takahash, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 14.

[283] 'It must be observed that the scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents …'. *Fretté v. France* (2002) 38 EHRR 438 [42].

[284] (2008) 47 EHRR 509.

[285] '[T]he Court cannot but observe that, in rejecting the applicant's application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention …'. ibid [96].

law, and legal understanding, are perfectible and evolutive. Furthermore, this perfectibility is contextually contingent – allowing for the 'correct' interpretation of law to be continually determined by identifying its conformity with accepted understanding of legal rules and precedents of the time (as well as with their underlying justificatory principles). In the context of human rights law, this is encapsulated within the 'living instrument' principle which was demonstrated in the aforementioned cases. Indeed, in reaching their verdict in *E.B.*, the court reiterated the importance of this principle by confirming that 'the convention is a living instrument which must be interpreted in light of present day conditions'.[286] The implication of this is that the 'right' answer to any legal issue will be relative (and non-definitive). Crucially, however, this apparent relativity will not undermine the legitimacy or significance of past 'right' answers. This is because, theoretically at least, these answers would themselves have been based upon the sublimation of accepted legal understanding which preceded them (e.g. commensurate with Hercules 'refining' of the law). As such, they would have provided validation of the process through which contemporary approaches are developed (e.g. by building upon established legal knowledge).

From our brief examination of the abovementioned cases, we see that acceptance of the idea of rights which retain the capacity to evolve in relation to their substantive content is clearly reflected in jurisprudence of the ECtHR. The legitimacy of such evolution, as well as of the corresponding obligations placed on states regarding the scope of protection these rights require, is also governed by various techniques developed by this same court. This is perhaps most notably represented by the concept of subsidiarity – specifically in accordance with the

[286] ibid [92]. The 'living instrument' principle was first established in the case of *Tyrer v. the United Kingdom* (1978) 2 EHRR 1.

margin of appreciation doctrine.[287] Principally, subsidiarity provides that the authority to secure convention rights (as well as to decide what should rightfully constitute the substantive scope of such rights) rests, in the first instance, with each individual member state (allowing the ECtHR to intervene only when member states demonstrate an inability to secure a sufficient level of protection on their own). Similarly, the margin of appreciation doctrine denotes the level of deference provided to member states by the ECtHR when interpreting and applying Convention rights (which can be either wide or narrow depending on the relevant issue).[288] Thus, these concepts are of particular importance for controversial matters whereby the adoption of an 'absolutist' approach by the ECtHR - that is to say one which could look to establish a universal standard of protection on matters where no universal consensus exists - is likely to undermine the integrity of the ECHR itself.[289]

In theory, effective usage of these concepts will allow for varying degrees of protection amongst member states which is reflective of their own specific values, whilst still conforming with a basic (universally shared) standard of substantive protection. In practice, the ECtHR's attempts to regulate the sufficiency of differing interpretations of rights (particularly in relation to the potential scope of such protections) have heavily relied upon various accounts of what is known as 'consensus analysis'. Such analysis generally represents the view that legitimate

[287] For an authoritative examination of the effectiveness of these techniques within the context of same-sex partnerships see Helen Fenwick, 'Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?' (2016) 3 European Human Rights Law Review 249.

[288] This concept, now integral to the workings of the ECtHR, was first considered in *The Cyprus Case (Greece v The United Kingdom)* (1958-59) 2 Yearbook of the European Convention on Human Rights, 172-197.

[289] Specifically, by refusing to endorse interpretations of rights which are unlikely to be adopted by certain member states (for example, such as in relation to matters concerning same-sex couples). On this matter, Fenwick notes that the fact that the ECtHR is reliant on member states voluntarily choosing to abide by its judgments is reflected in its jurisprudential approach which 'encapsulates its struggle to maintain a balance between preserving its legitimacy as on one hand the guardian of core Convention values, and on the other, in positivist terms, as a credible and authoritative Court whose judgments are not disregarded'. Helen Fenwick, 'Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?' (2016) 3 European Human Rights Law Review 249, 271.

interpretations of Convention rights relate to those which are shared by other member states.[290] As Helen Fenwick has observed, this process has historically been represented by a choice 'between relying on a restrictive model of the consensus, based on identifying a clear majority of states in favour of a particular practice, enshrined in their laws, or on a more liberal one, based on identifying a trend …'.[291] Crucially, the rigour of the consensus analysis adopted by the ECtHR will have significant implications for the margin of appreciation subsequently afforded to affected member states, and thus clearly impact upon the standard of protection they will be expected/obligated to provide. For example, the adoption of a liberal approach affords member states a wide margin of appreciation, whereby it is easier for them to justify non-compliance with more expansive interpretations of rights (when, for example, and in accordance with the 'living instrument' principle, the scope of protection is seen to have extended beyond that which was originally envisioned).[292] Conversely, by adopting a more strict approach, the ECtHR significantly reduces the margin of appreciation afforded to member states, and therefore requires affected states to provide stronger justification for non-compliance with emerging standards/norms.[293]

Ostensibly, allowing for variations of consensus analysis should provide the ECtHR with optimal means of regulating the evolution of the substantive content of rights; specifically by affording them opportunity to draw upon whichever account is most likely to provide the

[290] It is important to note that there are different means by which the ECtHR can look to establish the existence of consensus. Initially, as reflected in the judgment of *Handyside v. the United Kingdom* (1976) 1 EHRR 737, the Strasbourg Court restricted itself to the concept of European consensus (e.g. pertaining to identifying consensus within the geographical region of the member states of the ECHR themselves). However, as personified by the judgment delivered in *Goodwin v. the United Kingdom* (1996) 22 EHRR 123, the Court has subsequently embraced a wider approach which incorporates the idea of international or global consensus (e.g. making use of established/emerging trends in other parts of the world). More recently, as seen in the case of *Oliari and Others v. Italy* [2015] ECHR 21, the ECtHR may now also make use of the idea of 'internal' consensus – which simply looks to establish whether a consensus of opinion is held within a specific state.
[291] Helen Fenwick, 'Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?' (2016) 3 European Human Rights Law Review 249, 252.
[292] See *Rees v. the United Kingdom* (1987) 9 EHRR 56.
[293] See *Vallianatos v. Greece* (2014) 59 EHRR 12.

greatest level of protection in any given case. However, as Fenwick duly notes, in practical terms this also effectively provides the Strasbourg Court means by which to recuse themselves from demanding a greater standard of protection from member states – even if such demands are justified - on matters relating to controversial issues (wherein there can presently be no realistic expectation of cooperation from certain parties).[294] This outcome can result from the adoption of whichever approach happens to provide the greatest level of deference to the member states themselves on the relevant issue (and as such require the least amount of judicial scrutiny to their justifications for non-compliance with established/emerging norms).

Despite evident limitations with their current utilisation, we may still usefully highlight these techniques in support of the argument that the *correct* interpretation of the protective scope of human rights is contextually contingent – open to evolution - and thus non-definitive in nature (a position which, as we have now seen, is arguably accepted by the ECtHR itself). Moreover, critical consideration of these techniques provides an alternative means by which we may examine the practical significance of the idea of the 'perfectibility' of law. Specifically, by providing an additional method for assessing the sufficiency of the ECtHR's approach to securing Convention based rights. As mentioned in previous sections of this chapter, under a Dworkinian approach the 'right answer' to a legal question (e.g. the correct judgment in a case) will be one which reflects the 'general principles that underlie and justify the settled law …'.[295] Therefore, once a particular evolution/interpretation has been accepted as valid (as evidenced by judgments in case law), any deviation from this standard of protection - which is itself not based on a subsequent development/evolution of understanding (for instance, as witnessed *E.B.*

[294] Fenwick concludes that this is ultimately reflected in the fact that '[t]he Court's manipulation of the consensus doctrine is being deployed at present to seek to avoid confrontations' with certain member states. Helen Fenwick, 'Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?' (2016) 3 European Human Rights Law Review 249, 270.
[295] Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 143.

v. France) - cannot be seen to be justifiable. In this context, it is possible for us to question the adequacy of the ECtHR's approach to regulating the evolution of the scope of Convention based rights (as reflected by its use of the aforementioned subsidiarity-related mechanisms). This is because, in practice, the criteria developed by the Strasbourg Court for the purposes of determining legitimate evolution in relation to the substantive content of rights has not been restricted to the *merits* of each claim (e.g. reflective of Dworkin's 'right answer' approach), but has instead also been influenced by pragmatic considerations pertaining to the *nature* of the ECHR itself (e.g. the general reliance on voluntary participation from member states/lack of consensus on certain controversial issues). Thus, whilst the ECtHR's desire to protect against rights absolutism is laudable, the manner in which this is currently achieved is arguably deserving of improvement and/or revision.[296]

To consider this further, it is useful to briefly examine two additional ECHR cases relating to the question of legitimate interference with Article 10 of the ECHR (Freedom of Expression). The cases are those of *Müller and Others v. Switzerland* (1988)[297]and *Otto-Preminger-Institut v. Austria* (1994).[298] The former regards the confiscation of provocative artwork depicting human beings (primarily men) engaged in various sexual acts – action prompted *inter alia* by complaints received from the father of a minor who reacted 'violently' to exposure to the artwork when on public display.[299] In its judgement, the Strasbourg Court noted that:

> [T]he general public had free access to [the paintings], as the organisers had not imposed any admission charge or any age-limit. Indeed, the paintings were

[296] Fenwick ultimately reaches a similar conclusion in advocating for 'a more courageous stance from the Court' in future cases (whereby it approaches justifications for non-compliance with emerging - or firmly established - norms with a greater degree of scrutiny). Helen Fenwick, 'Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?' (2016) 3 European Human Rights Law Review 249, 271.
[297] (1988) 13 EHRR 212.
[298] (1994) 19 EHRR 34.
[299] (1988) 13 EHRR 212 [12].

> displayed in an exhibition which was unrestrictedly open to - and sought to attract - the public at large.[300]

These facts were influential in the Court ultimately finding in favour of the state (and acknowledging that there had been no breach of Article 10). Essentially, it was observed that the claimants had not acted sufficiently in accordance with the 'duties and responsibilities' required for the legitimate enjoyment of this Convention right.[301] Specifically, they had not taken sufficient action to minimise the possibility of causing unnecessary offence (by, for example, imposing an age restriction or charging an entrance fee).

In contrast, the latter case subsequently involved the confiscation of a satirical movie - entitled *Das Liebeskonzil* - which depicted various Christian figures (such as God, Jesus Christ, and the Virgin Mary)[302] in a manner regarded by the Catholic Church as blasphemous.[303] Crucially, as various restrictions *had* been in put in place to protect against the possibility of causing offence, the claimants in this case could seemingly satisfy the same criteria the Court relied upon in *Müller* when finding in favour of the state. For example, the movie was to be shown late at night, only to those over the age of 17,[304] and who were prepared to pay an entrance fee.[305] Consequently, it would appear that sufficient consideration had been given to the aforementioned 'duties and responsibilities' enshrined in Article 10 (as defined in *Müller*). Despite this, the Court still found in favour of the defendant state, concluding that there had been no violation of this protection. In justifying this outcome, the Court noted that

> Although access to the cinema to see the film itself was subject to payment of an admission fee and an age-limit, the film was widely advertised. There was sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature; for these reasons, the proposed screening

[300] ibid [36].
[301] ibid [34].
[302] (1994) 19 EHRR 34 [16].
[303] ibid [11].
[304] ibid [10].
[305] ibid [9].

> of the film must be considered to have been an expression sufficiently "public" to cause offence.[306]

As with *Müller*, the court ultimately afforded the Austrian authorities a wide margin of appreciation on this issue, despite obvious differences with the merits of each case. In doing so, they arguably acted in manner which is inconsistent with the 'right answer' approach discussed above. Indeed, it would appear that the decision in *Otto-Preminger-Institut* contradicted the justification for the earlier judgment. It is clear from the explanation provided for the later decision that the Court was reluctant to risk offending the member state in question.[307] Thus, in comparison with the approach of Judge Hercules, this decision was not truly 'objective' – that is to say, it does not appear to be representative of an optimal appreciation of the 'settled law' (e.g. the jurisprudence of the Strasbourg Court itself). Instead, this judgment reflects an apparent misuse of the margin of appreciation doctrine – wherein the determination of the required adoption of either a wide or narrow margin is not restricted to the relevant issues (or facts) of each case - and therefore highlights limitations with the current approach to securing a sufficient level of protection/enjoyment of Convention rights.

3.3.2 Implications of the Perfectibility of Law for Idea of Universal Human Rights

In reflecting on this analysis, there are arguably two principal aspects of Dworkin's interpretation of law which are most significant to this thesis. The first is the potentiality of definitive, justificatory legal principles. This is represented in the idea that there are absolute, objective, and discoverable moral truths which may be used to determine the validity of the development of law. Here, the legitimate development of law should always be in accordance

[306] ibid [54].
[307] This is clearly evidenced by the Courts assertion that 'national authorities … are better placed than the international judge' to assess the need for restrictions with the enjoyment of Convention rights. ibid [56].

with these truths.[308] A potential limitation with attempting to establish the validity of norms and ideals on the basis of a determinate 'truth' was addressed by Douzinas when he suggested that the concept of 'truth' implies permanence – the acceptance of definitive, fixed interpretations:

> Truth's obsession with a stable, fixed world, without conflict and contradiction reveals a moral prejudice. Truth as 'the one', the coherent, the fixed, is also conceived as the *good*. In this sense knowledge becomes law.[309]

Truth, by definition, must be resistant to change. Yet, the idea of the perfectibility of law is rooted in its apparent capacity to evolve. Moreover, the objectivity of any historical account of morality will be contextually contingent: predicated on an acceptance of knowledge and understanding which is susceptible to change (as addressed above in relation to the relevant ECHR cases). Consequently, the enduring perfectibility of law, and human society, must logically result in the diminishment of the moral worth of knowledge which is accepted at any given time. At best, such knowledge can only ever be regarded as reflecting an imperfect 'truth' – representing a relatively sufficient appreciation of relevant concepts. However, the importance of seeking to identify underlying justificatory principles relates to their ability to determine the legitimacy of developments of the law. These principles represent 'truths' only to the extent by which they are capable of articulating the overarching purpose of the law (and laws). Whilst understanding of these purposes cannot be definitive (as such understanding is itself susceptible to progression/development), they represent the potentiality of a 'complete' interpretation of legal concepts and ideals. This will be developed further in subsequent

[308] An excellent summary of the logic behind this position was provided by Hugh Baxter who explained that Dworkin 'sees morality as a "veto over law", in the sense that if a purported addition to law is morally outrageous, it cannot count as valid law'. Hugh Baxter, 'Dworkin's One System Conception of Law and Morality' (2010) 90 Boston University Law Review 857, 858.
[309] Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Hart Publishing 2005) 51.

sections of this chapter in an attempt sublimate justificatory accounts of the universality of human rights.

The second significant aspect of Dworkin's approach worthy of further discussion relates to the importance of the contextual contingency of ideals (represented here in the form of morality and law). For any proposed legal solution, recognition of its validity will be dependent upon it being accepted as legitimate within existing law (and legal precedent). Yet, as noted, such acceptance is transitional in nature. The 'accepted' legal approaches of a particular age are formed, in part, by sublimating the approaches of those that preceded it. Furthermore, as society and jurisprudence continue to develop, these approaches will themselves continue to change. Under Dworkin's approach - if consistent with the underlying justificatory principles of law - these changes may be interpreted as representing a progressive 'perfecting' of the law (as well as of our understanding of this law) – in that they contribute to the continuing enhancement of laws sufficiency.[310] As we have established, Judge Hercules himself is seen to represent the ideal that judicial decisions should be based upon complete appreciation of the appropriate application of established legal rules. This is to be achieved through consistent application of known solutions, or the creation of novel ones (based upon new appreciation of the law).[311] Judge Hercules thus retains the power to develop these rules through the process of enhancing understanding of their effectual usage. As such, the value and meaning of these legal rules are not definitively set, but instead possess an inherent potential to evolve (as evidenced in practical terms in our brief examination of ECHR case law in the previous section).

[310] This is to be understood as representing its capacity to effectively resolve legal issues and develop new solutions to emergent legal problems.
[311] That which allows Judge Hercules to refine or 'fix' the law. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 153.

There are several beneficial implications of this analysis for the human rights discourse. Notably, as mentioned at the start of this section, it potentially provides us with an opportunity to insulate the *idea* of universal human rights from complete disqualification. In contemporary times, attempts to achieve such disqualification are grounded in - amongst other things - references to the lack of secured universal implementation.[312] However, the concept of the progressive perfectibility of law suggests that a 'true' interpretation of any legal norm is potentially unknowable (in the sense that it possesses an inherent capacity to evolve in order to mirror societal progression). In the context of human rights law, it is proposed that 'true' is to be interpreted as representing an account which is universally acceptable, and which is capable of providing the foundation for continual universal implementation of robust human rights protections. Whilst it is reasonable to acknowledge that such an account is presently unknown, this fact, in and of itself, does not automatically invalidate the concept (or indeed the possibility of its eventual creation). This is because, as we have established, the legitimacy of legal knowledge is contextually contingent. The vital aspect of this for proponents of human rights relates to the fact that, despite the contextual contingency of ideas (and the relativity of 'true' interpretations of law), it is possible for us to imagine the existence of an objectively 'true' account (as described above) - even if only hypothetically. This is most clearly exemplified in the utopian ideal of human rights which we discussed in Chapter Two, and which appears to legitimate (and re-legitimate) continual affirmation in the inevitability of the practical applicability of such protections.[313] As discussed, this ideal reflects an enduring faith in the validity of the concept of universal human rights which has allowed (and allows) proponents of human rights to imagine (and strive to secure) universal implementation (and the alleviation of injustices). In this way, it uses knowledge of a possible future to justify action taken in the

[312] See for example Michael Ignatieff, 'Human Rights: The Midlife Crisis' (1999) 46 The New York Review of Books 58.
[313] As discussed in Chapter Two regarding the 'utopian end' of human rights. Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 380.

present. It for this reason, as Douzinas remarks, that 'utopia can be defined as remembrance of the future'.[314]

Consequently, because the 'true' account is presently unknown (if not unknowable), the idea of universally realisable human rights cannot be definitively rejected (as contextual rejections may reflect an imperfect understanding of the law). To be precise, this position is based upon the recognition that presently accepted interpretations of the concept of human rights may ultimately be incompatible with a potential 'true' justificatory account. This conclusion logically follows the fact that the substantive composition of the hypothetical account is unknowable (for obvious reasons). It is therefore impossible to ascertain whether current accepted interpretations are consistent with its fundamental principles or not. Consequently, any effective critique of a proposed defence of universal human rights can only truly be held to invalidate a specific historically contextual account of the idea upon which modern human rights are based (e.g. protecting vital human needs). Yet it cannot objectively undermine the concept of universal human rights itself.

Following this, it is reasonable to conclude that *any* interpretation of human rights which is consistent with the 'accepted' approaches of the time (and thus reflective of legitimate appreciation of the law) is defensible. In summation, this argument would be structured as follows:

1. If Dworkin's theory is correct, then we can accept that there are objective, discoverable moral truths (e.g. underlying justificatory principles) which facilitate the development of legal solutions (and represent the perfectibility of law). The idea of the perfectibility

[314] ibid 180.

of legal concepts (and understanding) may be used to support the concept of an evolutive justificatory account of universal human rights.

2. As we cannot know whether current justificatory accounts are incompatible with a 'true' interpretation of human rights, and as we do know that such an interpretation may exist (even if only hypothetically), it is reasonable to continue to support prevailing accounts of universal human rights so long as it can be determined that they accurately reflect contemporary appreciation of the purpose of this law (and thus represent contextually optimal justificatory accounts).

3. Furthermore, as we know that appreciation of the law will continue to develop, we must also accept that prevailing accounts, however convincing they may appear to be, may not be definitive. Yet, the continued support of such accounts should remain until the appreciation of law, morality, and social standards evolves to a point whereby a stronger, more convincing account can be constructed. This process is to continue indefinitely until the formulation of 'true' interpretation (even if this eventuality never occurs).

One of the most significant implications of this is that a successful justificatory account of human rights does not necessarily have to establish an immediately workable framework for universal application. Rather, it suggests that it would be sufficient to simply present the most robust case possible (given the contextual circumstances of the time) and allow this to be perfected and refined by future generations. In such a scenario, as modern accounts of human rights represent significant advances over earlier accounts, the present inability to actualise a universalisable framework for human rights protections (or indeed to conceptualise how such a framework may be practically possible) would not characterise failure. Instead, and in

reflection of the advances made on earlier attempts, modern accounts would be seen to embody a successful incremental step towards the ultimate objective (e.g. the 'true' account).

In support of this approach we can examine the evolution of existing international human rights treaties, beginning with the UDHR.[315] Reflecting upon the significance of the UDHR on its 50th anniversary, Mary Glendon remarked that it was clear that the 'aims of its framers [were] unrealistic'.[316] Its language was too imprecise and its scope overly broad. However, it could be maintained that the primary purpose for the creation of this declaration was not to define rights in detail, but was simply to highlight areas worthy of consideration. Arguably the most significant achievement of the UDHR was the legitimation of the *idea* of universal rights as normative claims. This is ultimately reflected in the fact that as a result of its success in this regard, the UDHR has 'achieved the status of holy writ within the human rights movement'.[317] Having accomplished its principal objective, future focus could then be transferred to more substantive concerns regarding the process of defining and implementing such rights (as evidenced with the ICCPR and ICESCR). The lack of prescriptive definitions for the rights contained within the UDHR clearly precluded the possibility of practical implementation (and regulation) of these claims.[318] In addition, the soft law nature of the UDHR ensured that signatory states were not obligated to apply the rights that it contained (many of which were deliberately expansive for this reason).[319] Yet, it would be an

[315] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) <http://www.un.org/en/documents/udhr/index.shtml#a25> accessed 18 May 2018.
[316] Mary Ann Glendon, 'Knowing the Universal Declaration of Human Rights' (1998) 73 Notre Dame Law 1153, 1155.
[317] ibid 1153.
[318] We will address this point in more detail in Chapter Four with an examination of the right to health. Within the Article 25 of the UDHR, this right was held to be a protection to 'the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services'. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) <http://www.un.org/en/documents/udhr/index.shtml#a25> accessed 18 May 2018.
[319] As Mary Glendon explains, '[o]ne of the first decisions made by the Commission on Human Rights was that the "international bill of rights" it had been asked to prepare should be in the form of a declaration rather than a legally binding treaty or covenant'. Mary Ann Glendon, 'Knowing the Universal Declaration of Human Rights' (1998) 73 Notre Dame Law 1153, 1164.

oversimplification to conclude from this that the declaration was unsuccessful. This is because it was able to validate the idea of universal rights in a modern context (and thus ensure continuation of commitment to this idea).

Following this approach, and in reflection of ECHR case law, the fulfilment of any specific individual right would also appear to be an evolving, deliberative process:

i) In the initial stage, an injustice is identified; a significant harm which is worthy of being addressed or basic interest which is deserving of being provided for.

ii) In contemporary contexts, this is then articulated in the language of rights: 'All human beings, by nature of their humanity, and with concern for the equal consideration for the well-being of others, deserve not to suffer the injustice'.

iii) Based upon the accepted legitimacy of this claim (determined by the significance of the vital interests which are protected through its eventual fulfilment) the state will then be obligated to implement measures capable of enabling it.

iv) The successfulness of these measures will be dependent upon social, political, and economic factors (as previously addressed). If the right is adopted, the judiciary will then interpret cases relating to it in accordance with accepted understanding of the claim. As social and moral standards develop, this accepted understanding will be open to expansion and a more robust reading of the protection.

v) Thus, 'true' fulfilment of individual rights is never truly achieved. These protections are constantly evolving. However, they can be said to be successfully enabled (and thus satisfactorily enjoyed) if they are applied in accordance with present jurisprudential interpretations of the purpose of each claim.

An apparent limitation with this approach is that it seemingly endorses varying degrees of protection of individual rights consistent with differing cultural practices. How can human rights be inalienable and universal as well as contextually contingent? In responding to this it is worth reiterating that the history of human rights is not a history of definitive, fixed moral standards. In contrast, it is a history of evolving ideas (and ideals) based on similar purposes (e.g. to protect fundamental interests). As such, human rights should be understood to epitomise an effective means of articulating the legitimacy of this purpose – but it should also be acknowledged that the legitimacy of this purpose is not restricted to the idea of human rights. Therefore, whilst it may be proved that contemporary accounts lack the capacity to secure universal implementation, this will not undermine the universality of the purpose such accounts represent. This is because, as Arendt suggests, 'the validity of a principle is always universal and is not bound to any particular person or any particular group'.[320] Under such an interpretation, the legitimacy of the idea should ensure that jurisprudential interpretations of it will continue to evolve as legal understanding, knowledge and society develops. The key objective for proponents of human rights is to ensure that such evolution conforms with the purpose of such protections in a manner more likely to lead to universal fulfilment.

3.4 Human Rights and Historicism

In order to determine a 'true' interpretation of either morality or human rights, if this is even possible, we are required to acknowledge the historical development of the ideas at the heart of these concepts (as means of determining their developmental scope). With regard to human rights this is readily achieved by drawing reference to the creation of significant right based documents. As noted, the DOI, DRMC and UDHR, are used to highlight the continuation

[320] Peg Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* (Indiana University Press 2006) 15.

of the idea of inalienable protections.[321] This is relevant to Dworkin's approach in the sense that it can also be utilised to demonstrate the 'perfecting' of the concept of universal human rights (in the form of an expansion of coverage in terms of both people and interests) as previously discussed. In relation to the potential perfectibility of human rights, it is pertinent to note that many contemporary proponents of this concept have proclaimed their continual expansion and progression as a matter of certainty. This is perhaps most famously reflected in Francis Fukuyama's *The End of History and the Last Man*. Here Fukuyama confidently predicted that the global adoption of liberal democracy and human rights was inevitable because, as populations become more educated, more would choose to adopt a form of democratic government that would be capable of providing them.[322] The rationale with this approach is clear to see. It would seem apparent that human rights are protected in more parts of the world in this generation than the previous one (with the same being true for the one that preceded it). Alison Brysk encapsulated this purported development when she claimed that in the present 'human rights standards, movements, and mechanisms have extended to embrace a majority of the world's population and almost every aspect of the human condition …'.[323] As such, proponents of this approach assume that this pattern will logically continue until universal protection has been achieved.

An alternative account that could be provided here would reflect the concept of a 'true' interpretation of human rights. Specifically, this would maintain that the historical expansion of the protection of human rights is simply a logical consequence of the process of 'perfecting' the idea itself. For example, it could be suggested that this generation has a more 'complete' understanding of the concept of human rights than the last because it is built on a greater level

[321] Micheline Ishay, *The History of Human Rights* (University of California Press 2003) 3.
[322] Francis Fukuyama, *The End of History and the Last Man* (Free Press 2006) 328-339.
[323] Alison Brysk (ed) and Michael Stohl (ed), *Expanding Human Rights: 21st Century Norms and Governance* (Edward Elgar Publishing 2017) 3-4.

of knowledge. Ultimately this proposal is based on the assumption that present generations are capable of continually refining ideas of the past. In the context of human rights, this process would culminate in more robust interpretations of individual rights as well as a greater scope of protection.[324] In this way, the development of human rights towards a definitive interpretation becomes an inherently historical process. History is to be used to justify both the idea of human rights (in the form of inalienable protections of vital interests) by referencing theoretical accounts of the past, as well as to legitimise the idea that universal protection is realisable (by suggesting that this will be a natural consequence of perfecting the idea of the concept itself).

The image which is promoted by such proponents of rights through the utilisation of history is one of linear progression – with humanity continually perfecting itself with each generation. Progress is determined by referencing the expansion of liberal democracy, globalisation, and the acceptance of fundamental liberties. Thus, '[h]istory is presented as the forward march of all conquering reason, which erases mistakes and combats prejudices'.[325] The appeal of this approach is self-evident, not least as a means of re-affirming the moral and intellectual legitimacy of contemporary efforts to actualise human rights. There is obvious satisfaction in proclaiming that the future history of human rights is pre-determined, represented by an unquestionable evolution towards a destined eventuality; the universal application of these protections.[326] This view is a representation of historicism; of interpreting the conditions of the present day favourably by considering their differences with those which have gone before. Douzinas suggests that 'historicism is a type of evolutionary progressivism:

[324] Within the context of the European Convention on Human Rights (1950), this is personified with the principle that the convention is a 'living instrument', as discussed earlier in this chapter. This has allowed the scope and meaning of convention based principles to change through case law over time. For more on this see George Letsas, *The ECHR as a Living Instrument: it's Meaning and its Legitimacy* (University College London 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836> accessed 18 May 2018.
[325] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 26.
[326] Francis Fukuyama, *The End of History and the Last Man* (Free Press 2006) 328-339.

the present is always and necessarily superior over the past'.[327] Yet, it should be noted that there are inherent risks with adopting such an approach. Indeed, if Judge Hercules embodies the culmination of historical advancement in relation to legal knowledge and understanding, his continuing validity is dependent upon the legitimacy of these advances. This, in turn, is contingent upon conformity with the objective moral truths. The importance of this is that it signifies that a certain type of change – as it pertains to advances in knowledge and understanding – can represent a legitimate, justifiable evolution of specific concepts. However, this approach would not automatically accept all change as justifiable progress, or indeed the expansion of ideas as evolution. To do so would be to encourage a historicist outlook which fails to examine the merits of advances, but which instead accepts all change as being morally justifiable. The need for a more objective, critical approach will be reinforced through an examination of the work of Fredric Nietzsche in a subsequent section of this chapter.[328]

For now, it is important to note that history is not necessarily bound to progression - as evidenced by the aforementioned decline in support of the idea of human rights. Indeed, Michael Ignatieff famously predicted that '[in] the next fifty years we can expect to see the moral consensus that sustained the UHDR in 1948 splintering still further …as the distance between the West and the Rest may also increase'.[329] Whilst notable advancements in technology, medicine and cultural appreciation – via globalisation – have undoubtedly contributed to the expansion of human prosperity, they have also arguably facilitated the insulation of existing hegemonies. Specifically, where once it was feasible for public protest and resistance to overthrow the governing powers of states, such measures appear to have relatively muted effectiveness in contemporary times. It has previously been established that the idea of an entitlement to basic standards, fundamental human interests, is repeatedly

[327] Costas Douzinas, and Adam Gearey, *Critical Jurisprudence* (Hart Publishing 2005) 53.
[328] See Chapter Three, section 3.4.1.
[329] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001) 93.

legitimised in the context of human rights. Historically, these claims were used to justify violence inflicted upon governing powers as means of securing necessary 'corrections' in relation to the law. As Douzinas asserts, '[t]he rights of man started as normative marks of revolutionary change'.[330] The validity of such action derived from the fact that it represented the last available recourse to redress injustice 'for those who experience the law … as victims of the exercise of power'.[331]

However, in modern contexts, general populations appear to have a decreased capacity to instigate such change through protest, violent uprising, or, indeed, revolution. From the Occupy Wall Street movement[332] following the financial crash of 2008, to the Arab Spring of 2010-12,[333] modern public resistance has appeared to consistently struggle to effect meaningful, long lasting change. Douzinas claims that 'revolutions start only after people have taken to the streets, stay there and challenge the established order'. [334] Yet, recent examples seem to question the endurability of resistance in contemporary times in comparison to historical examples. Reflecting on the Occupy Wall Street movement, John L. Hammond remarked that though it 'claimed to represent the 99% … most people cannot participate in political activity of this sort … at a minimum, because of time constraints …'.[335] A conclusion we can reasonably draw from this is that the prospect of resistance/revolution as method of directly securing change, has seemingly been replaced with public protest – a way of challenging perceived injustices of the established order in the hope of ensuring change occurs

[330] Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013) 83.
[331] Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Hart Publishing 2005) 138.
[332] John L. Hammond has produced an excellent account of this. He concludes that, whilst this movement (or 'moment' as he terms it) did not produce direct results, it did re-legitimate public protest as a means of attempting to instigate positive change. John L. Hammond, 'The Anarchism of Occupy Wall Street' (2015) 79 Science and Society 287, 311.
[333] For an insightful summary of this see Lisa Anderson, 'Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt and Libya' (2011) 90 Foreign Affairs 2
[334] Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013) 9.
[335] John L. Hammond, 'The Anarchism of Occupy Wall Street' (2015) 79 Science and Society 287.

through political means.[336] A detailed examination of potential causes of this perceived change are beyond the scope of this thesis. However, one possible influencing cause in particular is worthy of consideration. Namely, the disparity which now exists between established governing powers and general populations – between rulers and ruled – specifically with regard to certain technological advancements (and advantages).

For example, in contrast to historical examples, modern nation states possess sophisticated surveillance measures which afford governing powers a greater opportunity to avert the prospect of change effecting revolution.[337] Moreover, such tools provide these powers with means of effectively containing, if not disarming, this prospect even when a legitimate threat does emerge. As example of this we only need to look to the failed Turkish coup of 2016.[338] This is especially significant because it highlights another apparent consequence of the diminishing prospect of revolution: the perception of the possibility of such a threat, however real, is utilised to justify interference with fundamental liberties and rights. Where such rights/interests were once used to authenticate violence enacted against the state (e.g. French Revolution, American War of Independence) as a reversal of the operations of state power,[339] they are now utilised by state powers as means of securing their own survival. Principally, this is reflected in the fact that 'human rights are given in order to avoid revolution'.[340] Furthermore, the provision of such rights is made contingent, by governing

[336] Douzinas concludes that modern public resistances (that which he terms 'the squares' – in reference to Tahir square, which is seen to symbolise these movements) represent the 'repoliticising [of] politics and introducing the ethos of the collective into all aspects of public life … Deepening democracy and making it the form of every type of activity and life is the main lesson of the squares'. Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013) 197.
[337] See Neil M. Richards, The 'Dangers of Surveillance' (2013) 126 Harvard Law Review 1934.
[338] For an informative overview see Gonenc Uysal 'The Failed Coup in Turkey: Prolonged Conflict in State Apparatus' (2016) E-International Relations <http://www.e-ir.info/2016/09/21/the-failed-coup-in-turkey-prolonged-conflict-in-the-state-apparatus/> accessed 18 May 2018.
[339] Within the context of the French Revolution, this is represented by violent resistance as means of preventing the imposition of inhuman, degrading laws (such as torture). Reflecting on this, Lynn Hunt remarks that after the revolution, and as a direct response to the 'absurd ferocity' of previous laws, the penal system of the future was to be based upon 'rehabilitation through work rather than sacrificial retribution through pain'. Lynn Hunt, *Inventing Human Rights* (W. W. Norton & Company Inc 2008) 139.
[340] Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013) 83.

powers themselves, upon their being afforded an exceptional right to suppress them (e.g. whenever the state is threatened). Indeed, the resulting academic and political purge witnessed in Turkey following the failed coup appear to illustrate this further. As Yildirim and Lynch explain:

> The night of July 15, 2016 marked a distinct moment in Turkish democratic history as hundreds of thousands of Turks took to the streets to defy a coup attempt. Yet only a few months later … tens of thousands of academics, journalists and civil society activists have been purged from their jobs, with many imprisoned.[341]

This example can be used to cast doubt on the perception of the trajectory of human history as one of pre-determined progress (with progress here understood as the expansion and application of such protections). In developing this point further, we may briefly look to dystopian literature, which is useful precisely because it directly challenges this perception of progress. In texts such as George Orwell's *1984* and Aldous Huxley's *Brave New World*, progressive human advancement is represented, not in the emancipation of rights and peoples, but instead in their eventual subjugation: '[i]f you want a picture of the future, imagine a boot stamping on a human face – forever'.[342] Here the verification of the 'perfectibility' of human knowledge, or, indeed, the human character - through scientific and technological development - affords the respective authorities the opportunity to exert absolute power over their populations and confirm uncontested control of the state. The only 'rights' which exist belong to the state – represented by the governing power itself - specifically regarding its right to be preserved. Individuals, in turn, possess only a *duty* to protect the state (by preserving the governing power). In *1984* this is accomplished through near omnipresent, omnipotent surveillance and a manufactured adoration for 'Big Brother'.[343] In *Brave New World* this is

[341] A. Kadir Yildirim and Marc Lynch, 'Is There Still Hope for Turkish Democracy?' (2016) *Contemporary Turkish Politics* 22 POMEPS 72, 72.
[342] George Orwell, *1984* (Penguin Classics 2013) 280.
[343] 'There will be no loyalty, except loyalty towards the Party. There will be no love, except the love of Big Brother'. ibid.

depicted by the utilisation and creation of the drug Soma, and the establishment of accepted gradations of worth based on manufactured physiological differences.[344]

In both instances, these eventualities are presented as the direct results of human progress; of human history. These texts can thus be interpreted as being instructional of the dangers of presupposing the destination of human progress (and the inevitability of universal rights). Indeed, reflecting upon recent human history allows alternative patterns to be identified than the one which advocates for Fukuyama's democratic utopia. For example, it could be suggested that historical advancements led to an expansion of the enjoyment of fundamental liberties by creating opportunities to resist hegemonic power which superseded the states' ability to suppress them. As proponents of human rights have suggested, this can be seen with various rights based revolutions already highlighted within this thesis. With these examples, relative parity existed between the revolutionaries and the state in terms of technological or military capability. These conflicts were fought with rudimentary weaponry which was comparable in nature between the affected parties. Within the context of the French Revolution, Pëtr Kropotkin notes that both the soldiers and the revolutionaries fought with 'muskets and cannon'.[345] Crucially, the state did not possess a significant technological advantage over the revolutionaries in this regard. The governing powers of these states were therefore more susceptible to being disposed and replaced. These examples are, as Douzinas suggests, truly indicative of the effectiveness of legitimacy of the 'utopian end' of human rights which instigates resistance in an attempt to establish meaningful change.[346]

[344] 'The world's stable now. People are happy; they get what they want, and they never want what they can't get. They're well off; they're safe; they're never ill; they're not afraid of death; they're blissfully ignorant of passion and old age; they're plagued with no mothers or fathers; they've got no wives, or children, or lovers to feel strongly about; they're so conditioned that they practically can't help behaving as they ought to behave. And if anything should go wrong, there's *soma*'. Aldous Huxley, *Brave New World* (Vintage Classics 2007) 193.
[345] Pëtr Kropotkinp, *The Great French Revolution 1789-1793* (N. F. Dryhurst tr, New York: Vanguard Printings 1909) 50.
[346] Embodied within 'the great revolutions of the eighteenth century …'. Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 13.

In contrast, it could also be maintained that at a specific point in history (arguably at the midpoint of the twentieth century) this process was reversed: when such technological advancements provided governing powers with an ability to suppress effectual resistance which superseded the available means of resisting. Douzinas himself remarked that, as a consequence of fear of possible resistance, modern states pre-emptively adopt 'increased police powers and surveillance mechanisms, justified as necessary …'.[347] The aforementioned examples of the Arab Spring and the failed Turkish coup could also be used in support of this claim. In these examples, technological advancements – such as enhanced surveillance and intelligence gathering, together with the effective use of state media – provided state authorities with significant advantages over the would-be revolutionaries which greatly reduced the possibility of their displacement. Additionally, we see that the successfulness of contemporary forms of resistance to established hegemonic powers is seemingly contingent upon the support of alternative pre-existing powers. The intervention by the Egyptian army during the civilian uprising of 2011 can be referenced to support this claim.[348] Indeed, it has been noted that without this intervention the revolution was unlikely to succeed in dislodging President Mubarak.[349] Similarly, it is evident that without NATO led military intervention (by way of airstrikes) in Libya, the burgeoning revolution would likely have been emphatically defeated by Gaddafi's own military forces.[350] Alternatively, with the failed Turkish coup of 2016 we see a 'revolution' which, from the outset, sought to replace once established power – President Erdogan – with another, comprising of high ranking members of the Turkish military. The struggle was effectively presented, by both Erdogan and the media, as an unjustifiable, Western

[347] Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013) 29.
[348] Lisa Anderson suggests that the 'the army's carefully calibrated intervention … assumed control of Egypt after Mubarak's downfall …'. Lisa Anderson, 'Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt and Libya' (2011) 90 Foreign Affairs 2, 4.
[349] ibid.
[350] Spencer Zifcak confirms that, prior to the UN led intervention 'the Gaddafi forces [had] gained strength and territory, [and] the opposition [had] weakened to the extent that it appeared highly likely that it might be swept away …'. Spencer Zifcak, 'The Responsibility to Protect After Libya and Syria' (2012) 13 Melbourne Journal of International Law 1, 2.

supported interference with democracy.[351] This included encouraging the civilian population of Turkey to 'resist' the would-be coup, as if its successfulness would significantly damage their own interests. In effect, interests of the state – in the form of the survival of the existing government – was articulated as being commensurate to the individual interests of the population of Turkey itself.

Finally, it is worth reiterating, that further to the practicality of securing the application of such protections, the trajectory of public perception of the moral value of human rights, understood as fundamental claims, has itself become more difficult to reliably ascertain. As previously touched upon, the apparent acceptance of the recent 'othering' of criminals, suspected terrorists and those regarded as being 'undesirable' to a particular state – such as Syrian refugees[352] – arguably evidences a diminishment in the value of such protections to entire civilian populations. Here, once again, we see that historical progress – in the form of the supposed increasing desirability of human rights - is no guarantee of further continuation of similar advancements.

3.4.1 Assessing the Dangers of Historicism: Nietzsche and the 'Abuse of History'

It is clear, based on this analysis, that the limitations of an historicist usage of human history are worthy of greater consideration. To this end, it is useful to consider some of the ideas of nihilistic philosopher Fredric Nietzsche – himself a vehement anti-historicist. With the *Use and Abuse of History*, Nietzsche sought to criticise the attempted sublimation of historical study.[353] According to Nietzsche, the process of 'perfecting' human knowledge and

[351] Kimberly Guiler notes that after the failed coup, and in an attempt to reconsolidate his power, President Erdogan accused the West of 'supporting terrorism and taking sides with coups'. Guiler suggests that the media was subsequently complicit in this effort, by 'directly accusing the United States of trying to assassinate President Erdogan'. Kimberly Guiler, 'Towards Erdogan and the East: Conspiracies and Public Perception in Post-Coup Turkey' (2016) *Contemporary Turkish Politics* 22 POMEPS 28, 28.
[352] See Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking <http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.
[353] Friedrich Nietzsche, *The Use and Abuse of History* (Macmillan for the Library of Liberal Arts 1957).

understanding had led to the distortion of history.[354] This had occurred by ensuring that important historical events were to be examined only as means of identifying their potential functionality to present and future generations. In this way, history had effectively been subjugated; its function reduced to serving the misguided purposes of those in the present. Thus, this process allowed for future actions or initiatives to be justified with the creation of historical narratives.[355] For Nietzsche, scientific, technological, and social developments had rendered humankind arrogant and disconnected from the formative struggles of survival. This arrogance, in turn, enabled (if not encouraged) the exploitation of all available resources, including history – regarded as the rightful property of man. In effect, Nietzsche suggested that the (mis)appreciation of history had led humankind to mistakenly regard itself as its completion:

> The historical imagination has never flown so far, even in a dream; for now the history of man is merely the continuation of that of the animals and plants; the universal historian finds traces of himself even in the utter depths of the sea, in the living slime. He stands astounded in the face of the enormous way that man has run, and his gaze quivers before the mightier wonder, the modern man who can see all this way! He stands proudly on the pyramid of the world-process; and while he lays the final stone of his knowledge, he seems to cry aloud to listening Nature; "We are at the top, we are the top; we are the completion of Nature!"[356]

This 'completion of nature' is arguably represented by the reshaping of human identity within different periods of history touched upon in Chapter Two. Here it was shown that acceptance of the moral worthiness of particular ethnicities was eventually replaced, at least in Western states, with general acknowledgement of the moral significance of the human race - now reflected within the law (specifically in the language of rights). History provided a means by which this could be accomplished by presenting a reference point for human progress. This

[354] This view is reflected in Nietzsche's assertion that '[w]e do need history, but quite different from the jaded idlers in the garden of knowledge … we need it for life and action, not as a convenient way to avoid life and action, or to excuse a selfish life and a cowardly base of action'. ibid 3.
[355] ibid 2-13.
[356] ibid 55.

progress, in turn, was used to validate the perceived superiority of present generations over previous ones and legitimate the path that humanity had taken to reach this point. Costas Douzinas defined this approach as the embodiment of the belief that '[h]istory moves one way, values unravel inexorably towards their perfection in a linear process of gradual disclosure of essences and values, like freedom, equality or rights'.[357]

The 'abuse' of history is relevant to this study in several other ways. Specifically, it is worth addressing three methods identified by Nietzsche of utilising and interpreting the past to shape or influence present day objectives: defined as the 'monumental', 'antiquarian' and 'critical' methods respectively. Firstly, as way of introduction, it is important to contextualise these positions within the theoretical framework of the work itself. With this text, Nietzsche begins by describing the historical nature of humankind, which he then differentiates from what he calls super-historical and unhistorical beings. Humans are historical creatures simply because they have the ability to remember.[358] This allows them to formulate present and future plans, but also burdens them with the knowledge of what has gone before them (as well as what is ultimately to come – namely death)[359]. The capacity to recognise the significance of past achievements also necessitates the acknowledgement of past failures. Nietzsche suggests that it is because humans cannot escape their history that they attempt to utilise it to their own specific ends.[360]

To fully appreciate the significance of 'historical creatures' it is important to distinguish them from the proposed alternatives. As noted, Nietzsche defined two further categories for this task. The first, and easiest to draw practical comparisons to, is the unhistorical creature. To

[357] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 26.
[358] Friedrich Nietzsche, *The Use and Abuse of History* (Macmillan for the Library of Liberal Arts 1957) 5.
[359] ibid 5-6.
[360] ibid 7-8.

Nietzsche, this was represented by the 'beasts' of nature; the animal kingdom.[361] These creatures are unhistorical simply because they lack the characteristic which separates them from man: the ability to remember – of awareness of the history of their species.[362] Consequently, Nietzsche argues, they are not burdened, either by memories of what has gone before them, or indeed, by knowledge of their own mortality. Unhistorical creatures thus arguably live beyond the constraints of history.[363] For this reason, Nietzsche regarded them as the envy of humankind, who are unable to forget, or therefore truly capable of living in the present.[364]

The final category proposed by Nietzsche is known as the super-historical being. Of the three accounts, this is the only one without direct contemporary comparisons in nature. To live super-historically is to transcend the influences of the past.[365] A super-historical being is one with complete understanding and appreciation of what has gone before; for 'super-historical man … the world is complete and fulfils its aim in every moment'.[366] As such, they are able to liberate themselves from the need to justify future conduct with reference to historical events. Instead, the super-historical being lives entirely in the present. Nietzsche asserts that a super-historical being would be wise and cynical. Their actions would be entirely their own as they would be devoid of historical dependency. It could be argued that, due to their contextual perfectibility (in that they possess the most complete understanding possible at all times) super-historical beings are commensurate with the concept of Judge Hercules. Indeed, as discussed, Judge Hercules appears to embody complete knowledge and appreciation of an objective 'present'. This is because he retains the capacity to develop and evolve legal knowledge and

[361] ibid. 5.
[362] ibid 5-6.
[363] ibid.
[364] In establishing this point Nietzsche states '[c]onsider the herds that are feeding yonder, they know not the meaning of yesterday or today …Man cannot see them without regret, for even in the pride of his humanity he looks enviously at the beast's happiness'. ibid 5.
[365] ibid 9-11.
[366] ibid 10.

understanding in order to consistently reflect the values of the present. Despite their evident advantages, Nietzsche ultimately questioned the desirability of a super-historical existence. This was because he believed that possession of such superior knowledge would diminish the impetus for action (in that, through past experiences, a super-historical being would claim that the outcome of such action will already be known - and is therefore not worth attempting).[367]

As man cannot live unhistorically, without having to sacrifice his humanity, and a super-historical life would be unrewarding (and banal), Nietzsche saw a historical existence as the most desirable state of being. For this allows humankind to acknowledge and learn from their history, but, through its effective study – also a 'fruitful' future, and thus the opportunity to escape it.[368] Yet, he is critical of the fact that humankind continues to live a particular kind of historical existence; once which attempts to utilise history for the construction of narratives which only serve contextual purposes of the age (with no consideration of the future). The relevance of this to the idea of universal human rights can be highlighted by examining three particular forms of historical narrative mentioned at the start of this section. The first is described by Nietzsche as the 'monumental' method. Proponents of this approach attempt to draw inspiration from history and legitimise the realisibility of present day objectives by referencing significant achievements of the past. This is defined by 'the knowledge that [a] great thing existed and was therefore possible, and so may be possible again'.[369] History is 'monumentalised' in the sense that it is used to directly shape future conduct towards various objectives.[370] However, in Nietzsche's view, the process with which this is to be achieved ultimately results in the nullification of the value of the present:

[367] Nietzsche summarised this position by declaring that '[w]e would gladly grant the super-historical people their superior wisdom, so long as we are sure of having more life than they …'. ibid 11.
[368] ibid 12.
[369] ibid 14.
[370] ibid 12-15.

> Monumental history is the cloak under which … hatred of present power and greatness masquerades as an extreme admiration of the past. The real meaning of this way of viewing history is disguised as its opposite; whether they wish it or no, they are acting as though their motto were: "Let the dead bury the-living".[371]

Nietzsche was sceptical of this approach because of its willingness to focus on the outcome of historical events whilst ignoring the contexts in which they were achieved.[372] This culminates in a distortion of history because it creates a mythical, unrealistic account of the past. Consequently, the process is reductive to the importance of history. That is to say, by failing to understand, or take into account, the means by which they were made possible, this method ultimately undermines the very ideals/achievements which are intended to be monumentalised.

The second form of history is defined as the 'antiquarian' method. In contrast to the monumental approach, the aim here is not simply to monumentalise history, but rather to live as an extension of it. In this way, elements of history are referenced so as to highlight failings of the present and with the hope of instigating change. However, the purpose is not to inspire evolution, but to encourage the adoption or continuation of past methods which are held to be superior.[373]

> The antiquarian sense of a man, a city, or a nation has always a very limited field … history's service to the past life is to undermine a further and higher life … [as such] the historical sense no longer preserves life, but mummifies it.[374]

Nietzsche was critical of this approach because, like the monumental method, it is built upon a desire to idealise the past. Here, all peoples are understood to have an unbreakable

[371] ibid 17.
[372] Nietzsche maintained that this resulted in 'the individuality of the past forced into a general formula and all the sharp angles broken off …'. ibid 14-15.
[373] ibid 18-19.
[374] ibid 19-20.

connection with their history, represented in the form of customs and traditions.[375] Ownership of these customs is regarded as being inherently transitional as it is to be continually passed on to following generations. As such, the antiquarian approach reflects a desire to *preserve* history (and historical life). However, as Nietzsche suggests, in attempting to shape society through this process of preservation, humankind ultimately obstructs (and suffocates) the possibility of future progress. An antiquarian 'only understands how to preserve life, not to create it; and thus always undervalues the present growth …'.[376]

The third and final form of history was defined as the 'critical' method, and was regarded by Nietzsche himself as the most effective of the three.[377] This is because it adopts an irreverent style to the study of history. It is irreverent in the sense that it does not seek to preserve or elevate elements of history for a particular purpose (as with the monumental and antiquarian approaches), but rather seeks to ascertain the benefits of doing so. By exposing history to rigorous examination, humankind is able to reject elements of history which serve no purpose to the construction of a better future. In characterising this approach Nietzsche stated:

> Man must have the strength to break up the past, and apply it, too, in order to live. He must bring the past to the bar of judgement, interrogate it remorselessly, and finally condemn it.[378]

Principally, the advantage of a critical appraisal of history is that it is not restricted to a specific historical narrative. The purpose behind the study of history is to determine means by which an honest appraisal of it may be useful for human progress, but not a specific form of progress

[375] As Nietzsche noted, this was represented by 'the amount of reverence paid to … a custom, a religious creed or a political principle …'. ibid 20.
[376] ibid.
[377] Nietzsche defined this as a 'necessary … third way at looking at the past … in the service of life'. ibid 20.
[378] ibid 21.

(e.g. in accordance with either monumental or antiquarian interpretations). As such, its conclusions may be accepted as being more objective.

3.4.2 The 'Abuse of History' in the Context of Human Rights

With regard to the idea of universal human rights, all three methods have the capacity to be influential. With the monumental method this influence is seemingly represented in the general willingness to romanticise significant events in the history of the concept as means of legitimating present-day objectives. For example, with the DOI and the DRMC, contemporary narratives primarily focus on what both were effectively able to achieve (at the time and also in terms of laying the foundation for future progress) with the historical contexts of these declarations largely ignored. In support of this we can refer to Micheline Ishay who, when discussing the DRMC, simply asserts that they represented the 'triumph of reason associated with the Enlightenment …[and] would be recognised in the twentieth century as fundamental human rights proclaimed in the first clause of the UN Declaration of Human Rights (1948) …'.[379]

Indeed, these declarations are often read with modern interpretations in mind. The term 'all men' is seen as a definitive universal statement with 'men' understood to mean 'humankind'. Yet, as previously addressed, the universal scope of the DOI was not intended to cover slaves (who were seen as property). Similarly, with the DRMC 'all citizens' did not truly mean all people, as women at the time were unable to obtain citizenship.[380] It is therefore clear that these historical accounts are not completely compatible with accepted modern

[379] Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalisation Era* (University of California Press 2008) 83-84.
[380] Addressing this issue at the time, Marquis de Condorcet asked whether the drafters of the DRMC had 'violated the principle of the equality of rights in tranquilly depriving one-half of the human race of the right of taking part in the formation of laws by the exclusion of women from the rights of citizenship?' De Condorcet, M., "On the Admission of Women to the Rights of Citizenship" A. D. Vickery, *The First Essay on the Political Rights of Women: A Translation of Condorcet's Essay on "Sur l'admission des femmes aux droits de Cité"* (Garden City Press 1912) 5.

interpretations of the concept of human rights – and as such it is unhelpful to afford them a status which they do not deserve.[381] A further problem with a monumental approach, which can be identified here, relates to the manner in which it validates the idea that human beings possess an inherent entitlement to the fulfilment of their needs (e.g. by drawing inspiration from historical accounts of rights which were largely aspirational/utopian in nature). This in turn contributes to devaluing the significance of human rights by encouraging all individual needs to be expressed as claims. The danger here, as Douzinas attests, is that 'when everything becomes actually or potentially a right, nothing attracts the full or special protection of a superior or absolute right'.[382]

The relevance of the antiquarian method would appear to relate to the apparent 'idolatry' of contemporary accounts of universal human rights.[383] This is represented by the elevated level of recognition afforded to such accounts by academics and politicians in modern times. As noted, these efforts have been useful in facilitating the legitimation of the idea of universal human rights. However, they have also enabled current accounts to be presented as if they are definitive. This allows the idea of universal human rights to be reduced to understanding of how they are presently defined.[384] For an antiquarian, the overarching aim is seemingly to facilitate the continuation of post-war commitment to the objective of securing universal human rights. Yet, this objective is undermined by the apparent need to perpetuate specific historical accounts of the concept itself. Most notably those defined within existing international treaties such as the UDHR, ICCPR, and ICESCR. Therefore, an antiquarian seeks

[381] 'The concept of rights, including natural rights, stretches back centuries … But those *droits de l'homme et du citoyen* meant something different from todays "human rights"'. Samuel Moyn, *Human Rights and the Uses of History* (Verso 2014) 69.
[382] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 60.
[383] For more on this see Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001).
[384] Particularly, this looks to focus the discourse on definitions contained within pre-existing international treaties and instruments. The significance of this is that, as addressed, such accounts have so far proved incapable of securing either universal support, or, indeed, appeared likely to secure universal implementation.

to promote advancement through a contradictory process of preserving what is presently known and accepted. The principal limitation with this approach relates to the reduced possibility of legitimate evolution and progression. Indeed, with an antiquarian approach the legitimacy of the concept of universal rights is to be centred entirely on the effectiveness of contemporary accounts. This approach ignores the historical contingency of these positions and thus provides opponents with an easy means by which the concept of universal rights may be dismissed (through the identification of contextual limitations). For example, by arguing that as these instruments are constructed with a Western bias, they cannot be universal, but instead represent a form of cultural imperialism.[385]

We see therefore that neither a purely monumental or antiquarian method is suitable for justifying the legitimacy of the idea of universal human rights or the ultimate realisibility of universal protection. Indeed, as with Nietzsche, it would appear that identifying positive historical trends so as to substantiate a defence of the concept of human rights is only valuable if it reflects an objective appreciation of such issues (e.g. a critical approach). Yet, the apparent 'historicism' of the contemporary human rights discourse leaves it vulnerable to misapplication. In effect, without critical appraisal of the sufficiency of existing accounts, the purported absoluteness of these justifications (along with the supposed inevitability of universal rights) only serves to further undermine the human rights movement (in relation to its inability to secure robust universal application). To return briefly to Fukuyama, if, as he suggests, modern history is evidence of an expansion of liberal democracy (and corresponding rights),[386] it is equally true, as Douzinas notes, that it represents the greatest systemic violation of such protections.[387] As he observes, 'our era has witnessed more violations (of the principles

[385] See Boaventura de Sousa Santos, 'Toward a Multicultural Conception of Human Rights' in Berta Hernández-Truyol (ed), *Moral Imperialism: A Critical Anthology* (New York University Press, 2002) 54.
[386] Francis Fukuyama, F, *The End of History and the Last Man* (Free Press 2006) 328-339.
[387] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 51.

of human rights) than any previous, less 'enlightened' one'.[388] If the commitment to human rights is evidently greater in contemporary times it is because, Douzinas argues, they have effectively become a 'modality' of governance.[389] The language of human rights is now the language of politics. They provide a platform for international discussion, a way of 'conducting politics according to ethical norms'.[390]

As such, the rise in commitment to the 'idea' of human rights in modern history is not necessarily synonymous with a commitment to the principles of the concept of universal protections. Rather it is perhaps only evidence of a deliberate attempt to refocus the discourse toward political ends (which Douzinas saw as resulting in the loss of their 'utopian end'). If human rights *are* universal entitlements to the protection of vital human interests, then modern history arguably questions the claim that acknowledgement of this fact is steadily increasing. Instead, it can reasonably be held that all it demonstrates is that there has been a rise in commitment to an idea of human rights which is capable of providing a framework for the conduction of international politics. This is a commitment which is primarily pragmatic and rooted in practical consequences – both in relation to the aforementioned political benefits, and also with regard to a desire to enforce individual rights.[391] When the practical benefits cease, or are themselves outweighed by other considerations, then the commitment (and thus protection) to human rights is prone to end (as we are arguably witnessing in contemporary times with regard to the rights/security debate). This analysis appears to highlight the inherent limitations with attempting to use an historicist account of history to provide justification for the realisablity of universal human rights.

[388] ibid.
[389] ibid.
[390] ibid.
[391] This represents the argument previously discussed that, in addition to validating both governments and states through their provision, 'human rights are given in order to avoid revolution'. Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013) 83.

Nevertheless, it is evident that history is useful in contextualising the significance and value of present and future action. Knowledge of historical progress can be utilised to justify the claim that there is permanence to certain ideas – such as with the concept of human rights. However, as we have established, the value of history is seemingly contingent upon its effective usage. Referencing great achievements of the past in support of contemporary initiatives is only constructive if we take into account the contexts in which they were achieved.[392] Our ability to successfully use historical events to justify future commitments is not dependent upon conflating past accomplishments, but of understanding their limitations. For example, the DOI does not need to be presented as an eighteenth-century version of the UDHR. Attempting to do so, and failing to acknowledge the contextual contingency of the universal applicability of this document (by excluding slaves), is to risk undermining the legitimacy of contemporary justificatory accounts.[393] Furthermore, it diminishes the significance of the subsequent progress which enabled the creation of modern declarations of rights, by ignoring the circumstances that made such evolution possible. The UDHR was itself a product of history in that it was a direct response to atrocities that were committed in the years directly preceding its creation.[394] Indeed, the horrors of the holocaust were an important causative factor in the re-emergence of the idea of universal rights in modernity. As Fagan suggests, '[t]he modern human rights regime emerged out of mountains of human corpses'.[395]

[392] In an insightful commentary on the creation of the UDHR (1948), James Spickard highlighted the apparent misuse of history in relation to justifying the development of human rights and suggested that the 'focus on the recounted history on the West and the picture of human rights progressively emerging out of darkness is just that: pictures, not reality'. James Spickard, *The Origins of the Universal Declaration of Human Rights* (University of Redlands 1999) 13.

[393] Samuel Moyn makes a similar argument when he states that '[b]eyond the myth, the true history of human rights matters most of all so that we can confront their prospects today'. Samuel Moyn, *Human Rights and the Uses of History* (Verso 2014) 83.

[394] '[The] holocaust made the declaration possible'. Michael Ignatieff, 'Human Rights: The Midlife Crisis' (1999) 46 The New York Review of Books 58, 58.

[395] Andrew Fagan, 'Paradoxical Bedfellows: Nihilism and Human Rights' (2005) 6 Human Rights Review 80, 93.

Instead of conflating history, it is preferable to note that the DOI demonstrates a commitment to an idea which is comprehensible to us in modern times as human rights. Whilst it might not truly be human rights – as we now appreciate them - this does not negate its potential usefulness in instructing us about the importance and legitimacy of this concept. Consequently, and in accordance with the critical approach proposed by Nietzsche, an effective use of history would appear to be dependent upon the aggressive examination and subsequent objective utilisation of ideas. This, in turn, requires recognition of the precise contexts of all historical progress which has been made, as well as appreciation that this progress was not inevitable. For the purposes of this thesis, it is argued that this process is represented in the 'perfecting' of the idea of inalienable entitlements to basic protections; itself not contingent upon the concept of human rights. As previously discussed, this proposition is based on the understanding that contemporary accounts of human rights represent a specific vehicle for advancing a transcendent, foundational purpose.

In relation to the question of the universality of human rights, the benefit of adopting a critical approach is that it prompts reappraisal of the sufficiency of contemporary accounts (both deontological and consequentialist in nature). It enables us to identify and condemn limitations with the human rights movement as means of preserving the ideal of such protections. This is made possible by refocusing the discourse towards the purpose (e.g. underlying justificatory principles) of these exceptional protections/claims. In doing so, it allows us to suggest that sufficiency of contemporary accounts of human rights is dependent upon satisfactory fulfilment of this purpose. The overarching aim is not to discredit human rights instruments for the sake of invalidating the ideal of universal protections, but in order to preserve it. In effect, it is a process of (continual) demystification which enables evolution through rebirth. It therefore mirrors the continual reshaping of human identity discussed in

Chapter Two.[396] Echoing the philosophical outlook of Nietzsche himself, such an approach could be held to be nihilistic in nature. As Douzinas explains, '[n]ihilism is an open and plural concept, both a condition of degeneration and decadence and a joyful affirmation of life; the possibility of re-evaluation and regeneration of values'.[397] Indeed, if we are ever to be able to construct a 'true' account of human rights we need to be prepared to reject interpretations of the concept of which, through robust examination, are shown to be insufficient. In developing this point further, it is necessary to now consider the composition of the foundational purpose of such protections which determines their sufficiency in greater detail.

3.5 The Case for a Foundational Purpose

Throughout human history, the process of protecting certain interests for some individuals has, as we have established, simultaneously resulted in the 'othering' of those determined to be undeserving of protection. Douzinas notes that this process has repeatedly been utilised as means of perpetuating a supposed superiority of status within societies. In this way, 'humanity is created against the figure of the non-human'.[398] For the conceptual predecessors of rights, such as religion, natural law, and political philosophy, this was accomplished by establishing criteria from which entitlement to specific privileges could be deduced (e.g. based on faith, ethnicity, or social class). As we have seen, the influence of various contextual contingencies of any given time could result in the practical implementation of purportedly 'universal' ideals having a rather limited scope (see, for example, the 'all men' of the DOI). Ultimately, this created opportunity to justify interference with the fundamental interests of those who are determined to be undeserving of their protection. In modernity, as Douzinas identifies, this is reflected in the fact 'the inmates of the German, Cambodian,

[396] See Chapter Two, section 2.3.3.
[397] Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Hart Publishing 2005) 49.
[398] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 118.

Rwandan or Serbian concentration camps were constructed as non-human vermin, as beings so inferior and dangerous to the fully humans that their extermination was a natural necessity'.[399]

Commentators have consistently suggested that the concept of human rights represents the amalgamation of philosophical, religious, and legal considerations. These claims are supposedly legitimised on the apparent permanence of similar concerns - loosely based around the importance of protecting or providing for those individuals who are regarded as being vulnerable. Connor Gearty notes that this transcendent purpose of protecting individuals from unnecessary harm is concretised in modern times in the form of law (and specifically the language of law).[400] The legitimating purpose of protecting the vulnerable appears to provide the concept of human rights with contextual relevance and significance (in the sense that it replaces religious and spiritual justifications for such protection advanced in the past). Douzinas articulates this point effectively when he paraphrases Nietzsche to suggest that 'if God, the source of natural law, is dead, he has been replaced by international law'.[401] It would certainly appear reasonable to accept that the foundation of the historical significance of human rights, like the religious doctrines which preceded it – and which allowed for hierarchisation of interests based on individual worth - is rooted in the process of eradicating human vulnerabilities. However, as established in Chapter Two, this thesis does not aim to ground the legitimacy of the idea of fundamental human claims (e.g. human rights) on a justificatory account based purely upon this position. Instead, it suggests that the overarching purpose of

[399] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 372.
[400] Conor Gearty, 'Human Rights: The Necessary Quest for Foundations' in Costas Douzinas and Conor Gearty (eds), *The Meaning of Rights: The Philosophy of Social Theory and Human Rights* (Cambridge University Press 2014) 21-38.
[401] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 116.

the idea of human rights – namely to actualise individual autonomy[402]- distinguishes this concept from other historical accounts, and provides it with a foundation which is universally applicable. This proposition is based on the observation that all peoples/states can recognise the validity of agency (even if disagreement persists regarding what is required to enable it).[403] In reflection of analysis conducted within this chapter, it is further proposed that this purpose amounts to the 'underlying justificatory principles'[404] described by Dworkin, in relation to the concept of universal human rights itself. Similarly, in accordance with Nietzsche's proposed critical appraisal of ideas,[405] it is suggested that it is the legitimating purpose of human rights which is universal (and universalising), and that the value of the human rights discourse simply relates the manner in which it continues to optimally reflect and communicate this purpose (in reflection of the judicial approach of Judge Hercules).[406]

Consistent critical appraisals of the communication of this purpose in the context of rights is necessary in order to determine the sufficiency of existing/prevailing accounts. The necessity of this process is premised on the realisation that optimal communication is contextually contingent, and thus will continue to evolve. As such, the concept of human rights cannot reasonably be regarded as definitive – in relation to either the existence of claims or, indeed, the scope of existing claims. Ultimately, this approach looks to refocus consideration of the legitimacy of the universality (and absoluteness) of human rights away from the potential validity of contextual claims, and towards the purpose of such protections (e.g. to actualise human agency).

[402] This is represented in the process of protecting our 'personhood'; understood as the ability to function as autonomous agents. See James Griffin, *On Human Rights* (Oxford University Press 2008) 215-220.
[403] Alan Gewirth, *Reason and Morality* (University of Chicago Press 1992) 3-8
[404] '[G]eneral principles which underlie and justify the settled law …'. Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 143.
[405] Friedrich Nietzsche, *The Use and Abuse of History* (Macmillan for the Library of Liberal Arts 1957) 20.
[406] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 132-153.

3.5.1 Advantages with Foundational Protections and the Perfectibility of Law

As we have seen, the application of this approach could also result in practical benefits for contemporary human rights securing mechanisms – such as the ECHR (specifically, by providing an alternative means by which to examine the sufficiency of prevailing efforts to secure Convention based protections). For example, it is evident that an approach which is consistent with the 'right answer' (e.g. perfectibility of law) theory would require the ECtHR to display a greater level of consistency when determining the legitimacy of the scope of Convention based rights. In the first instance, this would call for more robust/consistent application of the objective criteria *already* established with their own jurisprudence across the jurisdiction of the ECHR. This would represent criteria which is based on practical understanding of the nature of convention rights themselves (as well as of legitimate circumstances in which their enjoyment may be restricted) – e.g. *Müller*[407] - and which should therefore not be overly susceptible to arbitrary interpretation or manipulation (as acceptance of their validity is not contingent upon specific national/cultural values). Similarly, it would also require a more disciplined approach to determining the appropriate form of consensus analysis the Court is to adopt in future cases - a decision which should be based exclusively on securing the strongest level of protection for Convention rights.[408] In accordance with the idea of the 'perfectibility of law', grounding the justification for this determination on the purpose of such

[407] *Müller and Others v. Switzerland* (1988) 13 EHRR 212.

[408] With controversial cases relating to issues of a moral nature (e.g. same-sex marriage), the revised approach could perhaps require some form of overwhelming consensus - either amongst other member states of the ECHR, or more broadly reflected by global developments, or instead the national opinion of a particular state (whichever is most likely to secure the strongest level of protection) - before seeking to legitimately hold affected parties to a higher standard of protection. The key thing to note is that with a 'right answer' approach, once an interpretation of Convention rights which effectively evolves the substantive content of protection is accepted by the ECtHR in relation to one jurisdiction, the expectation must be that all other member states will eventually conform with this new (legitimate) interpretation. Moreover, any subsequent variation with the application of this right may only be justified in the absence of a form of overwhelming consensus - that is to say, whilst alternative interpretations of the legitimate scope of this protection may still be regarded as defensible or valid. For a detailed examination of the possibility of reform regarding the ECtHR usage of consensus analysis see Helen Fenwick, 'Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?' (2016) 3 European Human Rights Law Review 249.

protections - to actualise normative agency - could therefore provide the ECtHR with a more optimal means of avoiding an unjustifiably absolutist approach (e.g. avoiding the promotion of specific, non-consensus driven interpretations of rights as being definitive), whilst holding member states to a higher level of accountability (by expecting eventual conformity with interpretations already determined to be valid).

This approach would also appear to be useful in considering possible resolution of perhaps the most pertinent challenge of the human rights movement – the purported conflict which exists between human rights and national security.[409] In contemporary times, this is exemplified by the debate surrounding the quantification of deserving claimants – principally in the context of suspected terrorist agents.[410] Populations of states within the international community are increasingly being asked to consider whether the fundamental interests of these individuals should be afforded the same level of protection as the 'innocent' people their actions invariably undermine. If such protections are justified due to their ability to safeguard fundamental interests all human beings possess simply because of their shared humanity, and are legitimised through the acknowledgment of this fact, then how, they are asked, can they protect individuals whose actions demonstrably disregard appreciation of this justification? The purpose of such questioning is seemingly to consider whether violent criminals and suspected terrorists, in depreciating the interests of others through their personal conduct, qualify as the class of human deserving of the protection of human rights law. It therefore appears to be based upon acceptance of the non-absoluteness of rights, in that it is acknowledged that they may be effectively 'forfeited' in certain circumstances. Specifically, as Stephen Kershnar explains, this approach embodies the belief that '[if] a person infringes or

[409] Philip Ruddock, 'A New Framework: Counter-Terrorism and the Rule of Law' (2004) 16 The Sydney Papers 112, 117.
[410] See for example the political and public debate regarding the case of *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1.

threatens to infringe upon the moral right of another, then in all contexts she forfeits her right to liberty or a right contained within it'.[411]

Yet, the basis of the contemporary concept of human rights appears to be the understanding that all possible claimants deserve to have their fundamental interests protected,[412] and that certain protections are absolute (such as the prohibition of torture). In this way, by accepting the validity of prioritising national security over fundamental liberties, we effectively acknowledge the illegitimacy of the idea of practically enforceable (and desirable) human rights. However, as this chapter has established, the legitimacy of universal rights cannot be made contingent upon accepting certain claims as absolute. This is because, to do so, we would have to acknowledge the definitiveness of particular accounts of human rights. Developments of the last century alone evidence the fact that the content, meaning and scope of such claims can evolve.[413] It would therefore be mistaken to interpret (or promote) the accepted content of such protections at any given time as being definitive. Similarly, the practical application of any specific right must also be accepted as non-absolute on this basis. Notwithstanding the merits of the critiques suggested by Bentham (and discussed earlier in this chapter), it is clear that rights can be justifiably interfered with if such action represents the optimal means by which autonomous agency may be actualised. Specifically, this would relate to exceptional circumstances wherein continual provision of the relevant protection would significantly endanger the survivability of the state. This point will be examined in more detail in Chapter Five.[414]

[411] Stephen Kershnar, 'The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing' (2002) 29 Philosophia 57, 73.
[412] Indeed, as Michael Freemen explains 'all human beings are equal in right'. Michael Freeman, M, *Human Rights: An Interdisciplinary Approach* (Polity Press 2002) 107.
[413] This was demonstrated earlier in this chapter in the context of ECHR case law. Specifically, by considering the evolving scope of Article 8 of the ECHR evidenced between *Fretté v. France* (2002) 38 EHRR 438, and *E.B. v. France* (2008) 47 EHRR 509.
[414] See Chapter Five, section 5.3.

As we have seen, there are evident strengths and limitations with both consequentialist and deontological approaches. Upon reflection, it is to be noted that the philosophical framework of this thesis will not be based on the complete adoption of either approach. Instead, it will argue that neither is capable of providing a sufficient, realisable justificatory account for human rights on their own. This thesis will propose that a preferable alternative would be to construct a model which accentuates some of the strongest aspects of each approach. Specifically, this will be comprised of two parts. Firstly, it will suggest that the purpose of human rights is absolute and universal. Secondly, it will propose that, in contrast, individual protections are non-definitive, and non-absolute (for reasons discussed in this chapter). Therefore, whilst the purpose behind such protections cannot be unjustifiably disregarded, it is accepted that this purpose is not contingent upon absolute fulfilment of contextual interpretations of human rights claims.

This position accepts that the language of human rights is persistently powerful and effective because it is a practical manifestation of a very specific purpose.[415] It is suggested that it is this purpose that is universalising, and which gives rise to universally relevant claims. Yet, as mentioned, these claims cannot be regarded as definitive. In this way, the language of rights should be understood simply as a vehicle through which this purpose is advanced. It provides a means of articulating the legitimacy of this purpose. Yet, it is not, necessarily, the only means by which it is possible to do so. This approach accepts that the content of rights is changeable, in that it will logically evolve over time. The inalienable aspect of rights should simply be seen relate to the purpose behind the protections, and not the content of individual claims themselves. In essence, this approach suggests that we should promote the universalising idea behind the concept of rights, but acknowledge that current, or historical,

[415] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 1-109.

interpretations cannot be regarded as the only possible means, and should therefore not be presented as such. Instead, it should be accepted that the concept of human rights articulates (with varying degrees of success) universally relevant principles. Moreover, it argues that these principles correlate with certain fundamental interests that all normative agents (a) have the capacity to recognise the significance of (b) and need to have protected in order to ensure a satisfactory standard of living.

It is important to briefly distinguish this approach from a traditional consequentialist account of human rights. It is proposed that the distinction rests upon the inherent non-subjectivity of the universalising idea. There is, at least theoretically, consistency in relation to the criteria upon which choices should be made. Under a traditional consequentialist decision-making system there will be no requirement to secure any benefit for rights based interests. In contrast, with the approach proposed in this chapter, the decision to act (or not to act) as it pertains to interference with human rights is to be made entirely upon the basis of human rights based interests (and the purpose of actualising normative agency). Where a traditional consequentialist approach can lead to interference with fundamental protections which is not predicated on the perceived benefits such action may have to these interests, the alternative approach proposed within this thesis would only allow such interference to occur when these interests are themselves better served by their temporary violation.

Similarly, with this approach the distinguishing characteristic adopted from deontological accounts relates to the specific *purpose* of seeking to protect certain individual interests. This reflects the intent to protect the actualisation of individual human agency as

proposed by James Griffin.[416] As such, it is seemingly based upon a universality largely resistant to the influences of contextual contingencies. This is because all those who qualify as human beings, as well as all ostensible agents (those who evidently retain the capacity to develop normative agency – such as children) are entitled to the protections afforded by human rights claims.[417] In this way, the universality of human rights arguably relates to the foundational purpose behind the justification to such protections.

3.6 Conclusion

This chapter began by examining consequentialist and deontological approaches to justifying the concept of human rights. Through this investigation it was ultimately determined that adopting either approach exclusively undermines the possibility of universalisable human rights. This conclusion was based on evident limitations relating to each approach respectively. In the case of consequentialist accounts, these limitations were noted to relate to the lack of certainty of protection of human rights norms (e.g. as a results-based approach may legitimately justify prioritising other benefits – such as state security – over individual rights). Conversely, with deontological accounts the limitations were seen to relate to lack of certainty of action (as it pertains to identifying practical means of securing such protections). It was further suggested that a preferable alternative to the adoption of either a purely deontological or consequentialist account may be found in the work of Ronald Dworkin. Specifically, this was argued to relate to the concept of the 'perfectibility of law' as represented in Dworkin's 'right answer approach', and reflected in the jurisprudential methodology of Judge Hercules. Essentially, it was argued that correct answers to legal solutions are contextually relevant, and are determined

[416] This represents that which James Griffin termed 'normative agency'. Griffin maintained that human rights are fundamental to a meaningful human life because 'human rights are protections of our normative agency'. James Griffin, *On Human Rights* (Oxford University Press 2008) 149. Ultimately, Griffin affirmed that the importance of such agency is that it represents the 'capacity to choose and to pursue our conception of a worthwhile life'. ibid 45.

[417] See for example Shaun Pattinson and Deryck Beyleveld, 'Defending Moral Precaution as a Solution to the Problem of Other Minds: a reply to Holm and Coggon' (2012) 23 Ratio Juris 258.

by establishing conformity with the 'general principles that underlie and justify the settled law …'.[418] In the context of human rights, it has been suggested that these general principles are represented by the underlying justificatory purpose of such protections (e.g. to actualise normative agency). As such, legitimate interpretation (and application) of human rights norms requires conformity with this purpose (in a manner which reflects general acceptance of the most optimal means by which it is to be fulfilled). Thus it has been established that the content of human rights is non-definitive, as it is open to legitimate evolution and expansion in accordance with the underlying purpose of such protections.

However, it was also noted that modern accounts of human rights generally attempt to restrict interpretations of this concept to those already defined in existing international instruments and declarations. Yet these accounts are products of history. Whilst they are representative of significant advancements in the human rights movement, it has been suggested that they should not be regarded as definitive. This is because the historical contexts in which their creation was made possible (and necessary) have changed. The challenges of the human rights movement in the present day are not commensurate to those of the era in which these existing instruments were constructed. For example, where the principal challenge was once to legitimate the idea of human rights (as accomplished with the UDHR), in modern contexts this challenge arguably pertains to securing the universal implementation of such protections. Moreover, in recent years, pragmatic efforts aimed at resolving the question of the universality of human rights (in relation to practical implementation) have sought to reduce the scope of such protections. Whilst this may enhance the universal applicability of human rights, it is unclear if it is ultimately consistent with the purpose of these claims. As previously noted, this chapter has suggested that the concept of human rights is perfectible, in the sense that it is capable of evolving; of changing in order to meet the needs of the contextual age. The

[418] Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 143.

potentiality of further evolution is dependent upon proponents of the idea of universal rights being prepared to question the sufficiency of prevailing accounts (in order to determine whether they represent genuine/optimal appreciation of the purpose of such protections). This chapter has suggested that, in accordance with Friedrich Nietzsche, the adoption of a 'critical' approach to the study of human rights may usefully clarify the sufficiency of contemporary accounts of these protections. As noted, a 'critical' approach requires the rejection of presuppositions with regard to the definitiveness/sufficiency of predominant interpretations of ideals/concepts. It essentially requires the careful study of the implementation of such ideals/concepts in a manner which is capable of determining the merits of continuing with prevailing approaches. In the context of human rights, it has been suggested that such merits are to be determined by establishing the sufficiency of prevailing interpretations of the concept within the context of the fulfilling the justificatory purpose of such claims.

Similarly, it would also appear to depend upon the willingness to resist the conflation of history in pursuit of the construction of specific historical narratives. Although it is clear that the idea of fundamental human needs and interests existed long before the creation of the UDHR (and are famously represented in the DOI and DRMC), it is equally apparent that universal rights, as presently understood, did not exist prior to the Twentieth century. As Samuel Moyn suggests:

> One thing is for sure: the lesson of the actual history of human rights is that they are not so much a timeless or ancient inheritance to preserve as a recent invention to remake ...[419]

A legitimate 'remaking' of human rights would represent developments of the interpretation of such protections (in relation to scope/substance) in a manner which more accurately/optimally reflects their underlying purpose. This thesis has argued that this purpose

[419] Samuel Moyn, *Human Rights and the Uses of History* (Verso 2014) 86.

is best understood as the objective of actualising normative agency. It has been further suggested that the foundational ideal of actualising human agency provides a preferable basis for justifying the universality of human rights as it transcends historical contingencies in a way that other justificatory accounts cannot (e.g. dignity). This is because its appropriateness in providing a universalisable foundation for human rights is not dependent upon the eventual acceptance of one specific interpretation of this concept (e.g. such as a Western account of dignity), but only on the continual presence of normative agents (capable of recognising the significance of their agency). For this reason, it is suggested that future development of the concept of human rights should be made in accordance with this ideal. Whilst historically such development has been personified with the expansion of protections (in relation to the scope of individual claims, as well as general coverage), it is important to note that this too is not definitive. Indeed, legitimate evolution can be seen to relate to the effective re-imaging of the idea of human rights in a manner which allows it to more sufficiently fulfil the overarching purpose behind such protections. This process begins with the realisation that all claims are foundational (in the sense that they cannot be regarded as definitive – due to the historical contingency of accepted interpretations). The thesis will now move on to consider the foundational nature of rights in more detail through the examination of a specific claim – the right to health.

4 Human Rights as Foundational Claims: Re-Conceptualising the Right to Health as a Right to Healthiness

4.1 Introduction

This chapter will consider two methods of articulating the legitimacy of the human right to health. The first draws from the various declarations within which this right is contained to argue that it is a valid concept simply because we have afforded it legitimacy by conceptualising it. The second approach suggests that there is a wider philosophical, theoretical understanding of the right to health which transcends the current legislative and normative accounts - which are themselves only capable of representing certain important aspects of the underlying right. The significance with this approach is the idea that the purpose of the right to health has yet to be satisfactorily defined or fully articulated. This chapter argues that this purpose must be clearly identified before we can begin meaningful discussion on the normative content of a universalisable claim. This chapter employs both of the aforementioned methods in order to present a robust theoretical account of the right to health. Although the primary focus will be on significant academic writings, an initial examination of the historical evolution of the concept in major international treaties will provide the foundation for further theoretical analysis and help to establish that development within this area has been both shaped and restricted by various legislative interpretations (based on contextually contingent understanding). In essence, this chapter argues that a clear, robust theoretical account of the human right to health can enhance the realisability of this protection by reconceptualising it as a foundational claim. Furthermore, it proposes that approaching this task from the perspective of acknowledging the perfectibility of law, as well as the need for the continual assessment and reaffirmation of ideas (as discussed in Chapter Three), is useful in determining the contextual legitimacy of this claim.

4.1.1 Chapter Four Structure: Key Aims and Objectives

In order to accomplish this objective, the chapter will be structured into several corresponding sections with three key outcomes to be achieved:

1. The focus of this chapter will be on providing a detailed examination of prominent academic accounts of the right to health. Through an examination of these contemporary perspectives, this chapter will address important issues relating to the task of actualising the right to health (such as how it is to be accurately defined). Essentially, this section will provide some clarification in relation to the objective of more effectively conceptualising the right to health in robust theoretical terms by identifying recurring characteristics of prominent theoretical accounts of this protection. Specifically, it will be seen that the inter-connected principles of 'necessity' and 'subsistence' are consistently argued to be integral to the underlying purpose of this claim – to secure a sufficient level of healthiness. This examination of relevant academic works will ultimately establish that the concept of healthiness extends beyond issue of physiological health (4.2);

2. In order to build on these results, this chapter will next consider necessary requirements for the fulfilment of the right to health in context of differing levels of subsistence: understood as (i) bare, (ii) adequate, and (iii) maximum, respectively. Here it will be suggested that bare subsistence constitutes basic physiological survival, whilst adequate subsistence denotes a satisfactory level of human functioning. Conversely, maximum subsistence relates to the most optimal means of healthiness. In the context of the right to health, it is further proposed that bare subsistence accounts for basic physiological elements (such as perquisites for health, like safe food and clean water), whereas adequate subsistence accounts for sufficient access to all relevant components

(comprising of physiological, psychological, and social elements of health). Finally, maximum subsistence is seen to represent the highest attainable standard of health possible. This section will demonstrate that, in reference to Griffin's account of human rights, an accurate and universally realisable account of the right to health must be rooted in the concept of protecting only those things necessary for securing a 'functioning human agent'. As such, it is to be argued that the right to health ought to be understood to be an entitlement to the fundamental universal elements of human healthiness which allow individuals the opportunity to live a life worthy of a human being. Accordingly, it will be established that, in practical terms, the right to health is realistically only a claim to adequate subsistence but, and in reflection of the justificatory purpose of such protections (e.g. in reference to the perfectibility of law), with a corresponding underlying objective of continually striving for the obtainment of maximum health (4.3);

3. To reinforce these conclusions, this chapter will next examine the three relevant components of human healthiness: physiological (e.g. diagnostic and curative treatments), psychological (e.g. free consent/ability to make a choice) and social (e.g. education, housing) respectively. This examination will establish that these components, whilst focusing on separate elements of healthiness, are ultimately inter-connected and reciprocally dependent. The purpose of this investigation is not to present a wholly new interpretation of the right to health, but rather is to utilise existing academic approaches in order to articulate a more 'complete' theoretical account of this concept. In effect, this chapter intends to demonstrate the perfectibility of legal knowledge (in accordance with Dworkin's theoretical approach) in the context of the right to health - argued to be represented by the concept of progressive realisation. Moreover, it aims to reinforce the practical benefits of a critical approach to appraising

the sufficiency of ideas as proposed by Nietzsche (specifically as means of ensuring future progress conforms to the underlying purpose of the law). Ultimately, this chapter will conclude with the contention that, due to necessary relativeness of its content (as well as its inherent perfectibility), the right to health is actually better understood as a foundational right to human healthiness which seeks to secure the enablement of human agency (4.4).

4.2 Defining a Human Right to Health

Before addressing additional aspects of the academic debate, it is useful to briefly explore the right to health in the context of international treaties. This analysis is important as it establishes the historical context in which the academic discourse has evolved. As has been noted by John Tobin,[420] this evolution stretches from the UDHR and the corresponding creation of the World Health Organisation (WHO 1948) the same year, to the creation of the UN Special Rapporteur for the Right to Health in 2002. In between these events the validity of the right to health was advanced by the International Covenant on Social, Economic, and Cultural Rights in (ICSECR) 1966 and the UN General Comment 14 in 2000.

At the start of this process, the right to health was broadly defined in Article 25 of the UDHR as an individual entitlement to 'a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services'.[421] As previously addressed, in relation to the general significance of the UDHR, Costas Douzinas suggests that the primary aim of this declaration was to articulate

[420] John Tobin, *The Right to Health in International Law* (Oxford University Press 2012) 14-30.
[421] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) <http://www.un.org/en/documents/udhr/index.shtml#a25> accessed 18 May 2018.

the validity of certain rights claims in the aftermath of an unprecedented global conflict.[422] Consequently, it is not surprising to discover that the normative content of this entitlement was left largely unspecified. The general purpose was not to define the right in explicit terms, but simply to provide the concept with a sense of legitimacy. It is also important to highlight that the notion of human healthiness was not restricted to purely physiological elements. Indeed, Article 25 clearly identifies other social factors integral to a 'healthy human life'. Therefore, it is apparent that the idea of a 'human healthiness' which transcends physiological health was present even at the earliest stages of conceptualisation.

Similarly, the preamble of the Constitution of the WHO identified that the right to health did not relate exclusively to a right to be healthy in a purely physiological sense when it declared that:

> Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.[423]

It is here for the first time that the language of a 'right to health' is directly utilised in the form of a proposed entitlement to the highest attainable standard of health. This preamble also provided the origins of several recurring themes pertaining to the right to health such as non-discrimination and equality. As we will come to discover, these terms have consistently been utilised within the discourse to reaffirm the universal applicability of this entitlement. It could be argued that such efforts stem from a determination to redress the supposed aspirational

[422] 'Indeed, the signing of the Universal Declaration, on 10 December 1948, and the execution of the seven defendants condemned to death by the Tokyo war crime tribunals, on 23 December, brought the two parts of the post-war project together … The trials gave an account of the past, while the Declarations and Conventions aspired to regulate the future'. Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 28. See also Michael Ignatieff, 'Human Rights: The Midlife Crisis' (1999) 46 The New York Review of Books 58, where he asserts that 'the holocaust made the declaration possible'.

[423] Constitution of the World Health Organisation (adopted July 22 1946, entered into force 7 April 1948) 14 UNTS 185 <http://www.who.int/governance/eb/who_constitution_en.pdf> accessed 18 May 2018.

quality of this right in the context of other fundamental protections. Indeed, the applicability of this particular right appears contingent on specific social or economic realities in a manner that so called 'basic' or 'priority rights' do not.[424]

The right to health was further defined in Article 12 of the ICSECR where once again it was articulated in terms of an entitlement to 'the enjoyment of the highest attainable standard of health'.[425] The purpose here was largely two-fold; to crystalise the definition of the right and to identify specific areas for appropriate application. In contrast to the largely un-quantified scope of this entitlement in preceding documents, the focus of this application was primarily physiological. The specific examples of infant mortality rates or possible global pandemics were used to simultaneously highlight what the right to health could endeavour to remedy, as well as reinforce understanding of why the right was required.[426] As such, Article 12 attempted to 'solidify' the concept by quantifying the scope and purpose of the entitlement in more specific terms.

However, it is important to note that the willingness to refocus on primarily physiological aspects of human healthiness arguably had the unintentional consequence of limiting the right as a justifiable *universal* claim (by selectively restricting the fundamental purpose). Here focus was placed on articulating the need to alleviate certain conditions which contributed to the perpetuation of physiological un-healthiness of disadvantaged individuals.[427] As such, the immediate applicability of the right to health was deliberately limited to particular

[424] For example, Samuel Moyn explains that human rights cannot be everything to everyone and must instead pertain exclusively to certain fundamental or 'priority' claims. On this point he notes that 'human rights call to mind a few core values that demand protection, they cannot be all things to all people'. Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press 2012) 227.

[425] International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force January 3 1976) 993 UNTS 3 (ICESCR) <http://www.un-documents.net/icescr.htm> accessed 18 May 2018.

[426] ibid.

[427] For example, we see this reflected in section 2(a) 'reduction of the stillbirth-rate …' and also in 2(b) 'industrial hygiene'. Whilst these are both highly important issues, it is reasonable to suggest that their prevalence is felt in some parts of the world (e.g. developing world) more than others (e.g. developed). ibid.

sections of humanity. Whilst it is certainly true that these accounted for hundreds of millions of individuals, this practice arguably prevented the right from becoming truly universally relevant during this time. That is to say, justification for this entitlement was linked to states of physiological un-healthiness primarily relevant to specific parts of the world. Consequently, the process of strengthening the underlying legitimacy of the right to health did not necessarily correspond with the successful articulation of the validity of its universal scope.

General Comment 14[428] on the right to the highest attainable standard of health sought to build upon the preceding declarations and reaffirm the universal applicability of the right to health by further defining practical methods for ensuring its fulfilment. Although the duty to provide an adequate health care system was discussed, the scope of the entitlement accounted for similar provisions as those contained in Article 25 of the aspirational UDHR. The recognition that the implementation of the right to health was actually dependent on the realisation of a broad selection of other rights – ranging from food, housing, work, education, as well as some traditionally negative rights such as life, prohibition against torture, and privacy – was highly significant.[429] The purpose of this broad approach was to reaffirm the essential nature of the right to health and establish that '[h]ealth is a fundamental human right indispensable for the exercise of other human rights'.[430] It was by articulating the expansive scope of the right that General Comment 14 endeavoured to confirm that *all* human rights are inextricably linked.

[428] CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health' (ICESCR art. 12) (11 August 2000) E/C.12/2000/4 <http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf> accessed 18 May 2018.
[429] In reflecting upon the importance of General Comment 14 Jonathan Wolff suggested that '[t]he right to health seems to stand somewhere between the right to health care and the right to be healthy'. Jonathan Wolff, *The Human Right to Health* (W. W. Norton & Company 2013) 27.
[430] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000 <http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf> accessed 18 May 2018.

In addition, General Comment 14 also identified specific conditions required to effectively implement the right to health in practical terms. As with other social or economic rights, these relate to the duty to respect, protect, and fulfil.[431] The former simply regards the duty to refrain from interfering with the enjoyment of the protection, either directly or indirectly. The second follows on from this and obligates states to prevent third parties from interfering with the enjoyment of the right. Finally, the latter concerns the duty to initiate procedures conducive to the fulfilment of the protection, specifically in the form of legislative, judicial, or economic measures.[432] This comment goes on to detail that these duties can be satisfied most easily by ensuring equality of access to health services as well as adopting and promoting a national health policy. However, perhaps the most important aspect of General Comment 14 precedes the sections on state obligations and pertains to the idea of 'progressive realisation'. This concept relates to an important pragmatic concession on behalf of the right to health (and arguably the concept of universalisable rights itself) with respect to appropriate methods of implementation.

In essence, this involves recognising that a combination of economic, environmental, and social realities may prevent certain states from fulfilling their right to health obligations in a commensurate manner to more developed or less disadvantaged ones. Crucially, as Jonathan Wolff notes, this principle represents acknowledgement that:

> [T]here can be legitimate reasons why a state may not be able to fully realise the right to health … that a country must take planned and targeted steps toward full realisation, but cannot be criticised for not immediately achieving the highest standard of health for its people if it is not attainable.[433]

Thus, progressive realisability affords such states some flexibility relating to their efforts to actualise the right to health in accordance with their contextual limitations. However,

[431] Scott Leckie, *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006) 20-23.
[432] ibid.
[433] Jonathan Wolff, *The Human Right to Health* (W. W. Norton & Company 2013) 10-11.

as General Comment 14 consistently emphasises, this concept does exempt states from their obligations indefinitely, but rather, the purpose of progressive realisation is to ensure that all states continue to develop the normative content of the right to health in a manner which provides an increasingly greater level of protection to individuals. In this way, it attempts to confirm that whilst the right to health is aspirational in nature, it can be practically realised, and is fundamentally realisable (and continually evolving in relation to content and scope). It is worth noting that the concept of progressive realisation is seemingly commensurate with the approach adopted by Judge Hercules, in that it reflects the view that the 'right' answer may be both contextually contingent and inherently perfectible.[434]

This understanding was subsequently reinforced in 2002 by the creation of the Special Rapporteur for the Right to Health.[435] The aim of this position was to give further effect to the right to health by fulfilling three correlating objectives. These were, as inaugural Special Rapporteur Paul Hunt duly noted:

> [T]o promote and encourage others to promote the right to health as a fundamental human right; to clarify the content and contours of the right to health; and to identify good practices for operationalizing the right to health at the community, national and international levels – and the ways they should be approached.[436]

Essentially, the aim of the Special Rapporteur was to facilitate actualising the universal application of the right to health by guiding the discourse and shaping understanding of the entitlement. The hope was to accomplish these objectives through a series of reports on various aspects which either impacted on, or indeed impaired, human healthiness; such as sexual health

[434] For a detailed examination of this see Chapter Three, section 3.3.
[435] John Tobin, *The Right to Health in International Law* (Oxford University Press 2012) 1-2.
[436] Paul Hunt, 'The UN Special Rapporteur on the Right to Health: Key Objectives, Themes, and Interventions' (2003) 7 Health and Human Rights 1.

and poverty,[437] mental health issues,[438] and equity of access to the highest attainable standard of health.[439] The creation of this position appears to mark the culmination of the evolution of legislative interpretations of the right to health. Whereas once the objective was simply to afford legitimacy to the *idea* of this right, there is now a corresponding aim to substantiate the relevance of the right by identifying either specific content or particular situations in which an operational claim is required.

It is thus comparable to the historical development of the modern concept of human rights in general (as represented in various international instruments).[440] Whilst this discussion has led to tangible disagreement in relation to both of these factors, it is perhaps most profoundly demonstrated with regards to the content of the entitlement itself. Indeed, the 'evolution' of the discourse has not necessarily resulted in progressing the understanding of the right in practical terms. This is significant because a recurring criticism of the role of Special Rapporteur is that it has failed to bring resolution to this disagreement by specifying precisely what the right to health should be.[441] Ultimately, this chapter proposes that a 'critical' appraisal of the concept of the right to health (in accordance with the Nietzschean approach discussed in Chapter Three)[442] provides us with a useful means of clarifying the purpose (and

[437] See UNCHR, The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Special Rapporteur, Paul Hunt (16 February 2004) UN Doc E/CN.4/2004/49 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/109/33/PDF/G0410933.pdf> accessed 18 May 2018.
[438] See UNCHR, The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Special Rapporteur, Paul Hunt (11 February 2005) UN Doc E/CN.4/2005/51 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/108/93/PDF/G0510893.pdf> accessed 18 May 2018.
[439] See UNCHR, The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Special Rapporteur, Paul Hunt (31 January 2008) UN Doc A/HRC/7/11 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/105/03/PDF/G0810503.pdf> accessed 18 May 2018.
[440] As discussed in relation to the evolution of the concept of natural rights from the eighteenth-century declarations through to modern international treaties. For a detailed account of this see Chapter Two, section 2.3.
[441] See Upendra Baxi, 'The Place of the Human Right to Health and Contemporary Approaches to Global Justice: Some Impertinent Interrogations' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 12-27.
[442] According to Nietzsche, it is through critical examination and re-evaluation that 'history can serve life'. Friedrich Nietzsche, *The Use and Abuse of History* (Macmillan for the Library of Liberal Arts 1957) 22. For a detailed account of this see Chapter Three, section 3.4.1.

thus the composition) of this fundamental claim. This approach is based on the desire to determine the sufficiency of existing historical accounts – through robust, aggressive examination - so as to establish the effectual usage, or identify required developments, of these ideas/concepts.[443]

4.2.1 Academic Accounts of the Right to Health: A Right to What?

This examination will commence by addressing some predominant theoretical perspectives on the right to health. To begin it is worth noting that of all purported universal human rights the right to health is perhaps the most contentious.[444] Indeed, as Jonathan notes:

> On the one hand the state of global health provides an apparently compelling case for a universal human right to health. On the other hand, especially considering the resource implications, the idea of such a right seems utterly unrealistic.[445]

This controversy is represented within the debate itself in the form of recurring disagreement pertaining to the necessary scope and content of the entitlement. The purpose of this section is to develop potential means of resolving this disagreement by identifying consistent elements within academic attempts to define and substantiate the theory of the right to health. Through this analysis it will become apparent that academic approaches are frequently based on individual conceptualisations of the same purpose, and that disagreements generally relate to the specific scope of the entitlement itself. Thus, it could be argued that, within the academic community the validity of the concept of the right to health is simultaneously undisputed and unresolved. Whilst the *idea* behind the legitimacy of this claim is consistently reaffirmed by legal academics, no consensus has been achieved regarding the required definition of the entitlement in prescriptive terms. Consequently, the focus of the

[443] ibid 20-22.
[444] Jennifer Prah Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 Yale Journal of Law & the Humanities 273.
[445] Jonathan Wolff, *The Human Right to Health* (W. W. Norton & Company 2013) 137-138.

discussion is strikingly divided between attempting to justify the theoretical legitimacy of the protection, and debating how best to qualify and actualise the un-quantified right in a practical sense. In this way, the progression of the discourse is seemingly hindered by an inability to provide a unifying theoretical account of the right to health. This section will establish whether it is possible to articulate a more 'complete' (e.g. 'true') definition by clarifying the required scope and focus of the entitlement based on determining factors which incorporate consistent elements from various important theoretical accounts (in an attempt to bridge the gap between theory and practice).

As mentioned, there are seemingly two fundamental objectives with regards to the academic approach which concern either; (i) definition or (ii) application. The first, and arguably most contentious, focusses on the challenge of defining the right to health in specific terms. An important aim of this theoretical approach is to attempt to justify the underlying philosophical legitimacy of the entitlement. In contrast, the primary aim of the second aspect is to establish practical means of actualising the right to health. With this approach understanding of the claim is often restricted to 'a right to health care' in an attempt to enhance its universal applicability.[446] However, it is important to note that the capacity to apply the right to health in a meaningful manner is contingent upon understanding exactly what it entitles, and as such what is required for it to be effectively fulfilled. In this sense, the right to health arguably represents an appropriate reflection of the general state of the contemporary human rights discourse itself (defined by persistent conflict between theory and result). For this reason, the remainder of this chapter will focus primarily on the task of providing a robust theoretical definition.

[446] Allen E. Buchanan, 'The Right to a Decent Minimum of Health Care' (1984) 13 Philosophy & Public Affairs 55.

In this regard, it could be maintained that previous attempts to define the right to health have focussed on one of three areas. The most basic is the historical approach, which was considered in the preceding section, and simply seeks to demonstrate the evolution of the concept and contextualise traditional interpretations within this framework. Two additional alternatives look to address contemporary interpretations of the right to health – or what the right is currently understood to be - and aspirational accounts – or what the right *should* be understood to be. Whilst this chapter will address each of these alternatives to some extent, the major focus will be on aspirational interpretations. This decision is based on the understanding that, as the ideological core of the entitlement, these should be most representative of its 'true' nature and purpose (e.g. reflecting the 'general principles that underlie and justify the settled law …').[447] Indeed, as mentioned, the task of securing the human right to health is seemingly dependent on the ability to *accurately* define it. Essentially, it is suggested that this definition must be founded on the fundamental purpose of the right, which it maintains a robust aspirational account can identify, if it is to substantiate the justifiable 'need' for corresponding action.

When discussing the right to health, Paul Hunt suggests that it should be regarded as an irreducible concept which cannot be quantified in complete or definitive terms.[448] This argument is based on the idea that the right is an entitlement to more than access to adequate health services and that the ability to live a healthy human life is seen to depend on securing various additional social elements. Moreover, this view maintains that our understanding of these elements can and should continue to evolve as our comprehension of 'healthiness' develops. For this reason, Hunt maintains that attempting to focus the content of the right on a

[447] Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 143.
[448] Ultimately, Paul Hunt suggests that an overly restrictive, fixed approach is undesirable because 'it can lead to a fractured consideration of the right to the highest attainable standard of health …'. Paul Hunt, 'Developing and Applying the Right to the Highest Attainable Standard of Health' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 32.

'complete' list of obligations ultimately risks fragmenting and undermining the primary purpose and justification behind the claim.[449] Whilst he acknowledges a need to adopt practical language to draft universally applicable legislation, he emphasises that 'at the same time, the empowering, transformative message of human rights must not be sacrificed'.[450] In order to protect the transcendent nature of this right we must refrain from unnecessarily narrowing the scope of the entitlement simply as a means of translating it into a realisable normative construct. In accordance with various legislative accounts, this interpretation arguably presents the right to health as a developing social objective covering a variety of corresponding individual entitlements.

According to this position, the fundamental aim should be to promote the continuous development of social and environmental factors integral to the enhancement of human healthiness.[451] Although physiological aspects of health may take precedence, they should not be accepted as the exclusive focus of the claim. Indeed, as Hunt goes on to suggest, a fully established health care system could 'still not serve human rights' if it did not also provide fair access to all.[452] The underlying principles of equity and non-discrimination in relation to access and distribution are seen as the key to the effective fulfilment of the right to health. In this way, the decision to focus the *application* of the right to areas of notable impoverishment (as represented in various international treaties) actually represents an effort to equalise the balance of healthiness, and not a desire to over-restrict the relative scope of the entitlement in practical terms. Consequently, if one accepts this position, the universality of the right to health should be understood to relate to recognition of the inherent *need* for the entitlement. Moreover, the

[449] ibid.
[450] ibid.
[451] In other words, as Hunt suggests, 'the larger, systemic issues upon which the right to health depends'. ibid.
[452] ibid 45.

legitimacy of this claim should not be undermined by the present inability to construct a legislative framework capable of immediate application to a universal standard.

Another influential approach to defining the right was adopted by Steven Jamar, who suggested that there are two helpful ways in which to conceptualise this entitlement; (i) as a broad and aspirational claim or; (ii) as a narrow 'core' human right.[453] With the former the focus is simply on promoting the general development of health and the adoption of practical measures capable of realising this objective (beyond simple health care coverage). This effectively attempts to provide justification for the necessity of the entitlement.[454] Conversely, the latter addresses specific methods of actualising a narrowly defined, legislatively enforceable interpretation of the right to health.[455] Jamar argues that a fulfillable definition would impose upon the state obligations of both a negative and positive nature.[456] Particularly, the state would have a negative duty to refrain from acting in a manner which could negatively impact the health of the population. As example, 'to refrain from barring access to health-related information, and the duty of states not to take health-harming actions'.[457] With the corresponding positive obligation, and so much as budgetary restrictions allow, all states would be required to make practical efforts to 'reduce or address serious threats to the health of individuals'.[458] Jamar asserts that with this, states should also be expected to educate the population, and to promote the enhancement of the contingencies of health. An example of an 'affirmative duty' would be to 'promote safe and sufficient food and nutrition … to maximise the population's chances for health'.[459]

[453] Steven D. Jamar, 'The International Human Right to Health' (1994) 22 Southern University Law Review 1, 3.
[454] ibid.
[455] ibid.
[456] ibid 4.
[457] ibid.
[458] ibid. 61.
[459] ibid 54.

An inherent problem with proceeding with an expansive definition of the right to health was addressed by James Griffin who maintained that an unwillingness, or inability, to narrow the scope of the entitlement and proceed with a quantified account actually undermines, not only the capacity to promote the right as a normative construct, but also as 'a useful social claim'.[460] Under this interpretation, the attempt to secure the transcendent nature of the right by refusing to focus on specific obligations necessarily results in its very legitimacy being called into question. This is because, in a purely practical sense, all rights have to be a right to something determinate, and not just to the idea of something. Significantly however, and seemingly contradictory to his dismissal of an expansive approach, Griffin acknowledged that understanding of the claim should not be restricted to it being viewed simply as 'a right just to healthcare'.[461] Despite this, a cornerstone of Griffin's argument is belief in the need to demystify the concept of the right to health by reconsidering the realistic scope of a fulfillable claim.

Once again, the primary purpose is not to identify any form of definitive normative content, but simply to reaffirm the need to focus the discourse towards this end. Crucially, however, Griffin did provide guidance in relation to the necessary limitations of any determining criteria regarding the nature of this content. Indeed, he highlights that whilst the entitlement is often conceptualised as a claim 'to "a satisfactory" standard of living … the obvious trouble with relying on the word "satisfactory" is its tendency to change with time and place'.[462] However, it could be suggested that the apparent relativity of the value of 'satisfactory' does not invalidate its meaningfulness as it relates to determining the required focus of fundamental claims. In support of this position we could once again reference Judge Hercules and the idea of the perfectibility of law. Whilst 'satisfactory' may be contextually

[460] James Griffin, *On Human Rights* (Oxford University Press 2008) 100.
[461] ibid 99.
[462] ibid 183.

contingent, this contingency does not preclude the possibility of its fulfilment (so long as it is consistently interpreted in accordance with the accepted meaning of any given time – or place). Indeed, the applicability of the right to health seems inextricably linked to the sufficiency of language used to articulate its purpose, scope, and limitations. Thus, following this line of thinking, the objective of securing the universal application of the right to health is actually reducible to the challenge of prioritising its aims and encapsulating them in specific normative language (which accurately reflects contextual understanding of this concept).

Another alternative approach worthy of discussion was developed by Upendra Baxi.[463] Three of the most significant aspects of his argument relate to concepts of necessity, universality, and realisability. In a similar manner to other distinguished legal scholars, Baxi suggests that the 'need' and corresponding legitimacy of the right to health are primarily self-evident.[464] Additionally, he maintains that this would remain true even if the right was held simply to be a claim to adequate health care. This position is founded on the understanding that 'a minimum of health remains necessary in order to have and enjoy … other related human rights'.[465] As such, Baxi's account arguably presents the right to health as an 'enabling right' which retains the capacity to assist the fulfilment of corresponding claims. In this way, it could be conceptualised as a 'priority right' in a similar manner to so called non-derogable entitlements, such as the prohibition of torture.[466] It can be regarded as a priority right in the sense that the meaningfulness of other protections is critically undermined in the absence of its

[463] Upendra Baxi, 'The Place of the Human Right to Health and Contemporary Approaches to Global Justice: Some Impertinent Interrogations' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012).
[464] Indeed, Baxi goes on to suggest that right to health is increasingly being recognised as 'the most basic of all social and economic rights'. ibid 13.
[465] ibid.
[466] See Henry J. Steiner who suggests that the most basic, and as such least contentious, human rights (that which have been termed 'priority' here) are those that retain an 'anti-catastrophe' dimension – such as rights prohibiting torture, arbitrary detention and so on. Henry J. Steiner, 'Religion and State: An Interdisciplinary Round Table Discussion' (2004) Harvard Law School Human Rights Program, Cambridge 1, 52 <http://hrp.law.harvard.edu/wp-content/uploads/2013/08/ReligionandState.pdf> accessed 18 May 2018.

provision. This point will be expanded upon in greater detail in later sections of this chapter (and once again in Chapter Five).

Having addressed the essential purpose of the right to health, Baxi attempts to further establish the universal relevance of this fundamental claim. Here, once again, reference to physiological health is utilised to substantiate the position. Specifically, Baxi maintains that in the age of globalisation, deadly diseases can spread transnationally in an extremely short period of time.[467] Consequently, he suggests, we live under the constant threat of a potential global pandemic. Indeed, despite continuous development in the medical industry, this threat is becoming more and not less tangible due to the rise of certain anti-biotic resistant bacteria.[468] Baxi notes that 'transboundary' health risks such as these would 'respect no territorial or ideological frontiers; (and) affect the human health of all of us in various ways'.[469] Therefore, he concludes, the universal relevance of certain health related issues is clearly demonstrable.

To expand upon this point further, Baxi examines two forms of human life he classifies as; (i) bare and (ii) good.[470] The former is argued to be commensurate with 'a living death',[471] and is primarily, but not exclusively, represented in third world countries where potential impoverishment, starvation, or subjection to atrocities have reduced the quality of life to its lowest sustainable level.[472] This is 'life' purely in the form of physiological survival. Naturally, this is incompatible with the notion of 'a life worthy of a human being' and as such 'securing' this standard of living could not adequately satisfy the purpose or need of the right to health.

[467] Upendra Baxi, 'The Place of the Human Right to Health and Contemporary Approaches to Global Justice: Some Impertinent Interrogations' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 22-23.
[468] Alfonso J. Alanis, 'Resistance to Antibiotics: Are We in the Post-Antibiotic Era?' (2005) 36 Archives of Medical Research 697.
[469] Upendra Baxi, 'The Place of the Human Right to Health and Contemporary Approaches to Global Justice: Some Impertinent Interrogations' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 23.
[470] ibid, 13-14.
[471] ibid 13.
[472] In addition to poverty and mass starvation, Baxi suggests that bare life 'is also produced by the insurgent or establishment of practices of mass atrocity and politics of cruelty rendered by war or warlike events …'. ibid.

Conversely, the concept of 'a good life' appears to have clear correlation with this underlying purpose. Yet, it is important to note here that this is arguably because the concept of 'a good life' is extremely ambiguous - it is an un-quantified and unrestricted standard with seemingly infinite scope. The obvious problem with this term is that it is a standard that can be easily met by the inclusion of provisions we don't actually *need* (and thus contributes to the conflation of rights). Moreover, as Baxi duly highlights, the term is highly contentious and provides no fixed guidance in relation to what is actually *required* of a fully realised right to health. Indeed, he suggests that it could be used to justify medical care beyond human survival up to and including 'a nascent right to choose termination of an individual life … the right to a dignified death'.[473] Thus, we see once again the fundamental importance of adopted language. In the following section, this chapter will develop this to argue that that there must be a middle ground between 'bare' and 'good' which, once clearly defined, ought to provide the determining criteria for the required normative content of the entitlement.

Lisa Foreman argues that all social rights have minimum essential levels and the capacity to effectively apply them is dependent on ensuring that the conditions of these levels are satisfied.[474] In essence, these 'minimum levels' provide the 'core' of such entitlements. Foreman suggests that this core can represent both the philosophical foundation of social rights as well the basic obligations that are required to enable application.[475] As such, this position attempts to further legitimise the relevance of the right to health by reinforcing the theoretical justification behind its purported necessity, whilst underscoring its universal applicability by providing guidance in relation to its practical scope. Theoretical justification is reaffirmed with the identification of basic 'minimum' provisions that all human beings require. Thus, according

[473] ibid 14.
[474] Lisa Foreman, 'What Future for the Minimum Core?' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 67-68.
[475] ibid.

to this position, it is the demonstrable universality of basic provisions that validates the need for this entitlement.

Moreover, the concept of 'subsistence' is used to reinforce the fundamental nature of the right to health. Indeed, a traditional hierarchical approach to the gradation of the significance of rights would emphasise certain negative, or 'priority rights', above so called 'developmental' ones – such as the right to health. This justification would be constructed on the understanding that 'priority rights', such as the right to life, prohibition of torture, or freedom of expression, are superior because they are the means by which 'liberty' or 'autonomy' are protected against interference from the state.[476] However, as Foreman explains, 'one cannot be concerned about freedom without being concerned with subsistence …'.[477] The purpose of this observation is to highlight the intrinsic inter-dependency of all human rights. The relevance of 'priority' rights is clearly undermined if an individual lacks a sufficient level of 'health' to enjoy them. Or, to put it another way, the ability to enable or protect autonomy and liberty is seemingly contingent on firstly securing subsistence. The nature of the concept of subsistence in relation to the right to health will be addressed in more detail in the subsequent section of this chapter (as well as in Chapter Five).[478] For now, it is adequate to note that, according to Foreman's interpretation, the right to health is itself arguably a priority claim.

There are several other significant aspects of this theoretical account worth exploring. Firstly, Foreman reaffirms the importance of equity and non-discrimination.[479] Indeed, these principles provide the framework by which she attempts to specify the normative content of

[476] James Griffin convincingly explains that we have 'a right not to be tortured, because, among its several evils, torture destroys one's capacity to decide and to stick to the decision'. James Griffin, *On Human Rights* (Oxford University Press 2008) 33.
[477] Lisa Foreman, 'What Future for the Minimum Core?' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 65.
[478] See Chapter Four, section 4.3 and Chapter Five, section 5.4.
[479] Lisa Foreman, 'What Future for the Minimum Core?' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 65.

the ‘core obligations’. These basic provisions take the shape of ‘non-discriminatory access to health care, and housing, and services … as well as equitable distribution of these things’.[480] The right to health is again presented as a construct of over-lapping social claims. Whilst only access to housing and undefined ‘services’ are mentioned, it is evident that the entitlement is understood to be more than a claim to adequate health services. The foundational concept is seemingly ‘human healthiness’, and not simply ‘physiological health’, which merely plays a part.

In this regard, it is apparent that there is a willingness amongst theoretical approaches to reaffirm the trans-physiological aspect of the entitlement, and yet an inability to articulate this in detailed or determinative language. Whenever the scope is narrowed, it is only to the extent by which ambiguous terms such as ‘good life’, ‘minimum core’, or ‘subsistence’, are capable of providing clear guidance to the task of constructing a practically realisable right to health. Further, as Foreman goes on to prove, the universal relevance of the entitlement is consistently anchored to the identification of contextually specific conditions, such as the reduced quality of life in poor countries.[481] Furthermore, where efforts are made to demonstrate the relevance of the protection to Western states the focus is still on the most disadvantaged members of society (such as children or the poor).[482] The reason for this appears to relate to the concept of the ‘minimum core’ and the principles of equity and non-discrimination at its heart. As Foreman suggest, ‘the minimum core concept reflects the fundamental human rights idea that certain individual interests, including the basic health needs of the poor, should be prioritised at any cost’.[483] Indeed, proponents of this position argue that utilising the language

[480] ibid 68.
[481] Foreman notes that the negative consequences of such an inferior quality of health evidences the legitimacy of the right to health as it is needed to ‘assist those without access to the basic necessities required to live autonomous and dignified lives …’. ibid.
[482] ibid.
[483] ibid 62.

of the right to health to promote the universal equalisation of 'human healthiness' actually enhances the opportunity of all individuals to live lives worthy of human beings.

Aoife Nolan has attempted to clarify the purpose and required scope of this entitlement still further.[484] Specifically, Nolan suggests that there are two substantive aspects of the right to health. The first simply relates to 'the right to health care or health services (… generally understood as the provision of preventative, curative, and rehabilitative medical services)'.[485] This represents the most obvious element of the entitlement and, as such, there is a temptation to restrict understanding of the claim to these specific terms. Indeed, the challenge of actualising the right to health seems contingent upon clearly establishing how much physiological health (and as such corresponding health care) we can be entitled to. However, as Nolan confirms, in actuality this question is not restricted to determining the required level of access to health services, but rather extends to cover pre-requisites of healthiness upon which the relevance of such access depends. This understanding denotes the second substantive element of the right to health which Nolan defines as 'the right to the underlying preconditions for health, including access to safe and potable water, adequate supplies of safe food, access to health-related education and information'.[486] Similarly to Foreman's assertion that the relevance of other human rights is dependent on securing 'subsistence', Nolan suggests that the task of maintaining 'subsistence' in the form of access to health care is contingent upon firstly providing the means by which such access can be appreciated and enjoyed. The 'pre-requisites' of human healthiness are simply the foundational elements of such subsistence. Moreover, the duty to fulfil them correlates with both the 'minimum core' of obligations and the basic universal provisions which purportedly legitimise the entitlement.

[484] Aoife Nolan, 'The Childs Right to Health and the Courts' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press 2012).
[485] ibid 136.
[486] ibid.

Nolan goes on to reaffirm the 'immediacy' of the minimum core but concludes that the right to health is ultimately progressively realisable and limited by a state's maximum available resources.[487] Writing specifically within the context of the child's right to health, Nolan develops this position further when reflecting upon the implications of the duties to 'respect, protect and fulfil'. Notably, Nolan suggests that there is a clear hierarchical framework to the right to accomplishing these objectives. Whilst there are immediately realisable aspects of all three – 'for fulfil', as mentioned, this is seen to relate to 'minimum core' obligations – the scope of coverage and protection is intended to progress (and expand).[488] Nolan maintains that the prioritisation of the focus of efforts to fully actualise the right should begin with the most immediate concerns. That is to say, although there are many significant factors which must be included within an accurate conceptualisation of the entitlement, the validity of individual factors is contingent on the implementation of others. For example, the relevance of 'Y' is dependent on firstly securing 'X' and 'Z' upon 'Y' and so on. As such, it appears to suggest that it is actually unhelpful to weigh the discussion in favour of the apparent *importance* of issues (e.g. health care), and instead proposes that the focus should be on establishing the contextual relevance of various elements. Regarding the Convention on the Rights of the Child (CRC 1989),[489] Nolan demonstrates this, along with the potential scope of health-based protections, when she explains that:

> [F]ull implementation of this right includes taking measures to reduce infant and child mortality; to ensure the provision of the necessary medical assistance and healthcare to all children … to combat disease and malnutrition … to ensure appropriate pre-natal and post-natal healthcare to mothers … to develop preventative healthcare …and family planning education and services.[490]

[487] ibid 140.
[488] ibid.
[489] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 02 September 1990) 1577 UNTS 3 (CRC) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> accessed 18 May 2018.
[490] Aoife Nolan, 'The Childs Right to Health and the Courts' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 140.

The 'prioritisation' template is useful because it can be used to conceptualise the right to health as a blue print with foundational, intermediate, and upper level objectives. Specifically, following Nolan's description of the CRC, the upper levels would seemingly pertain to access to the highest attainable levels of medical care, intermediate to universal access to necessary basic medical care, and foundational to the prerequisites of healthiness (e.g. food, water)[491] and the corresponding aim of equalising access to the protection. The evident significance of this account is that it could provide a clearer framework for determining the normative content of a practically realisable right to health. In practice, the determining criteria should relate to the concept of 'necessity' - understood as representing those things all human beings require (with the most universally relevant 'needs' taking priority over others) - as this retains the capacity to establish the legitimacy of the entitlement based on suggested un-contentious factors of human healthiness. Naturally, these are largely physiological, but Nolan also attempts to demonstrate a clear correlation with other elements of health – such as access to water, or health education. In effect, therefore, and similar to Baxi's approach, this interpretation arguably presents the right to health as a foundational claim which is capable of providing means to give effect to others.

One final theoretical account worthy of consideration is that of J. P. Ruger. The importance of this account relates to its persuasiveness in rejecting attempts to reduce the debate to a deliberation on adequate health services. Here, Ruger explains that:

> [T]he focus on health care (mistakenly) suggest(s) that the major inequity in domestic international health is differential access to care, not differences in health. This emphasis has left scholars unspoken on the philosophical foundations of health and its distribution.[492]

[491] ibid 136.
[492] Jennifer Prah Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 Yale Journal of Law & the Humanities 273, 275.

In order to counter this Ruger attempts to provide a 'philosophical justification for the right to health',[493] and ultimately concludes that this entitlement should be understood as 'an ethical demand for equity in health'.[494] As with previous accounts, this interpretation incorporates the work of various legal scholars. Indeed, it is through an examination of alternative efforts to qualify and quantify the right to health in normative terms that Ruger attempts to demonstrate the existence of unifying characteristics within the theoretical discourse. Essentially, she argues that these characteristics represent the core universalisable aspects of the right to health. In accordance with the aforementioned aim, Ruger advocates for the adoption of an interpretation of human healthiness which incorporates both '*potential* health and *actual* health'.[495] This, she suggests, would provide clearer representation of 'individuals practical opportunities for optimal health'.[496] Whilst Ruger does not expand upon these terms in great detail, potential health would presumably concern the maximum possible health obtainable by each person – influenced by developing societal, environmental and technological factors, as well as 'preexisting illness'[497] – with actual health representing the standard of health presently enjoyed. Although securing optimal health is the objective, due to the progressive nature of the protection - in accordance with continuing medical development and economic growth – it is possible that it will never be completely, definitively realised. In this sense, the objective is seemingly to strive to actualise the highest attainable potential health possible at any time (and consistent with contextual restrictions). Furthermore, it should be noted that the relative distance between these categories will be different for each individual. As such, determining this distance for an entire population can potentially provide means by which the medical needs

[493] ibid 277.
[494] ibid 278.
[495] ibid 317.
[496] ibid.
[497] ibid 303.

of certain individuals can be justifiably prioritised over others (as advocated by scholars previously discussed).

Following previous approaches, Ruger maintains that an accurate definition of the right to health would transcend physiological factors and incorporate 'additional health' elements Ultimately, this definition 'rests on the understanding that humans are biological organisms living in social environments. It thus concerns both physical and mental states and recognises that humans interact as social organisms …'.[498] Crucially, Ruger explains that 'an expanded model of health, which does not go all the way to include everything that is quality of life, can define the central features of human health at a practical (if not epistemological level)'.[499] The key, therefore, is to recognise that this right cannot be an entitlement to access to all aspects of optimal healthiness, nor indeed purely to basic physiological health, but rather should be understood to be an entitlement to necessary (universally relevant) levels of healthiness. It is also worth noting that the concept of 'central features' appears commensurate to the 'minimum core' discussed by Foreman and the potential middle ground conceptualised by Baxi in previous accounts.

Indeed, of particular significance is Ruger's definition of these central features which she maintains 'represent universally shared elements of health'.[500] The idea of identifiable universally relevant aspects of health is used, in a similar manner to Nolan, to suggest that there are basic common denominators which all individuals require to enjoy a 'human life', or of a life worthy of a human being. In addition to previously established features, such as basic health, education, and access to safe water, Ruger draws from the preamble of the WHO, alongside academic commentary, to assert that healthiness is also dependent on various

[498] ibid 317.
[499] ibid.
[500] ibid.

'psychosocial' aspects.[501] Recognition of this fact is seemingly significant because it appears to clarify the importance of social health components. That is to say, if psychosocial health impacts upon physiological health then it follows that additional social factors are pivotal to the concept of human healthiness, simply because psychosocial health is clearly contingent upon additional social factors, such as access to housing and employment.

Additionally, Ruger maintains that the primary purpose of the right to health is not to provide means to a 'good life', as Baxi notably critiqued, but rather to ensure access to basic provisions which 'promote the good life'.[502] In articulating this point she reaffirmed the significance of the corresponding principles of 'prevention and treatment' in relation to the objective of enabling longevity (as well as quality) of life. In addition, similarly to various other accounts, Ruger suggests that the initial or immediate focus of the right should favour 'those most deprived in health and at risk of health deprivation'.[503] This, once again, relates to the proposed *equalising* aspect of the right to health. The 'need' to prioritise the interests of certain disadvantaged individuals stems from an understanding that the foundational aspect of this claim is to improve the general standard of living to a commensurate level with the less disadvantaged (and ultimately un-disadvantaged) members of any given state. The concept of progressive realisability would account for temporary contextual contingencies in relation to this standard. It is also, once again, reflective of the adopted method of Judge Hercules and the proposition that the 'right' answer, or approach, can mean different things depending on contextual circumstances. In addition, and as we briefly addressed in relation to ECHR case law in Chapter Three, it establishes that the existence of different approaches (or answers) does not invalidate the relevance (or legitimacy) of any specific approach, so long as it is consistent with the accepted legal knowledge and understanding of the place (and time) wherein it was

[501] ibid 316.
[502] ibid 326.
[503] ibid.

reached.[504] Arguably, however, the most important aspect of Ruger's account is the idea that the right to health should 'emphasise individual agency and support efforts to improve health to equip individuals with the mental and physical ability required for agency'.[505] Thus, a realisable right to health is presented as a necessary mechanism for securing 'human subsistence'. As such, according to this interpretation, it must be an entitlement to more than adequate health care or access to the prerequisites for the sustainment of physiological health. Indeed, it is fundamentally a right to 'human healthiness', and includes corresponding entitlements to additional health factors upon which this depends.

4.2.2 Constructing a Right to Health: Recurring Characteristics

It is possible to identify several recurring underlying principles with regards to the theoretical debate on the right to health. Particularly, it is important to note that, even amongst those who argue against limiting the scope of the entitlement simply as a means of raising its universal applicability, there is a firm belief in the 'necessity' of certain provisions. In addition, it is evident that at the heart of each interpretation is an understanding that the successful fulfilment of the entitlement is actually dependent upon providing or securing access to 'health provisions' which are deemed necessary for individual subsistence. Indeed, academic disagreement regarding these provisions relates specifically to the *nature* of what is actually required and not to the legitimacy of the requirement itself. In this way, the foundational aspects of the theory of the right to health could be categorised as comprising two separate, but interconnected (and multifaceted) components:

[504] During our initial examination of this concept in Chapter Three, we demonstrated this point in consideration of the 'living instrument' interpretation of the European Convention on Human Rights (1950). For a detailed account of this see Chapter Three, section 3.3.1.
[505] Jennifer Prah Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 Yale Journal of Law & the Humanities 326.

(1) Necessity: reflecting the universal relevance of the claim - incorporating the need for equitable and non-discriminatory access to protection;

(2) Subsistence: incorporating the specific interests needed to subsist as a human being/normative agent.

Or, as it were, the belief that certain provisions are required to secure a standard of 'healthiness' worthy of a human being. If we accept this definition then it follows, theoretically at least, that constructing a realisable right to health is simply dependent upon identifying what provisions (physiological, psychological, and social) are actually *necessary* to enable human healthiness. That is to say, the focus of the discourse should be on attempting to qualify what standard of living is commensurate with 'human subsistence' in specific terms. It is this task that the next section of this chapter will address. In doing so, and building upon Upendra Baxi, it will distinguish between different potential interpretations of the concept of subsistence; (i) bare, (ii) adequate, and (iii) maximum. Furthermore, it will argue that 'human subsistence' should ultimately be understood as the capacity to secure the enablement of individual agency.[506]

4.3 The Right to Health and 'Human Subsistence'

As established, this section of the chapter will examine the concept and justifiable scope of individual subsistence. Whilst this is a recurring foundational aspect of conceptions of universal human rights in general, this section will specifically address subsistence in the context of the right to health. In this regard three aspects of 'human subsistence' will be

[506] This is generally defined as the ability to make autonomous choices and exercise self-determination. For an effective description see Jeremy Waldron who explained that 'personal autonomy evokes the image of a person in charge of his life, not just following his desires but choosing which of his desires to follow'. Jeremy Waldron, 'Moral Autonomy and Personal Autonomy' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism* (Cambridge University Press 2005) 307.

explored; (i) bare, (ii) adequate and (iii) maximum. In practical terms, it will be established that each provides a significant contribution to our understanding of the right to health.

To begin it is useful to briefly expand upon the definition of each form of human subsistence. In the context of the right to health, the 'lowest' form of subsistence should be regarded as 'bare', and generally accounts for the purely physiological aspect of the right to health. The 'middle' form of subsistence is 'adequate'. This is bare subsistence plus some additional social elements (e.g. education, welfare). Finally, the 'highest' form of subsistence is termed 'maximum'. This is bare subsistence plus all possible additional social elements plus optimal access and distribution of medicines and treatments.

4.3.1 A Right to Health in the Context of Bare Subsistence

It is proposed that bare subsistence can be satisfied simply by keeping the human body alive. With this approach, the quality of life is not important, merely the presence of it. Of course, the physiological element of healthiness is naturally a foundational aspect of the right to health. However, it is evident that a 'fulfilled' right cannot be satisfied simply by securing this requirement. Whilst the idea of bare subsistence has influenced the work of several legal scholars it is perhaps most notably represented in the writings of Upendra Baxi[507] as previously addressed. With his accounts, the language 'a living death' is used to give meaning to this concept. Baxi explains that in many third world countries, such as sub-Saharan African nations, a combination of mass starvation, dehydration and lack of sanitation, has severely reduced the quality of life of the population at large.[508] As such this is representative of bare subsistence in its most basic form – of the human body surviving, purely physiologically, in extreme

[507] Upendra Baxi, 'The Place of the Human Right to Health and Contemporary Approaches to Global Justice: Some Impertinent Interrogations' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 14.
[508] This was also noted by Costas Douzinas when he explained that 'life expectancy at birth is around 45 years in sub-Saharan Africa, but over 80 years in Western Europe'. Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 51.

circumstances. This form of 'a living death' is commensurate to human life clearly *unworthy* of human beings.

In assessing the practical implications of this further, we may briefly consider a theoretical account of bare subsistence by referencing the work of Michel Foucault. In *'The Birth of the Clinic'*, Foucault set out to explain how the evolution of medical knowledge in France during the nineteenth century was highly dependent on the exploitation of lower social classes.[509] In this way, those who 'volunteered' for medical experimentation were themselves enduring a 'living death' not so dissimilar in context from the ones envisioned by Baxi in contemporary times. It is important to note that Foucault's philosophical perspective was greatly influenced by the idea of 'biopower'. This represents a process of continual subjugation which allows states to maintain dominion over their populations by establishing control over human bodies.[510] In the context of health, it is embodied in what Foucault termed the 'Medical Gaze'. The purpose of this 'Gaze' is not simply to observe the human body, to understand it, but to use this knowledge as means of establishing control: 'The sovereignty of the gaze gradually establishes itself – the eye that knows and decides – the eye that governs'.[511] Foucault argued that this allows medical observation to transpose the human being from a potential patient (and a source of knowledge) into a body through which state power may be imposed.

Crucial to Foucault's account on accessing medical care is the belief that all human beings are 'sovereigns' of their own body in the sense that the decision to seek treatment should be based upon 'free consent'.[512] This represents the idea that each individual has the authority to govern how their body is treated, and, within limitations, to determine what their body is

[509] Michel Foucault, *The Birth of the Clinic* (Routledge 2003).
[510] For an insightful examination of this concept see Vernon W. Cisney and Nicolae Morar (eds), *Biopower: Foucault and Beyond (*University of Chicago Press 2015).
[511] Michel Foucault, *The Birth of the Clinic* (Routledge 2003) 108.
[512] ibid 101.

exposed to. It is thus a true manifestation of autonomy and embodies, as Isiah Berlin might suggest, acknowledgement that 'the essence of human beings (is) to be able to choose how to live'.[513] Yet, it is clear that such consent is conspicuously absent in states of bare subsistence. To this end, Foucault maintained that a pivotal point in French history occurred with formation of a mutual compromise agreed upon by the different social classes. Specifically, this resulted in the wealthy agreeing to finance the experimental treatment of the poor, who, as recompense, voluntarily allowed such means to be conducted in order to enhance the understanding of their condition and of the human body in general. As Foucault asserts, under these circumstances:

> [T]here emerges for the rich man the utility of offering help to the hospitalised poor: by paying them to be treated, he is, by the same token, making possible a greater knowledge of the illness with which he himself may be affected; what is benevolence towards the poor is transformed into knowledge that is applicable to the rich ...[514]

In theory, this arrangement benefited all parties as it would allow the sick access to much needed treatments which in turn, through their successful or unsuccessful administration, would enable greater understanding of the affliction. Though this compromise was seemingly logical in practical terms, there was, as Foucault expressed, a critical moral dilemma at the heart of this plan; 'by what right can one transform into an object of clinical observation a patient whose poverty has compelled him to seek assistance at the hospital?'[515]

Indeed, it was precisely the personal circumstances of these individuals that resulted in their subjection to potentially dangerous treatments as their only means by which to gain assistance.[516] In the process of this, the possibility of 'free consent' is undermined. By making the availability of necessary medical treatment contingent upon agreement to the proposed terms, and in the absence of alternative means of obtaining such access, the decision to become

[513] Isiah Berlin, *The Crooked Timber of Humanity* (Pimlico Press 2003) 4.
[514] Michel Foucault, *The Birth of the Clinic* (Routledge 2003) 102.
[515] ibid 101.
[516] Ultimately, as Foucault asserts, the patient 'was now required to be the object of a gaze, indeed, a relative object, since what was being deciphered in him was seen as contributing to a better knowledge of others'. ibid.

a patient was not based on choice. Furthermore, this exposed vulnerable individuals (in terms of both poverty and sickness) to the possibility of medical experimentation. From the standpoint of the doctor, Foucault characterised the belief that '[in] the hospital he is not fettered ... and his genius may express itself in a new way … patients are, for several reasons, the most suitable subjects for an experimental course …'.[517] In addition to the lack of certainty of curative treatment with this, there was the added risk of it leading to the creation some other ailment (or indeed their death).

This example is demonstrative of the fact that bare subsistence is insufficient because it lacks the ability to secure autonomous agency. Such agency is an integral component of the human identity, regardless of individual circumstances (e.g. whether they are healthy or unhealthy members of society). As Foucault notes, 'a sick man does not cease to be a citizen'.[518] As established in previous chapters, universal human rights are envisioned as essential tools for enabling human agency.[519] If this is correct, then the right to health needs to do more than offer the sustainment of physical health (as this can take many forms, some of which, as we have seen, are incompatible with human subsistence). However, there is some practical significance with this concept regarding the affirmation that the right to health needs to *begin* with concerns of a physiological nature.

4.3.2 A Right to Health in the Context of Adequate Subsistence

If 'bare subsistence' relates purely to certain physiological elements all human beings must have to retain the capacity to enable their own agency, then adequate subsistence accounts for the additional elements of health all human beings need to actualise this process of enablement. As discussed in previous chapters, there has been a tendency among many legal

[517] ibid.
[518] ibid 102.
[519] James Griffin, *On Human Rights* (Oxford University Press 2008) 90.

scholars to attempt to link the legitimacy of human rights to the concept of shared humanity.[520] This argument asserts that because we are all 'equally human', in the sense that we all share certain basic characteristics – such as moral agency and vulnerability - we are all entitled to certain provisions or protections which allow us to exercise our humanity (or afford us the opportunity to make autonomous choices regarding how best to live).[521] Whilst the concept of 'necessity' is integral to this approach, the focus is on emphasising the universality of basic human characteristics in order to legitimise the relevance and applicability of certain determined entitlements.

However, Costas Douzinas has argued that it is actually unhelpful to ground the legitimacy of human rights in concepts of shared humanity because '[t]he idea of "humanity" has no fixed meaning and cannot act as the source of moral or legal rules'.[522] As discussed in Chapter Two, the term has many historical connotations unrelated, or indeed directly opposed, to notions of equality and non-discrimination which are fundamental to the concept of universal rights (and specifically the right to health).[523] Indeed, in many communities the term 'humanity' has been used to define a hierarchy of existence based on a perceived gradation of 'worth'. For this reason, Douzians concludes that the word is incapable of affording legitimacy to a concept of purported moral and universal validity. Instead, he suggests that the legitimacy of rights is truly grounded in their capacity to articulate claims to basic needs: 'Rights allow us to express our needs in language by formulating them as a demand'.[524]

This approach recognises the potential validity of certain inherent human characteristics but suggests that basic human needs are easier to determine, less contentious, and consequently

[520] As example, see Jack Donnelly, *Universal Human Rights in Theory and in Practice* (Cornell University Press 2002).
[521] When discussing this in Chapter Two, it was determined that this is representative of what James Griffin termed a 'functioning human agent'. James Griffin, *On Human Rights* (Oxford University Press 2008) 35.
[522] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 52.
[523] See Chapter Two, section 2.3.3.
[524] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51, 64.

provide a stronger foundation for universal claims. The significance of the needs themselves would be dependent on the scope of their relevance in relation to other individuals. The greater this scope, the stronger the claim for entitlements to corresponding action. Ultimately, this position is based on the understanding that human life, in a physiological sense, in and of itself has no moral significance. That is to say, the process of living, of surviving, is an incomplete universal need (see for example bare subsistence). What matters is the quality of life – of living a life worthy of a human being – and not of ensuring simply that you are able to live (or survive physiologically). Similarly, the ability to live a life of maximum possible quality is un-relatable as a basic need, due to the fact that perceptions of what this represents are unavoidably relative and contextually contingent. Briget C. A. Toebes summarised this effectively when she explained:

> [T]he term 'right to health' is awkward since it suggests that people have a right to something that cannot be guaranteed, namely 'perfect health' or 'to be healthy'. It has been suggested that health is such a highly subjective matter, varying from person to person and also from country to country.[525]

For example, what constitutes maximum quality in developing states is unlikely to qualify as such in Western Europe. It is for this reason that, as Griffin suggests, the starting focus for universal rights should be on accounting for those things 'grounded in basic human needs'.[526] With regards to the right to health, this would incorporate bare subsistence in the form of basic physiological health as well as some additional factors of social wellness required to enable 'human healthiness'. The discussion on what these should relate to in more specific terms will be addressed in greater detail with the subsequent section of this chapter. For now, the key confirmation is that human healthiness is not merely physiological and that other social rights impact upon the effectiveness of the right to health.

[525] Briget C. A. Toebes, *The Right to Health as a Human Right in International Law* (Intersentia Publishers 1999) 16.
[526] James Griffin, *On Human Rights* (Oxford University Press 2008) 88.

4.3.3 A Right to Health in the Context of Maximum Subsistence

The concept of maximum subsistence correlates with the objective of securing the highest attainable standard of health. This would pertain to providing equal access to the best possible medical care of the time, as well as accounting for all additional elements of social wellness; education, welfare, employment, and housing. Thus, this form of subsistence is arguably representative of the desired 'end' of the right to health,[527] that which the right ultimately aims to achieve. Consequently, it appears unrealisable as fundamental claim. That is to say, if the right to health is to be understood purely as an entitlement to maximum subsistence, then it cannot be quantifiable in practical terms or, therefore, truly universally applicable. For example, it would appear as if such a claim could only define general duties, such as the promotion of the advancement of health, and not specific obligations regarding precisely what states must do to give effect to this entitlement.

The difficulty with such an approach, as Onora O'Neill explains, is that, for purely pragmatic reasons, rights need corresponding duties; definable obligations which can be imposed upon a specific state or the international community at large.[528] Accordingly, for any right to be regarded as valid it must be able to articulate what is required for it to be fulfilled in precise terms. An inability to do so undermines the legitimacy of the right itself (as it effectively represents acknowledgement that the claim is unrealisable in a practical sense).[529] O'Neill's position thus reaffirms Griffin's assertion that we cannot have rights to an idea, but only to tangible things which we can practically claim based on identifiable universal needs. Indeed, these protections are validated, not only by the demonstration of this need, but by the inherent

[527] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 138.
[528] Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 International Affairs 427.
[529] ibid 428.

potentiality of securing their implementation (which is dependent upon their being sufficiently defined).

This is particularly relevant in relation to the concept of maximum subsistence because, as discussed, Paul Hunt - as Special Rapporteur for Health - consistently refused to specify what exact normative content is required for a universalisable right to health. He maintained that the duty of the Special Rapporteur is to adjudicate the evolving discourse and facilitate the development of the conversation and not to provide conclusive commentary regarding what the right to health should be in definitive terms.[530] The problem with this approach is that it runs the risk of conflating the claim. Indeed, by refusing to limit the focus of the discussion there is a danger that the scope of the entitlement cannot correlate with practical realities (and is therefore easily dismissed).

To further emphasise this point, it is worth referencing Aryeh Neier who, in *'Social and Economic Rights: A Critique'*, suggests that a broad approach to the question of determining the content of such entitlements is incapable of satisfactorily resolving the issue. This, he argues, is due to the fact that 'not everybody can have everything' with such claims, and as such 'certain decisions and choices' have to be made 'when one comes to the question of benefits'.[531] In other words, the realisability of social rights is contingent on prioritising certain objectives over others and placing commensurate focus on the corresponding methods which are required to secure their practical implementation. To confirm, the 'highest attainable standard of health' is not a practically or universally realisable claim.[532] The choice Neier mentions must surely relate to determining what standard of protections and entitlements

[530] Paul Hunt, 'Developing and Applying the Right to the Highest Attainable Standard of Health' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 52.
[531] Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13 Human Rights Brief 1, 2.
[532] This would therefore appear to echo Bentham's critique that 'want is not supply - hunger is not bread'. Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), The Works of Jeremy Bentham Vol. II (Edinburgh: William Tait 1843) 254.

human beings need, and not what, in theoretical terms, they may be held to deserve for one reason or another. This is primarily due to the fact that conceptions of what individuals 'deserve' are themselves contextually and culturally contingent. For example, in developed states an individual could argue that they deserve coffee breaks at work or paid vacations based on their specific working conditions. Yet this claim would have no practical relevance to the millions of impoverished individuals who are starving throughout the world. Whilst Article 24 of the UDHR does recognise that 'Everyone has the right to rest and leisure, including … periodic holidays with pay',[533] Elisabeth Reichert questions whether 'paid vacation [would] have the same human rights status in less economically developed countries that may not be able to pay for vacations?'[534] In responding to this she concludes that the idea is too 'Western oriented and lofty in its realisation even if the concept has merit'.[535]

It is worth noting, however, that there is an alternative way of conceptualising maximum subsistence. Namely, as the philosophical (aspirational) core of the entitlement that ensures that the normative content continues to match up to real world situations and, as such, that the quality of the protection, access, and treatment continues to progressively improve (e.g. representative of the 'general principles which underlie and justify the settled law'[536] in relation to the right to health that allow us to determine the legitimacy of interpretations/evolutions of this concept).

4.3.4 Focusing the Right to Health: Assessing Achievable Subsistence

It is possible to draw several conclusions from this analysis. Firstly, it appears as if the right to health would offer inadequate protection if it focussed purely on bare subsistence.

[533] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) <http://www.un.org/en/documents/udhr/index.shtml#a25> accessed 18 May 2018.
[534] Elisabeth Reichert, *Social Work and Human Rights: A Foundation for Policy and Practice* (Columbia University Press 2011) 68.
[535] ibid.
[536] Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 143.

Similarly, it also cannot be an entitlement to maximum subsistence due to the prevalence of contextual limitations (for example, economic and/or social disparities between different states). Indeed, the principles of equity and non-discriminatory in relation to access clearly cannot be met if the right is held to be an entitlement to maximum subsistence. Instead, it seems preferable to understand the claim as an entitlement to adequate subsistence, but which imposes a corresponding duty to continually strive for the maximum achievable standard. The core of this approach is certainty of a demonstrable need for such a protection. In acknowledging the universal legitimacy of this need, the crucial question then becomes – what level of 'healthiness' is required for human subsistence – understood as the ability to live a life worthy of a human being?

It has been suggested that the concept of universal human rights is justifiable only when it translates to entitlements to those things necessary for human subsistence, not simply those that would benefit or enhance it.[537] In this way, Samuel Moyn's noted 'need' to refocus the discourse and limit the scope of rights,[538] specifically in relation to the right to health, actually translates as a requirement to focus the discussion of its normative content within this framework.

This chapter suggests that performing this task for the right to health can potentially provide a template for all other rights by conceptualising the right to health as a foundational claim. Indeed, reconceptualising rights with the aim of assisting the objective of securing their universal application should incorporate two stages; (i) define the normative content of these entitlements in terms of human subsistence; (ii) address the specifics of practical application (e.g. on both the legislative and judicial level).

[537] As represented in Griffin's account of the 'functioning human agent'. James Griffin, *On Human Rights* (Oxford University Press, 2008) 35.
[538] Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press 2012) 226-227.

In conclusion, this thesis will proceed with the understanding that 'adequate subsistence' accounts for the necessary normative content of the right to health in the specific contexts of each state (e.g. securing the elements of healthiness required to enable a 'functioning human agent'), with this standard continually developing, universally, in accordance with the concept of 'maximum subsistence' (representative of the most optimal means by which the purpose of human rights may be fulfilled).

4.4 A Normative Account of the Right to Health as a Right to Human Healthiness

> The basic human rights are the rights necessary for the development and exercise of autonomy.[539]

In previous sections it was suggested that the human right to health should be understood as an entitlement to the basic level of human healthiness required to enable individual agency (that which Griffin termed normative agency).[540] Individual agency is defined here as the combination of two basic human characteristics; (i) autonomy and (ii) liberty. In explaining the relationship between these concepts Griffin states that:

> Normative agency consists not only in deciding for oneself what is worth doing, but also in doing it. We attach great value not only to the autonomy of our decisions but also to our accomplishing something with our lives by carrying out our decisions … That is, we also value our liberty.[541]

As such, actualised agency simply denotes the ability for individuals to make informed choices in the pursuit of their own perception of the 'worthwhile life'.[542] The final section of this chapter will expand upon this further and consider the required normative content of the interpretation of the right to health as a right to human healthiness. As mentioned, the enablement of individual agency represents the process of providing the means to develop and

[539] William Talbott, *Which Rights Should Be Universal?* (Oxford University Press 2005) 113.
[540] James Griffin, *On Human Rights* (Oxford University Press 2008) 33.
[541] ibid. 151-152.
[542] ibid 45.

exercise autonomy and self-determination. The right to health is presented as an enabling right for this reason because a necessary level of human healthiness must be provided and secured for other rights to take effect. Right's to life, privacy, and freedom of expression, for example, provide the means by which to protect only individual agencies that have already been enabled, and are thus able to appreciate the significance of such protections. This chapter argues that an individual must first enjoy a level of human healthiness, defined as a combination of physiological, psychological, and social elements, for this agency to be enabled (or even possible).

There are seemingly two corresponding questions stemming from this premise which must be addressed before proceeding. Firstly, if this assertion is correct, then how have rights remained relevant in those states where human rights are already legally enforced – such as ECHR member states - where no right to health is applied? Surely this fact refutes the notion that a fully realised right to health is *necessary* to secure the enablement of individual agency? Secondly, even if this suggestion is correct, how would we determine which elements of healthiness should meet the definition of providing the means to enable individual agency? It is worth briefly tackling these concerns, starting with the former. It could be argued that in states where human rights are already implemented, a sufficient level of human healthiness is already provided despite the absence of a legally enforced right to health.[543] However, this observation does not invalidate the suggestion that a sufficient level of human healthiness is required to give effect to other human rights. It simply highlights that this has, to date, been capable without an actualised right to health. Yet, this fact does not provide any guarantee that this will continue indefinitely. The argument advanced with this chapter has been that an actualised right to health is required to *guarantee and sustain* the capacity to enable individual

[543] For example, within the context of the U.K. despite the fact that the European Convention on Human Rights (1950) does not bestow a 'right to health', U.K. citizens (as well as all those residing in the U.K.) have free access to the National Health Service.

agency, not that it is impossible to provide this capacity without a realised entitlement.[544] This position can be strengthened further by drawing reference to those states where human rights protections, of any meaningful kind, have yet to be secured.[545] In such states, a sufficient level of human healthiness is often strikingly absent, which would seem to reinforce our argument, if anything.

The second concern is perhaps most pertinent to this chapter. The process of determining what specific elements of human healthiness are required to secure the enabling capacity is obviously of paramount importance. As suggested in the previous section, this should correlate with the task of securing adequate human subsistence – those healthiness elements that all human beings *need* to enjoy a level of health worthy of a human life – understood as that which provides the means to enable individual agency.[546] Analysis of the academic approach to providing a theoretical account of the right to health identified a recurring perception that human health is composed of physiological, psychological, and social elements. This chapter concludes by briefly addressing each of these categories in turn in an attempt to establish some justifiable normative content based on the established definition of the fundamental purpose of this claim.

4.4.1 Physiological Components of Healthiness

The first category is perhaps simultaneously the most obvious component of human healthiness and also the most contentious. This dichotomy is due to the fact that it must, by definition, prescriptively relate to health care provisions. A spectrum of problems stem from

[544] This is of course true of all human rights and does not specifically relate to the right to health. For example, the absence of a fully realised right to freedom of expression would not dictate that a state would be incapable of protecting it, only that it would be unable to guarantee the sustainment of such protection.
[545] For example, states such as Liberia. See Katharine Derderian and Helene Lorinquer and Stéphan Goetghebuer, 'Post-War Liberia: Healthcare in the Balance' (2007) 28 Forced Migration Review 19.
[546] That which James Griffin defines as 'a functioning human agent'. James Griffin, *On Human Rights* (Oxford University Press 2008) 88.

this but the most important pertain to issues of financing and scope.[547] How much health care are we, as human beings, entitled to by default? Further, how are we to justify this component as a universal claim when its relevance is seemingly contingent on the presence of certain social and economic conditions? In brief, if the realisation that the capacity to live a 'human life' is dependent on enjoying a basic level of physiological health is seemingly self-evident, the ability to define a realisable means of providing it in specific terms is much more complex.[548] The purpose of this section is to offer some clarification in pursuit of this end. Drawing from analysis conducted within this chapter (in relation to both existing international treaties and academic opinion), it is possible to suggest some basic aspects of this component of human healthiness. For example:

- Pre-requisites of physiological health; access to safe water and safe food.
- Preventative treatments (including basic health education – such as sex education).
- Diagnostic & Curative treatments (including mental health).

As touched on earlier in the chapter, the prerequisites of physiological health appear to represent the most basic elements of human healthiness. It is un-contentious to assert that the human body cannot survive without vital nourishments in the form of water and food.[549] Thus, it is logical to regard access to these factors as the most fundamental aspect of the claim.

[547] When explaining the controversy surrounding economic and social rights, like the rights to health and education, Brigit C. A. Toebes suggested that the nature of the protection itself (and what is understood to be required for it to be satisfactorily fulfilled) 'creates fear on the part of States for financial commitments once they guarantee these rights'. Briget C. A. Toebes, *The Right to Health as a Human Right in International Law* (Intersentia Publishers 1999) 6.

[548] Jennifer Prah Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 Yale Journal of Law & the Humanities 273, 317.

[549] On this see Peter Gleick who maintains 'an absolute "minimum water requirement" for humans, independent of lifestyle and culture, can be defined only for maintaining human survival'. Peter H. Gleick, 'Basic Water Requirements for Human Activities' (1996) 21 Water International 83, 83-84

In relation to medical treatments, there are arguably two separate but correlating categories. The first can be termed 'Preventative Treatments', and relates, in its most basic form, to health education – such as access to information on sexual health and contraceptives.[550] It would also cover basic inoculations as well as education aimed at preventing the development of (and thus need to treat) certain ailments in later life. Within a Western context this could seek to tackle what Elbe termed 'non-communicable "lifestyle afflictions" such as smoking, obesity and alcoholism …'.[551]

By far the most contentious form of medical care, in relation to the task of constructing a universally applicable right to health, relates to 'Diagnostic & Curative' treatments. These would cover all physiological aspects of health, biological (in the form of diseases), physical injuries, and also mental illness. Indeed, as will be explained later in the section, this chapter makes an important distinction between mental health (which is essentially interpreted as an extension of physical health) and psychological health (which is presented as the culmination of all aspects of human healthiness). For this reason, it is vital to acknowledge that mental health related issues must be accounted for in a commensurate manner to physical or biological elements. Following the established guidance regarding how to determine the required inclusion of content, it seems that a crucial distinction should be between 'life saving' and 'life-enhancing' treatments.[552] Undoubtedly, this is itself far from conclusive. Indeed, what represents 'life saving' in highly developed Western states is still likely to do so in third world states presently lacking the means to provide access to such care. For example, medicines capable of effectively treating HIV/AIDS. Jonathan Wolff explains that efforts at combating

[550] Jonathan Wolff explains that such access is important in preventing the spread of various deadly diseases (including HIV/AIDS). On this point he notes that '[c]ondom use is clearly a very important strategy, and has further benefits in contraception and prevention of other sexually transmitted diseases'. Jonathan Wolff, *The Human Right to Health* (W. W. Norton & Company 2013) 84.
[551] Stefan Elbe, *Security and Global Health: Toward the Medicalisation of Insecurity* (Polity Press 2010) 132.
[552] Unless, of course, this 'enhancing' treatment would provide means of correcting a pre-existing inequality in relation to the standard of health an individual enjoyed.

the disease have been largely defined by 'restricted access to very expensive patented medicines …'.[553] Surely this observation invalidates the notion that the right to health is universally applicable as a consistent claim? Yet the key to this principle is the idea that all states have a duty to ensure that access to basic 'life saving' saving treatments are afforded, and not that *all* possible life saving treatments must be provided.[554] What constitutes 'basic' would logically be contextually contingent to a large extent. It would take account of certain contextual limitations but would also, through the promotion of progressive realisability, attempt to ensure that the quality of care provided continued to improve indefinitely. For example, the formula should be; what constitutes life-saving in state X – in the context of both social and technological expectations? Naturally, a third world country would not be required to provide certain highly expensive procedures in the same manner as more developed ones might. This is not to say they would fail their obligation (e.g. reflective of Judge Hercules) to enforce the right to health by such inability. Rather, the satisfactory fulfilment of this obligation would be dependent on providing for those treatments which are realistically deliverable within the contextual circumstances of the individual state. This process would therefore appear to be representative of the perfectibility of rights once again. In essence, this stage ensures that the human body is able to subsist in physiological terms.

Having discussed the most apparent aspects of physiological health, it is worth briefly considering additional components of physical (i.e. biological) healthiness unrelated, or transcendent, to physiological which are nevertheless crucial to the capacity of enabling individual agency. As previously addressed, when considering the required focus of a right to health, Jennifer Ruger referenced academic research which identified certain factors beyond

[553] Jonathan Wolff, *The Human Right to Health* (W. W. Norton & Company 2013) 39.
[554] That is to say, simply because something has been developed somewhere in the world which has been identified as having the capacity to treat a particular illness, this fact cannot realistically be held to entitle all peoples to its provision. Instead, it is suggested that this should operate in accordance with the principle of 'progressive realisation' discussed earlier in this chapter.

physical needs relevant to human health. Ruger explained that these had been termed 'psychosocial' and that research indicated that they are 'strongly related to depression and other mental illness.'[555] For our purposes, it is helpful to now consider the composition of necessary 'psychosocial' elements by tackling them in two separate categories: (i) psychological issues and (ii) social issues, respectively.

4.4.2 Psychological Components of Healthiness

The first, and perhaps most obvious extension to physical health, can broadly be termed 'psychological'. Although, as mentioned, this is principally understood to relate to issues of 'mental health', it is possible to provide a more expansive definition. Specifically, by interpreting psychological health as representing the culmination of all other aspects of human healthiness. In support of this position we can reference the pre-requisites of health, as well as physical health, which are generally regarded as being more important (as they must be present before psychological health can become meaningful). As such, psychological healthiness is seemingly dependent upon enjoying an adequate level of physiological health. Psychological health therefore represents the 'free consent' envisioned by Foucault, as it essentially denotes the ability to make fully realised choices in relation to health (e.g. the sovereignty of the body), up to and including choosing to pursue experimental treatments or indeed to decline medical assistance. Interestingly, this would also seem to legitimise the notion of 'a right to die', as discussed by Baxi,[556] so long as the decision is autonomous. This is because, as Albert Bandura highlights, 'agency thus involves not only the deliberative ability to make choices and action

[555] Jennifer Prah Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 Yale Journal of Law & the Humanities 273, 315.
[556] Baxi discussed this in relation to 'physician-assisted suicide'. Upendra Baxi, 'The Place of the Human Right to Health and Contemporary Approaches to Global Justice: Some Impertinent Interrogations' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 14.

plans, but also the ability to construct appropriate courses of action and to motivate and regulate their execution'.[557]

Hypothetically, therefore, any individual who had been provided access to all preceding necessary components of human healthiness and decides to voluntarily relinquish their life should be allowed to do so – as it fulfils the actualisation of their agency.[558] This would seemingly remain true even if the rationale behind the decision was not based on, or indeed influenced by, physiological health matters. That is to say, if the legitimacy of the claim is based upon its conformity with normative agency, then this 'right to choose' in relation to the right to die should not be restricted to situations where the physiological quality of life is significantly impaired.[559] The presence of such impairment is not a necessary condition for justifying the capacity to give effect to this right. This is because, as we have seen, human healthiness is not a purely physiological concept. An individual who has grown weary of living and, in anticipation of the eventual development of physical impairments (either mental or physiological), decides to forgo the opportunity to continue their life should surely have this decision respected.

Certainly this area is tremendously controversial, as evidenced by case law on the issue.[560] In order to protect against potential misuse, the general principle should be that, so

[557] Albert Bandura, 'Toward a Psychology of Human Agency' (2006) 1 Perspectives on Psychological Science 164,165.
[558] 'Respect for personhood would require respect for its very existence. But respect for personhood would require respect also for its exercise—for example, in reaching a judgement that suicide in certain conditions is rational'. James Griffin, *On Human Rights* (Oxford University Press 2008) 217.
[559] For a relevant case law example on this relating to the U.K. see *Nicklinson and Lamb v United Kingdom* [2015] ECHR 783. Although Tony Nicklinson was suffering from 'locked-in syndrome', having been left severely paralysed after a stroke (and as such unable to take his own life), his claim for being afforded a right to die – via assisted death (which would normally constitute a criminal offence under U.K. law) under Article 8 of the ECHR (Respect for Private and Family Life) was ultimately unsuccessful. For an insightful review of this see Elizabeth Wicks, 'Nicklinson and Lamb V United Kingdom: Strasbourg Fails to Assist on Assisted Dying in the UK' (2016) 24 Medical Law Review 63.
[560] See Stephen Hoffman, 'Symposium: Jurisprudence and the Body: Taking the Pulse of Health Law: Euthanasia and Physician-Assisted Suicide: A Comparison of E.U and U.S Law' (2013) 63 Syracuse Law Review 383.

long as other areas of healthiness have been accounted for - and as such the decision is *verifiably* based on a fully actualised agency - then it ought to be honoured (and the choice to relinquish normative agency through suicide protected). However, in the event that all additional elements have not been accounted for, then the initial obligation ought to be to secure the means of providing them. This is to ensure that the decision consistently represents a truly autonomous choice (one based on all necessary factors), and does not result from temporary, or beneficially alterable, conditions of healthiness (unless, as mentioned, access to such means is already available and has been rejected by the individual in question).

4.4.3 Social Components of Healthiness

The social aspects of the concept of human healthiness simply pertain to certain vital non-physical components. As example, this chapter argues that enjoyment of the right to health, as a right to human healthiness, is contingent upon access to housing and an adequate level of education. The former is significant primarily because it provides shelter in the form of an environment capable of cultivating individual development.[561] Indeed, the concept of 'physiological health', as well as the wider notion of human healthiness, surely necessitates the provision of basic conditions in which its sustainment can be safely secured. Similarly, a sufficient level of education is required in order to afford individuals a means of earning financial (and as such physiological) subsistence.[562] To further emphasise this point, it is worth referencing Costas Douzinas who argues that an important (and largely undervalued) aspect of being human is the ability to recognise that 'every person is a world and comes into existence in common with others, that we are all in community'.[563] The social aspects of healthiness

[561] As represented in Article 25 of the Universal Declaration of Human Rights (1948), and the genesis of the modern right to health, which states that the right includes entitlements to adequate 'housing … and necessary social services'. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) <http://www.un.org/en/documents/udhr/index.shtml#a25> accessed 18 May 2018.
[562] William J. Talbott, *Which Rights Should Be Universal?* (Oxford University Press 2005) 163.
[563] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 59, 59.

relate to the idea that our individuality – and as such capacity to develop and exercise our own autonomy - is dependent upon the interaction and acknowledgement of other human beings.[564] That is to say, our appreciation of health, in a purely physiological sense, is influenced by recognition of its value in relation to what possessing an adequate level of it allows us to do in social terms. On a fundamental level, it provides us with an opportunity to attain subsistence in accordance with the pursuit of our own interpretation of the 'good life'. In this way, it is possible to regard social health as certain foundational components which are necessary for developing the enablement of agency.

4.4.4 Hierarchy of Normative Components of the Right to Health

Having briefly considered some of the required content of the right to health, it is worth attempting to reconceptualise the process of prioritising relevant components. Significantly, and in accordance with the perfectibility of law (e.g. the idea that the correct answer is relative, representing optimal appreciation of the issue within specific contexts), this process need not be structured in an absolute manner (i.e. with one complete category taking definitive precedence universally). Instead, different elements of each category should be given precedence over others (in a manner that most optimally fulfils the purpose of the right within each individual state).[565] Despite this, it is still possible to conceptualise a basic template for actualising the right to health which could have universal relevance. For example, the pre-requisites of health would generally be understood as the most fundamental components for

[564] This position has also been used to validate the universal applicability of human rights in general. Most notably Shaun Pattinson and Deryck Blelyveld have developed the theoretical approach initially proposed by Alan Gewirth to suggest that 'all agents (beings with the capacity to pursue purposes voluntarily that they treat as reasons for their actions) must grant ―generic rights (rights to conditions that are necessary for action/successful action regardless of the purposes involved) to all agents on pain of contradicting that they themselves are agents'. Shaun Pattinson and Deryck Beyleveld, 'Defending Moral Precaution as a Solution to the Problem of Other Minds: a reply to Holm and Coggon' (2012) 23 Ratio Juris 258, 259.

[565] Thus, reflecting the model proposed by Aoife Nolan which was discussed earlier in the chapter. See Aoife Nolan, 'The Childs Right to Health and the Courts' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012). 140.

the reasons previously addressed. Following this would be some basic social elements, then health care aspects, before psychological components.

Under this interpretation, psychological aspects are considered to be the highest form of human healthiness, because they are seen to represent fully enabled individual agency. However, they cannot take precedence over other elements upon which their own enjoyment depends. For example, it is evident that psychological health as defined here cannot be fully realised without the fulfilment of both social and physiological elements. In contrast, both social and physiological health can be satisfied to some extent without firstly accounting for psychological health. Consequently, as it represents actualised normative agency – the ability to make actionable autonomous choices - the ultimate purpose of the right to health is arguably to secure psychological health. To clarify, the hierarchical structure of components of the right to health would be as follows:

1. Pre-requisites of health; access to food and water.
2. Housing; access to shelter as non-physiological pre-requisite.
3. Preventative Treatments; health education/contraceptives.
4. Diagnostic & Curative Treatments; contextually determined.
5. Education (Formal); introduction to social interaction/community.
6. Psychological components; representative of actualised normative agency.

These components can arguably be broken down even further to identify a three-stage process to the objective of fulfilling the right to health. In this way, the first two components provide the basic platform and account for a form of ‘bare subsistence’ with regards to the concept of human healthiness. They represent the foundational aspects of individual agency;

those things upon which the ability to provide and then protect the exercise of such agency depends. The second stage relates to the middle two components, and, together with the first stage, represents the fundamental aspects necessary to secure an adequate level of physiological health. The third stage incorporates the final two components and denotes the capacity to give effect to the optimal enablement of individual agency. This represents the ultimate fulfilment of the process and the actualisation of the right to health as an entitlement to human healthiness.

4.5 Conclusion

This chapter has examined the theoretical approach to the right to health in an attempt to reaffirm it as a justifiable universal claim. In the process, it has established that this right is not simply an entitlement to an adequate level of health care. Indeed, by drawing on various important academic approaches, it has been seen that the concept of 'healthiness', as it pertains to human beings, is more than physiological, but also social and ultimately psychological. As such, this chapter has argued that a normative account of the right to health must incorporate all elements of human healthiness if it is to retain the capacity to successfully fulfil the legitimising purpose of the claim (e.g. to enable normative agency). This chapter has attempted to provide some further clarification in relation to the required content of a universally applicable normative account by examining the concept of 'human subsistence'. Such analysis resulted in the conclusion that the right to health, as an enabler of individual agency, should be understood as a right to human healthiness. Indeed, if Costas Douzinas is correct and 'human rights construct humans',[566] it is simply because they provide individuals with either the opportunity to enable, exercise, or protect their own agency.

[566] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 57.

To reinforce these conclusions, and as means of identifying the required scope of the right to health, this chapter examined various forms of human subsistence – namely (i) bare, (ii) adequate, and (iii) maximum, respectively. Here, it was determined that bare subsistence relates to mere physiological survival. In the context of the right to health, this would be represented by the provision of basic pre-requisites of healthiness (such as safe food, shelter, and clean drinking water). Alternatively, adequate subsistence was seen to relate to a satisfactory standard of human functioning. In the context of the right to health, it was argued that this would therefore be represented by the provision of a sufficient level of protection for the different aspects of human healthiness (physiological, psychological, and social). Finally, maximum subsistence was defined as the most optimal level of healthiness possible. Thus, in the context of the right to health it was suggested that this is arguably reflected in the objective of obtaining the 'highest attainable' standard of health.

In building on this analysis, this chapter next attempted to provide some guidance in relation to specific content required to account for physiological, social, and psychological healthiness. Whilst the task of securing each category in accordance with the concept of adequate subsistence was discussed, it was suggested that a realisable normative account must take various contextual limitations into consideration, particularly with regards to 'medical treatments'. The key component of this interpretation is to afford an element of flexibility in relation to the means of securing the right to health, and not the actual purpose or required scope of the entitlement. Additionally, any accommodations provided must be temporary in nature and offered with the understanding that, in accordance with the notion of progressive realisability, contextual circumstances will develop towards improvement and the ultimate alleviation of potential limitations. In this way, the right to health, as a right to human healthiness, could represent a universal *foundational* right to human rights. The quality of

protection could and should continue to improve, universally, although potentially at different rates in places, in line with societal, economical, and technological advances.

As such, it was ultimately held that the right to health is, in the first instance, realistically a right to adequate subsistence (e.g. protecting those things necessary to enable a 'functioning human agent'). This is understood to relate to the provision of a satisfactory level of access to the relevant components of human healthiness (e.g. physiological, psychological, and social) in manner which accurately reflects optimal means of fulfilment within each specific state. It was further suggested that the inherent progressive realisability of the right to health requires continuing development/evolution with regard to the standard of protection provided (in accordance with the 'perfectibility of law' approach addressed in previous chapters).

It is suggested that the most important conclusion from this analysis, in accordance with the central aim of the thesis, it that it establishes the right to health as a necessary claim for the enablement of human agency. It therefore validates its legitimacy as a universal right (irrespective of contextual concerns which appear to undermine it – such as those relating to economic issues). Furthermore, it is proposed that the integration of the concept of progressive realisation into the human rights discourse represents acknowledgement of the non-definitiveness/absoluteness of such protections, as well as evidences the inherent perfectibility of human rights/fundamental protections. In doing so, it confirms that the universality of rights cannot be made contingent upon the feasibility or strength of accepted contextual interpretations. Finally, this investigation has demonstrated that, due to the inherent perfectibility of their substantive content (as well as the means by which means by which they may optimally be fulfilled), universal human rights are best understood as foundational claims (open to legitimate evolution and development).

5 Health, Security, and Subsistence: Assessing the Absoluteness of Universal Human Rights

5.1 Introduction

With the previous chapter we assessed the theoretical scope of the concept of the human right to health. This concluded with the suggestion that the right to health is best understood as a foundational claim. Foundational, in this sense, is to be understood as representing several significant ideas. Firstly, as evidenced by the adoption of the concept of progressive realisation by both academics and member states of relevant international treaties, fulfilment of this protection is not necessarily contingent upon the consistent implementation of specific normative content. Indeed, non-consistent application – as it pertains to composition – does not appear to invalidate the universal significance or relevance of this right. As Fuukuda-Parr notes, '[a]lthough rights are universal, the level of enjoyment spans a significant range that is difficult to capture with the same indicator for low and high-income countries'.[567]

Secondly, it is foundational in the sense that its focus covers interrelated issues of human healthiness, and thus provides a foundation upon which other fundamental protections can become meaningful. Put simply, a prerequisite for the enjoyment of all human rights is clearly the presence of a satisfactory level of health. This conclusion logically follows the acknowledgement that, for any individual, the significance of rights is undermined if they lack the physical capacity to claim them.[568] As discussed, the concept of human healthiness is not limited to concerns of physiological health, but also incorporates psychological and social

[567] Sakiko Fukuda-Parr and Terra Lawson-Remer and Susan Randolph, 'Measuring the Progressive Realisation of Progressive Rights Obligations: An Index of Economic and Social Rights Fulfilment' (2008) University of Connecticut (Working Paper 8) 1, 10.

[568] This is to be distinguished with the practical capacity to claim them as represented by the 'political subject' of human rights as discussed in Chapter Two. For a detailed account of the 'abstract' and 'political' subject of human rights, see Chapter Two, section 2.4.

components.[569] Yet physiological health – as the prerequisite for human subsistence (in both a practical biological sense as well as that of autonomous agency) – should rightly be regarded as the foundational element of human healthiness. With this final chapter, this point will be developed further by suggesting that the idea of subsistence connects the concept of universal/absolute rights – represented here by the right to health - and state security (generally regarded as a competing interest) by evidencing a complimentary purpose which exists between them: namely protecting/securing 'human' survival – understood in either theoretical or practical terms.

As mentioned in Chapter Three, the precise practical composition of the right to health is itself deserving of further study and analysis. For the purposes of this thesis, the importance of conceptualising the right to health as a right to human healthiness is to validate the idea of human rights as foundational claims – open to progression, evolution and (re)interpretation. Once this is acknowledged, and in accordance with Dworkin's implied perfectibility of ideas, the relevance and potential applicability of human rights cannot be conclusively undermined through the identification of practical difficulties pertaining to universal acceptance or implementation.[570] This is because these difficulties would be contingent upon contextual circumstances and thus themselves susceptible to change. Indeed, as they must be representative of (generally) accepted positions within a specific time in history, any arguments which appear to invalidate the relevance of a specific human right – or indeed the concept of rights itself – can only objectively be said to do so on a temporary basis. As social and political attitudes have changed (and continue to change), the integrity of arguments seeking to either validate or delegitimise rights have faced rejection or adaptation in accordance with

[569] These include the pre-requisites of health - such as safe food, clean water, and shelter - as well as access to various means of enabling autonomous agency (e.g. communal/societal integration; work, education).
[570] For example, as Briget C. A. Toebes addresses, the idea that the right to health is too expensive. Briget C. A. Toebes, *The Right to Health as a Human Right in International Law* (Intersentia Publishers 1999) 6.

developments of the time.[571] In this sense, the apparent unfeasibility of a universal right to health in modern times does not, in itself, undermine its *potential* fulfilment (or, therefore, call into question the purpose of current efforts to secure it). The most significant conclusions from this are as follows:

1. There are many separate but interconnected fundamental interests which construct the right to human healthiness.
2. The effective fulfilment of these claims enables the implementation of the right to healthiness.
3. This right is a foundational claim, both in terms of substantive content as well as practical significance - it provides a platform upon which all other protections can themselves be enabled and given meaning.
4. As it is a foundational claim, in relation to its normative content, its legitimacy is not contingent upon the implementation of a consistent universal standard (with regards to any of the core interests which construct it).
5. The right to human healthiness can be regarded as inalienable in the sense that human subsistence is dependent upon its direct or indirect fulfilment (intentionally or simply resulting from ensuring other protections).
6. Finally, in the context of fundamental claims, the right to human healthiness is absolute in that the universalising idea/purpose behind the concept of rights – to protect foundational interests – is rendered meaningless in its absence.

In building upon this analysis this will chapter look to consider the contemporary practicality of absolute claims. As noted, robust critique of the idea of inviolable rights has

[571] As example, an effective critique of the specific form of relative universality embodied within the DOI or DRMC would not sufficiently challenge the composition of the UDHR, ICCPR. This is because the circumstances which enabled such relative universality to emerge (e.g. tolerance of slavery) no longer exist to the same extent (if at all).

accompanied the promotion of such claims throughout their history. Historically, this is perhaps best (if not most famously) personified by the work of Jeremy Bentham that we addressed in Chapters Two and Three.[572] In modern contexts, the universality of rights is scrutinised with regard to the practical applicability of existing human rights instruments and claims. Andrew Fagan suggests that this highlights the principal paradox of human rights. These instruments were created in reflection of atrocities with the purpose of preventing the possibility of their future occurrence.[573] For many proponents of human rights, the legitimacy of the concept is predicated on this position. Yet, as Fagan explains, atrocities and genocides still occur.[574] The human rights movement is based on the value of human life, but this is consistently undermined by the actions of human beings. Fagan proposes that the paradox of human rights is signified in the following question: 'Why is it that the ultimate justification and application of the doctrine is frustrated by members of the very species upon which the doctrine is based?'[575]

Despite the emergence of these critiques, it is clear that the idea of an inherent entitlement to universal, absolute protections has greatly facilitated the persistence and progression of human rights (particularly in relation to the developments of the 20th century). In the contemporary United Nations (UN 1945) era specifically, this has been aided through Western advocacy of human rights.[576] A defining characteristic of modern international law has been the prevalence of human rights initiatives and the promotion (by word if not by

[572] Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843).
[573] Andrew Fagan, 'Paradoxical Bedfellows: Nihilism and Human Rights' (2005) 6 Human Rights Review 93.
[574] ibid.
[575] ibid.
[576] An insightful examination of the effectiveness of some of these efforts is provided by Andrew Moravcsik who proposed that they generally fall within one of three different categories: 'Sanctions', 'Shaming' and 'Cooptation'. Ultimately, Moravcsik concluded that the successfulness of such measures will largely depend upon the extent to which respect for the concept of human rights is already ingrained within states (and reflected in domestic policies). Andrew Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' (1995) 1 European Journal of International Relations 157.

action)[577] of the idea of inherent, fundamental human interests. Most recently, however, the focus of member states has shifted toward internal affairs in contrast to the external, collective, international initiatives which generally personified the emergence of the UN. Douzinas attributes this to the fact that 'after the 9/11 attacks … security became the main concern of the great powers'.[578] Given this change, the utopian idea of human rights as universal, absolute protections appears to be under threat. This chapter will look to examine the legitimacy of the contemporary representation of human rights as an inhibitor of state security.

As has been shown, human history is replete with differing accounts of the concept of human rights. Crucially, despite differences relating to the identification of an appropriate justificatory foundation, none of these accounts have seriously contested the need for a *subject* upon which these protections could be bestowed. Regardless of the differing means by which specific generations or cultures attempt to justify the basis and content for such protections, the capacity to claim is accepted as being necessary in all of them.[579] It has been demonstrated that, in practical terms, the ability, not only to make such a claim, but to appreciate its significance, is dependent upon a basic amount of physical, psychological, and social subsistence. Whilst the content of the specific protection being claimed is likely to be substantively different depending on the historical contingencies of the subject making it (although loosely based on the same general purpose), the validity of fundamental protections is clearly not restricted to the conceptual origins of a specific, universalising idea. Indeed, the perception of validity is also heavily influenced by the practicality of enabling such protections. It is for this reason that Jonathan Wolff, when speaking within the context of the right to health, maintained that 'the

[577] For example, in the context of U.S. authorities, this is reflected in intentional diminishment of the scope of human rights protections for actual (or suspected) enemy combatants in the War on Terror (e.g. the prison complex at the Guantanamo Bay Naval Base). See David Luban, 'The War on Terrorism and the End of Human Rights' (2002) 22 Philosophy & Public Policy Quarterly 14.
[578] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 139.
[579] See for example the concept of 'normative agency'. James Griffin, *On Human Rights* (Oxford University Press 2008) 149.

right to health is not the right to be healthy, for no one could have that right'.[580] In contemporary contexts, this practicality is seemingly determined by weighing pragmatic considerations relating to economic and social concerns (e.g. balancing of individual interests), alongside determining the desirability of prioritising individual liberties over certain collective interests (such as state security).[581]

For the purposes of this thesis, the relevance of security to human healthiness and the concept of absolute rights is twofold. Firstly, in reflection of the fact that human rights have been consistently undermined through various forms of securitisation (framed as competing objectives), health is representative of a concept which has been recently securitised.[582] Secondly, we can further reinforce the foundational aspect of the right to health (as an enablement of human agency) through an examination of the securitisation discourse by presenting health – of subsistence (in relation to both individuals and the state) - as the foundation of security.

5.1.1 Chapter Five Structure: Key Aims and Objectives

Having briefly summarised the relevant findings from previous chapters, we can now advance to an examination of the contemporary potentiality of the concept of universal human rights within the context of security considerations (specifically centred upon health). Essentially, there are four key objectives to be achieved with this final chapter:

[580] Jonathan Wolff, *The Human Right to Health* (W. W. Norton & Company 2013) 27.
[581] In relation to counter-terrorist initiatives, as discussed, Ben Golder explains that there is a general acceptance that 'the demands of national security and the protection of human rights are opposed'. Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Response of Common Law Nations to the Threat of Terrorism' (2006) 8 Journal of Comparative Policy Analysis 43, 50.
[582] For an example of this see United Nations Security Council, 'On the Outbreak of the Ebola Virus in, and its Impact on, West Africa' (18 September 2014) UN Doc S/RES/2177 (UNSCR 2177) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2177%20(2014)> accessed 18 May 2018.

1. To begin, we will contextualise the national security paradigm and its historical implications for the idea of human rights. Specifically, this will consider the legitimacy of claims that human rights and security are competing aims (with one ultimately needing to be given priority over the other – usually understood to be security). Drawing from prominent academic works on this issue, this section will examine the sufficiency of prevailing approaches to balancing these interests (centred on an examination of the derogation powers of the ECHR). Here it will be demonstrated that the ECtHR has been complicit in facilitating acceptance of perceptions that security concerns legitimately trump human rights by failing to effectively establish the presence of a genuine emergency in affected states (and therefore the need for derogations). Essentially, this section will conclude by suggesting that human rights and security are not in actuality competing objectives (5.2);

2. In order to reinforce these conclusions, this chapter will next consider the potential absoluteness of rights within the context of health based threats to security (e.g. pandemics). Through an examination of a hypothetical Public Health Emergency of International Concern (PHEIC),[583] this chapter will demonstrate that the purpose of such human rights (e.g. actualising normative agency) may be best fulfilled through interference/violation in exceptional circumstances. Namely, when non-interference with such protections is more fatal to the continuation of agency (and therefore the ability to appreciate the enjoyment of rights). As this examination suggests that the absolute application of rights would jeopardise fulfilment of the purpose of such protections, it will be argued that all rights must be derogable (but with varying degrees of derogability – e.g. with certain protections harder to justify interfering with than others). Finally, this section will draw from this analysis in order to make proposals for

[583] WHO, 'Revision of the International Health Regulations' (23 May 2005) WHA Res 58.3 [IHR 2005].

reform regarding existing derogation machinery (e.g. the approach of the ECtHR). Specifically, this will suggest the adoption of a stricter approach to scrutinising the existence of emergencies (and thus the need to derogate) as well as acceptance of the derogability of all human rights protections (in order to both enhance the credibility of the concept itself as well as to more optimally provide for the potential fulfilment of the purpose of such protections) (5.3);

3. In building on these conclusions, this chapter will next assess the so-called securitisation of rights within the context of health. Specifically, this section will consider the 'referent object' of human rights. 'Referent objects' refer to ideals which face direct threats to their continuation (and which therefore must be protected if the fulfilment of a relevant concept is to be secured). It will be demonstrated that the 'referent object' of universal rights comprises of two components – namely (i) human security (representing the ideal of protecting individual interests) and (ii) national security (representing the ideal of protecting the physical integrity of the state). With the former, it will be suggested that the ideal is threatened by non-fulfilment/interference of/with human rights norms (e.g. where the sovereign power chooses to interfere), whereas the latter is held to be threatened by the absolute implementation of such protections (e.g. when the sovereign power is prevented from taking necessary defensive measures). This study will therefore reinforce the inter-connectedness between the fulfilment of human rights and the obtainment of state security by establishing that the realisation of each aim is dependent upon securing the continuance of various forms of subsistence (e.g. human and state subsistence). Here it will ultimately be argued that a sufficient level of national security is contingent upon appropriate consideration being given to matters of human security (specifically in relation to the fulfilment of the purpose of human rights) (5.4);

4. This chapter will finally consider potential implications for the universal realisability of human rights stemming from the concept of state sovereignty (reflected in the 'referent object' of human rights previously discussed). By referencing the derogation machinery of ECHR once again, it will be established that sovereignty has traditionally been regarded as a potential inhibitor of the implementation of human rights. Specifically, this will be seen to relate to the fact that the application of human rights is largely dependent upon the consent of governing powers of member states (who also have the authority/right to choose to derogate from such protections in times of emergency). By drawing from contemporary developments in the global arena (e.g. humanitarian intervention), this chapter will demonstrate the non-absoluteness of sovereignty in the context of securing effective protection of human rights norms. Moreover, as these contemporary developments evidence general acceptance of the fact that concerns based on matters of 'human security' may be utilised to justifiably interfere with the sovereignty of member states, this chapter will argue that sovereignty is therefore ultimately non-fatal to the potentiality of the fulfilment of universal human rights. To reinforce these points, this chapter will next examine different interpretations of sovereignty within the context of health: namely (i) national, (ii) international, and (iii) human, respectively. This chapter will conclude by suggesting that human rights are both universal and absolute, but that the absoluteness of these rights is actually represented by a permanence of purpose, rather than by practical application (5.5).

5.2 Contextualising the Security Paradigm: Two Types of Security

> Human rights are part of a long and honourable tradition of dissent, resistance and rebellion against the oppression of power and the injustice of law.[584]

[584] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 13.

As Douzinas duly notes here, the idea of human rights has historically been utilised to provide justification for destabilising the security of sovereign powers so as to better secure individual interests/liberties. In modern contexts, the relationship between human rights and security is arguably reversed, perhaps most clearly represented by the fact that the objective of preserving national security is increasingly utilised so as to diminish the effectiveness of human rights norms. As previously alluded to, recent developments in the international arena (such as the 'War on Terror') have prompted a reassessment of the concept of security – and, as consequence, the place of human rights within this context. For much of the twentieth century the security paradigm was predicated on an understanding that there could be no higher priority than the preservation (and perseverance) of the state itself – and that this practical preservation was a justifiable purpose on its own merits (irrespective of any other subsequent or incidental benefit - such as the protection of individual rights). Specifically, this was conceptualised as a need to protect states from external threats and acts of aggression.[585] By framing the idea of security in this way, international actors intentionally restricted the interpretability of developing and future threats. The security paradigm assessed the legitimacy of emerging dangers through an historical lens – by attempting to establish their compatibility with known threats of that time. Whilst this approach could be held to have had validity at the dawn of modern international law and a context in which the realities of international conflict were directly felt by member states (e.g. in the aftermath of WW1 & WW2), its relevance naturally

[585] Divya Srikanth attests to this when he states that, prior to very recent developments, it was generally accepted that 'the gravest security threats that a nation-state faced were invariably the armies of other states'. Divya Srikanth, Non-Traditional Security Threats in the 21st Century: A Review (2014) 4 International Journal of Development and Conflict 60, 60.

diminished the farther the international community advanced from this point in history (and as the concept of warfare itself began to change).[586]

During the 1950's and 1960's, the spectre of a nuclear war developing between the two dominant powers of the time – the United States of America and the Soviet Union – did much to prolong the significance of this interpretation of security.[587] However, as the Cold War and the twentieth-century itself came to an end, so too did the relevance of a purely traditional conceptualisation of the security paradigm. Indeed, in the twenty-first century, it is becoming increasingly evident that the security of states does not purely rest upon the ability to defend against known (or anticipated) external threats – but will also the power to respond to internal ones.[588] These internal threats can adopt different forms with the most obvious being commensurate with traditional security considerations. In contemporary contexts, for instance, with the image of 'home grown' terrorist attacks.[589] The compatibility of such threats with the historical idea of security is immediately apparent. It is perhaps for this reason that they are seemingly prioritised over the emergent internal security concern which is most relevant to this chapter – human security.[590]

The UN 'Human Development Report' of 1994, was integral to the emergence of the concept of 'human security'. In describing this concept, the report confirmed that '[there] have always been two major components of human security: freedom from fear and freedom from

[586] As example, the controversial concept of the 'moving battlefield' which the US presently adopts to justify the targeting of enemy combatants by way of drone strike throughout the world. Melina Sterio described this as the proposition that 'members of al-Qaeda forces may be targeted anywhere in the world: that the battlefield follows those individuals who have been designated as enemies …'. Milena Sterio, 'The United States' Use of Drone Strikes in the War on Terror: The (Il)legality of Targeted Killings Under International Law' (2012) 45 Case Western Reserve Journal of International Law 196, 199.
[587] See David Baldwin, 'Security Studies and the End of the Cold War' (1995) 48 World Politics 117.
[588] Divya Srikanth, Non-Traditional Security Threats in the 21st Century: A Review (2014) 4 International Journal of Development and Conflict 60.
[589] For example, the attacks that took place on London Bridge and in London Borough Market on the evening of 3 June 2017, and the attack on Manchester Arena on the 22 May 2017.
[590] See Sabina Alkire, 'A Conceptual Framework for Human Security' (2007) 22 Praxis 5.

want'.[591] In essence, the idea of human security (much like the right to health itself) incorporates a myriad of independent but interconnected needs – covering issues deemed integral to individual (and thus collective) personal security. This concept is based on the understanding that the fulfilment of these basic needs will provide populations with adequate protection from various vulnerabilities stemming from the threat (or fear) of violence. In addition to physical security, through the provision of a secure space (in both physical and social forms), the alleviation of poverty is to be a made priority under such an approach. Kwasi Nsiah-Gybaah explains that the reason poverty reduction is so important is because 'widespread, chronic and crushing poverty and underdevelopment negatively impact human security … The hope for human security lies in a balanced development approach based on poverty reduction, global peace, and cooperation'.[592] Essentially, this idea represents the stability of persons as additional means of ensuring the preservation of the state.[593] In effect, human security represents the integrity (and moral worthiness) of the survivability of human beings. It incorporates direct and indirect causative factors reductive to human survival. With regards to human healthiness, direct factors are understood as the results of specific health based conditions – such as diseases – whilst indirect relates to more general socio-economic conditions, such as poverty, which can provide environments within which direct factors can develop (and proliferate).

Due to its obvious philosophical influences and relatively recent emergence, it is fair to suggest that the idea of human security is more controversial than traditional interpretations of the security paradigm. In addition, even when accepted by member states, there is a tendency to restrict its conceptualisation to historically accepted security norms, by considering the

[591] United Nations Development Programme, *Human Development Report* (Oxford University Press 1994) 24.
[592] Kwasi Nsiah-Gybaah, 'Human Security as a Prerequisite for Development' in Richard A. Matthew et al (eds), *Global Environmental Change and Human Security* (MIT Press 2009) 255.
[593] This is personified within the UN *Human Development Report* of 1994 with the declaration that '[the] battle of peace has to be fought on two fronts. The first is the security front where victory spells freedom from fear. The second is the economic and social front where victory means freedom from want. Only victory on both fronts can assure the world of an enduring peace …'. United Nations Development Programme, *Human Development Report* (Oxford University Press 1994) 3.

significance of the basic needs of human security in traditional security contexts; internal or external acts of aggression. As example, 'the possibility of an infectious disease being intentionally released for hostile political purposes'.[594] Yet the results of this is arguably to diminish the relevance (and effectiveness) of the concept of human security itself. This is because the importance of human security, as it pertains to the security paradigm, conceivably rests on its ability to establish a significance of personal security beyond intentional acts of violence (specifically between state actors).

The notion that national security is dependent only on the actions of states has, in recent years, proven to be outdated.[595] Instead, it is evident that the security of these states is now contingent upon dangers which are difficult to anticipate and/or largely independent of (or indifferent to) human actions – such as environmental changes or pandemics. As Catherine Lo Yuk-Ping and Nicholas Thomas confirm, in present times, 'pandemics, emerging diseases and bioterrorism are readily understood as direct threats to national and global security'.[596] Therefore, when assessing the relevance of universal human rights in the contemporary context of security – in particular, the feasibility of balancing seemingly competing interests - it is worthwhile to do so through the lens of health. Specifically, by examining various health-based threats to security - incorporating both national and human elements - and their potential impact on determining the absoluteness of these foundational protections.

However, before proceeding further with this analysis, it is useful to firstly give some additional consideration to the concept of security within a more topical context (e.g. the threat

[594] Stefan Elbe, *Security and Global Health: Toward the Medicalisation of Insecurity* (Polity Press 2010) 66.
[595]A topical example for this is the concept of 'cyberwarfare'. Srikanth provides an excellent summary of the increasing danger posed by such threats, ultimately defining them as 'the new threats to a state's security … [as during] a cyber-conflict, there are no clear lines between the civilian and military, as civilian computer systems may be used to launch offensive cyber-war against an "enemy" state'. Divya Srikanth, Non-Traditional Security Threats in the 21st Century: A Review (2014) 4 International Journal of Development and Conflict 60, 66.
[596] Catherine Lo Yuk-Ping and Nicholas Thomas, 'How is Health a Security Issue? Politics, Responses and Issues' (2010) 25 Health Policy Plan 447, 449.

of terrorist attacks) by drawing from some significant academic contributions to this issue. For our purposes, this will focus on a brief examination of the academic assessment of the manner in which human rights mechanisms (such as the ECHR) have attempted to strike an effective balance between national security and the enjoyment of human rights. Helen Fenwick has recently addressed this issue within the context of the United Kingdom (specifically in accordance with various counter-terrorist initiatives which have been introduced under the framework of the Human Rights Act 1998).[597] Fenwick establishes the backdrop for this analysis as the intent to examine the reasonableness of fears that government efforts to secure such balance risks the adoption of counter-terrorist measures representative of 'defensive democracy' (something which Fenwick ultimately determines to have been effectively avoided in the United Kingdom to date).[598] For the purposes of this examination, the concept of 'defensive democracy' is defined as:

> Semi-permanent limitations of rights in a democracy entailed by adopting disproportionately preventive measures in the face of terrorism, to defend itself against those seeking to subvert it by acts of violence directed or inspired by powerful external groups.[599]

The anticipated danger with such an outcome is that it may lead to the abandonment of a requisite level of commitment to human rights norms, simply as consequence of stronger efforts to minimise the prospect of future terrorist attacks.[600] This interpretation of the concept of 'defensive democracy' can therefore be seen as representative of a general acceptance of the plausibility of governments choosing to sacrifice human rights in the pursuit of security. It thus provides further evidence of the existence of an apparent hierarchisation of interests/objectives, whereby human rights and security are not only perceived to be in conflict, but where one

[597] Helen Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of 'Defensive Democracy'?' (2017) 4 Public Law 609.
[598] ibid 626.
[599] ibid 609.
[600] See Amnesty International, *Europe: Dangerously Disproportionate: The Ever-Expanding National Security State in Europe* (London: Amnesty International 2017) 8.

interest (security) is clearly acknowledged (even if only tacitly) as being of superior concern to the other (human rights).

In practice, previous attempts to strike an effective balance – understood as one which provides sufficient protection to human rights norms whilst also affording relevant public authorities adequate scope to interfere in response to genuine security threats - have also been marked with difficulty. In the context of the United Kingdom, for example, Fenwick notes that this is represented by the various initiatives which have so far been introduced being attacked as either overly intrusive (e.g. resulting in unjustifiable interference with the enjoyment of Convention rights)[601] or largely ineffective (e.g. making no real difference in practical terms).[602] This clearly demonstrates the obvious difficulties governments face when attempting to strike a successful balance between ostensibly conflicting aims. Moreover, a heightened sense of insecurity, prompted *inter alia* by recent terrorist attacks,[603] as well as the impending collapse of ISIS and the anticipated return of nationals presently fighting in Syria,[604] seemingly strengthen the argument that more aggressive/intrusive counter-terrorist measures are required.[605] This in turn reinforces the perception that a necessary level of security may legitimately be achieved at the cost of a sufficient level of consideration for human rights norms. If this narrative were ultimately to be accepted by the general populations of member states, it

[601] This is represented by the Control Orders scheme, first introduced in 2005, which looked to prevent the possibility of future terrorist attacks by allowing for the restriction of the enjoyment of Convention rights for those suspected to be engaged in terrorist activities. On the use of Control Orders, Fenwick remarks that they 'handed the executive apparently unlimited power to impose restrictions on [terrorist] suspects, with minimal judicial supervision'. Helen Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of 'Defensive Democracy'?' (2017) 4 Public Law 609, 613.

[602] For example, as reflected in the initial use of the Terrorism Preventative and Investigative Measures (TPIMs) introduced in 2011 as a replacement for Control Orders (with the aim of making preventative measures more consistent with human rights norms). Fenwick notes that by 2014 these measures were regarded as being 'under-used', ultimately cultivating 'the perception of their inefficacy'. ibid 618.

[603]

[604] Fenwick notes that this fear is personified by the fact that 'the expected eventual military destruction of the 'caliphate' is likely to lead to an increase in the number of returnees who have experienced weapons and explosives training …'. Helen Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of 'Defensive Democracy'?' (2017) 4 Public Law 609, 610.

[605] Fenwick observes that this is reflected in the "striking recent increase in the securitisation of Europe." ibid 611.

would effectively represent the provision of their consent to the adoption of increasingly disproportionate counter terrorist laws which could arguably seek to ignore the concept of balance all together. Ironically, as Fenwick persuasively explains, rather than provide a greater level of security, the introduction of such laws 'would be more likely to have the effects that [the terrorist] attacks themselves have had—to increase fear and divisiveness'.[606]

From this analysis we have seen that presenting the debate surrounding this issue as a choice between the prioritisation of security or, by demanding stricter adherence to human rights norms, acceptance of the unavoidability of insecurity, does little to increase the likelihood of creating a viable solution. This chapter proposes that a preferable alternative is to refocus the search for an effective solution in a manner which accepts that, in actuality, security and human rights are not in fact competing aims. It will now begin to develop this argument in more detail by moving on to examine the concept of security within the context of health.

5.2.1 Examining Security and Human Rights as Conflicting Aims

As discussed, there are various points of contention in relation to the place of human rights in the contemporary world. These questions are relevant not only in states who have, for various reasons, resisted previous efforts to establish an effective basis of human rights protection on the international level, but also to those states who have championed such attempts. Reflecting on these challenges, in relation to securing the widespread implementation of human rights, Stephen Hopgood remarked that '[at] a time of declining Western power, more push back against hypocrisy … [and] authoritarian backlash … there is little to suggest that further progress is on the horizon in the manner to which we have become accustomed'.[607]

[606] Helen Fenwick, 'Probing Theresa May's Response to the Recent Terror Attacks' (2017) (4) European Human Rights Law Review 341, 350.
[607] Stephen Hopgood, 'Challenges to the Global Human Rights Regime: Are Human Rights Still an Effective Language for Social Change?' (2014) 11 SUR – International Journal on Human Rights 67, 73.

Indeed, in some ways the most significant tests to the concept of human rights are being experienced within such 'Western' states. A pertinent example would be the increasing unpopularity of the idea of human rights within various populations in the European Union.[608] Whilst the idea of protecting fundamental interests endures, the political focus of such protections has shifted away from true universal coverage (of the 'abstract concept') back towards a universality of contextual contingency (and the 'political construct'). The issue of global terrorism has resulted in the perception of these protections becoming distorted. Rather than protecting the fundamental interests of society they are instead increasingly understood - aided greatly by depictions in the media - as protecting the interests of those individuals who wish to undermine or harm it.[609]

In this sense, this change is perhaps an implicit antiquarian use of history[610] - an attempt to revert the focus of contemporary human rights to their original scope (as exemplified with the DOI where 'all men are born free and equal' did not extend to cover slaves). The significance of this change, in accordance with the Nietzschean approach discussed in Chapter Three,[611] is that it representative of an 'abuse of history' – an attempt to effectively respond to present day issues with an idealised understanding of successes of the past. The consequences of such change, however, are not necessarily conducive to the objective behind the need for such protections. Seemingly, if it does not completely undermine the notion of absolute protections (for example by justifying the arbitrary suspension of various rights in pursuit of 'collective interests'), it risks distorting them to such an extent that the aim of achieving

[608] Katja S. Ziegler and Elisabeth Wicks and Loveday Hodson, *The UK and European Human Rights: A Strained Relationship?* (Hart Publishing 2015) 475-478.
[609] See for example the political response (and corresponding media coverage) to the case of *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1.
[610] Friedrich Nietzsche, *The Use and Abuse of History* (Macmillan for the Library of Liberal Arts 1957) 18-19.
[611] ibid.

universal application ceases to be meaningful (when access to such protections is held to be contingent upon fixed gradations of worth).[612]

As we addressed in the previous section of this chapter, an underlying cause of changing perceptions of the concept of rights is the ever-present nature of possible terrorist threats. In recent years, this has quickly become a primary concern for member states in the international arena - and one which is consistently utilised to justify interference with rights and liberties. In *'Speaking Law to Power'*, Joan Fitzpatrick highlights the scope of the challenge facing modern proponents of human rights when she suggests that, in direct response to al-Qaeda and the anticipated threat posed by international terrorism, '[governments] that style themselves as champions of the rule of law against the absolutism or nihilism of terrorists have, at least temporarily, constructed "rights-free zones"'.[613] An unavoidable consequence of this change is the marginalisation of the purported inalienability of these protections. Indeed, if the international community is closer to an agreement on the justifiable scope of such protections it is arguably with regards to the need for further restriction.[614] The rationale behind such moves are rooted in the same justificatory purposes of the concept of human rights itself - the need to protect fundamental interests. In this context, the interests relate to the survivability of these very states (e.g. state subsistence). Despite the fundamental importance of various individual interests, the legitimacy of claims to their protection are argued to be rendered meaningless in the absence of a means by which they can be enforced.[615] Therefore, the continuance of the

[612] More specifically, by promulgating that such protections should only be afforded to 'lawful citizens'. For more on this see Anthea Roberts, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11' (2004) 15 European Journal of International Law 721.
[613] Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14 European Journal of International Law 241.
[614] See for example measures passed by French, German, and Dutch governments in recent years in response to purported terrorists threats. For more on this see Christophe Paulussen, 'Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe: Towards an Effective Response Based on Human Rights' (2016) 7:10 The International Centre for Counter-Terrorism - The Hague 1.
[615] As Bentham notes, '[that] which has no existence cannot be destroyed – that which cannot be destroyed cannot require anything to preserve it from destruction'. Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843) 500.

state, understood as the capacity to ensure secure governance, is surely a prerequisite for all other individual concerns? It can be presented as *the* foundational interest. Phillip Ruddock develops this position further to suggest that interferences with fundamental protections can be a necessary means of ensuring their continuing fulfilment. In this way, he argues that 'national security can in fact *promote* civil liberties (by preserving a society in which rights and freedoms can be exercised) …'.[616] Writing in the context of seeking to effectively balance security and human rights, Ruddock concludes that 'the extent to which we can continue to enjoy our civil liberties rests upon the effectiveness of our counter-terrorist laws'.[617] Whilst Ruddock maintains that this approach does not suggest that 'counter-terrorism legislation should not be scrutinised',[618] it is ultimately susceptible to doing just that – by inserting 'state security' into the lexicon of human rights law and affording it superior status. As we will address later in this chapter, the survivability of states is, like human subsistence itself, not purely a matter of physical security – but also incorporates additional aspects that help construct its *'identity'* (such as civil liberties and the rule of law). In this way, whilst it is true that the physical security/subsistence of states is necessary for human rights to be effectual, the means by which such subsistence is ensured – particularly in relation to these fundamental protections – is important in determining the legitimacy of such action.

A dichotomy at the heart of modern human rights however evidently exists. The legitimising purpose upon which the need for such rights is based can also be utilised to justify limiting their application or nullifying their effectiveness. Thus, when considering both the contemporary and conceptual universal applicability of human rights protections, it is important to examine them within the modern national security paradigm. To begin it is worth

[616] Philip Ruddock, 'A New Framework: Counter-Terrorism and the Rule of Law' (2004) 16 The Sydney Papers 112, 117.
[617] ibid.
[618] ibid.

re-establishing the apparent incompatibility which exists between the two competing interests – protecting the state at all costs and guaranteeing fundamental individual protections for all peoples (within a specific jurisdiction). Indeed, a traditional account would arguably interpret the apparent conflict as undermining the concept of universal protections, or instead critique the legitimacy of interferences with rights based upon pursuing other interests (such as the continuance of the state).[619] However, an alternative critical approach could suggest that certain interferences can be justified when they are truly conducive to the aim of protecting fundamental interests - both directly as it pertains to the governance of the state, and indirectly in relation to providing a space within which individual interests can continue to be secured. In this sense, the inalienability of human rights would not necessarily require absolute application, but would rather be dependent upon accepting derogations consistent with the purpose of such protections.

Crucially, under this theoretical approach, the scope for justifiable interference would need to be extremely narrow. Whilst exceptional circumstances could legitimate the process of derogating from human rights protections, it could only do so when such measures are necessary to perpetuating the relevance of these fundamental interests (e.g. representing the most efficient means of enabling normative agency). Arbitrary interference, understood as that which is premised on action conducive to the continuance of the state but which is not evidently necessary for it, would not be acceptable. The integrity of the purpose behind the interference would therefore determine the legitimacy of the derogation (irrespective of the perceived lawfulness of the conduct itself).

[619] In the sense that, in pursuing such action, states have the potential to over-react and act disproportionately, to the detriment of fundamental human rights. See Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14 European Journal of International Law 241.

5.2.2 Balancing Security and Human Rights in Practice

There have, of course, been previous efforts within the human rights movement to account for national security concerns. Perhaps the most significant of these is represented by the derogation powers contained within Article 15 of the ECHR.[620] The purpose of this provision is multifaceted. Ostensibly the fundamental aim is to provide adequate flexibility to the governing entities of member states to effectively respond to existential threats – generally envisioned to be restricted to times of war or other emergency situations.[621] However, for the drafters of the ECHR itself, an additional motivation for the inclusion of Article 15 pertained to more practical considerations in relation to membership – to encourage states to voluntarily participate. Frederick Cowell defines this as a 'realist' approach and explains 'there is often a strong pressure for derogation clauses to accommodate the needs of states in order to preserve the implicit bargain states enter into when entering international organisations'.[622] At the heart of both purposes was the intent to balance the fundamental interests of human rights with the duties and responsibilities of member states regarding various national security considerations.

However, this approach differs from the one offered within this chapter with regard to the justifying purpose behind the act of derogating from fundamental protections. Whereas a traditional approach – encapsulated within Article 15 of the ECHR – is predicated on the need to balance between separate fundamental objectives (security and rights), our alternative

[620] 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'. Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No.11 and No.14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005 (ECHR) art 15 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 18 May 2018.

[621] As Helen Fenwick explains, 'a valid derogation requires the state in question to show that there is a state of war or other public emergency and, in order to determine the validity of this claim, two questions should be asked. First, is there an actual or imminent exceptional crisis threatening the organised life of the state? Second, is it really necessary to adopt measures requiring derogating from the articles in question?' Helen Fenwick, *Fenwick on Civil Liberties and Human Rights* (Routledge 2016) 99.

[622] Frederick Cowell, 'Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR' (2013) 1 Birkbeck Law Review 135, 141.

approach does not automatically establish a need to distinguish between these objectives, but is instead based upon the premise that they are interrelated, and that derogations can themselves be consistent with the aim of protecting fundamental interests. There are conceivable benefits of choosing to adopt this alternative approach. Most importantly it appears to provide greater opportunity at providing a more robust framework for regulating the legitimacy of derogations (and thus afford the concept of universal rights enhanced credibility). Indeed, a recurring critique of the operation of Article 15 is that it has failed to adequately ensure that it is only utilised in appropriate situations. In support of this claim, Helen Fenwick affirmed that 'the court has not been very consistent as regards the margin allowed to the state in relation to derogations'.[623] This inconsistency ultimately led Alan Greene to conclude that:

> [The] threshold that a phenomenon must cross in order to justify a declaration is set extremely low, and the level of scrutiny the ECtHR applies when assessing this question renders the first limb of Article 15 merely a procedural hurdle to be crossed, rather than an effective line of demarcation between normalcy and emergency.[624]

Consequently, provisions which were intended to provide temporary relief to member states in exceptional circumstances, have been increasingly utilised in a manner which arguably undermines the legitimacy of the derogatory machinery and questions the credibility of the ECHR itself.[625]

We may reinforce this point further by drawing from some contemporary developments within member states of the ECHR, specifically in relation to their use of this existing derogation machinery. For example, by examining the recent (and controversial) derogations

[623] Helen Fenwick, *Fenwick on Civil Liberties and Human Rights* (Routledge 2016) 99.
[624] Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 German Law Journal 1764, 1766.
[625] That is to say, through the Court's failure to provide an adequate level of protection for fundamental interests, or to secure these protections against the possibility of state over-reach with regard to the use of derogations. As Greene notes, '[by] deferring to national authorities, namely the executive, on the existence of a state of emergency, the phrase "threat to the life of the nation" is stretched to the point whereby it becomes useless in controlling a state's actions'. ibid 1782.

initiated by France and Turkey over the past few years. In the case of the former, Article 15 was engaged in the aftermath of several deadly terrorist attacks.[626] In the case of the latter, derogations were initiated as consequence of a failed military coup.[627] In both instances, the objective of safeguarding a necessary level of security was used to justify the apparent non-temporary nature of the derogations. They were non-temporary in the sense that neither state provided clear indication of when the need for the use of emergency powers was expected to end. It subsequently resulted that France would engage Article 15 for almost two years – from November 2015 to November 2017 – whilst in April 2018, Turkey decided to extend its state of emergency - originally initiated in July 2016 - for a further three-month period. Despite receiving heavy criticism from international organisations, such as Amnesty International, for the use of such derogations,[628] in neither case has the derogating state subsequently been held accountable for this apparent misuse of the derogating powers (e.g. the non-temporary nature of their engagement). Instead, the ECtHR have sought to hold the affected parties responsible only for interferences with Convention rights themselves during the respective period of

[626] A series of coordinated ISIS backed attacks targeting several public spaces – including the Bataclan Theatre and the Stade de France - were conducted in Paris on the 13th of November 2015. These terrorist acts incorporated suicide bombers and mass shootings ultimately resulting in the deaths of 130 people (and injuring over 400 others). President Hollande subsequently declared a state of emergency as means of derogating from the ECHR on national security grounds. For an insightful analysis of how these attacks contributed to an alteration the public perception of security within France, see Christian Lequesne, 'French Foreign and Security Challenges After the Paris Terrorist Attacks' (2016) 37:2 Contemporary Security Policy 306.

[627] The failed *coup d'état* was initiated by sections of the Turkish military on the 15th July 2016 with the stated aim of 'protecting democracy' (e.g. safeguarding secularism, securing human rights). By the time the coup had been successfully supressed, over 300 were estimated to have been killed with more than 2000 others reportedly injured. In response, President Erdogan declared a state of emergency which subsequently enabled wide ranging interferences with human rights protections. On the matter of determining the justifiable scope of derogation from human rights norms in response to an attempted coup, Ignatius Yordan Nugraha ultimately concludes that '[e]ven if it has been determined that a certain coup amounts to a threat to the life of a nation or public security, the invoking power must keep an eye on the situation. When the threat has been eradicated or has diminished significantly, the suspension or derogation clause is no longer applicable'. Ignatius Yordan Nugraha, 'Human Rights Derogation During Coup Situations' (2018) 22:2 The International Journal of Human Rights 194, 203.

[628] For an effective critique of France's use of derogation powers see Amnesty International, *Europe: Dangerously Disproportionate: The Ever-Expanding National Security State in Europe* (London: Amnesty International 2017) 14-16. Similarly, for a detailed critique of Turkey's use of emergency powers see Amnesty International, *Amnesty International Report 2017/8: The State of the World's Human Rights* (London: Amnesty International 2018) 367-72.

derogation.[629] This once again reflects an excessively deferential approach to regulating the conduct of sovereign states on matters of national security. Significantly, this approach does not appear to be restricted to specific/topical anticipated threats (such as terrorist attacks), but instead seems to demonstrate a general acceptance of the superiority of security over human rights norms. The apparent pervasiveness of this perception may be reinforced by drawing from additional recent developments, both within the jurisdiction of the ECHR and also internationally.

Looking once again to France, first of all, it is notable that in October 2017 their controversial use of derogation powers was replaced with the adoption of more robust domestic counter-terrorist measures – ultimately creating what has been termed by some as a 'permanent state of emergency'.[630] In writing on the potential dangers of this new measures, Fionnuala Ní Aoláin observed that they provide 'vague definitions of terrorism and threats to national security exacerbating concerns that the powers may be used in an arbitrary manner … [and] write exceptional, emergency practices into normal criminal and administrative law'.[631] By diminishing the role of judicial oversight, Ní Aoláin also explained that these measures would appear to reflect the normalisation of unquestioned interference with human rights norms in face of security threats (whether they are actually occurring, have recently occurred, or are merely anticipated to (re)occur in the future).[632] Indeed, other commentators have noted that

[629] See *Mehmet Hasan Altan v. Turkey* [2018] ECHR 251 and *Sahin Alpay v. Turkey* [2018] ECHR 253. In addressing the significance of these cases for the regulation of the use of derogation powers, Dilek Kurban explains that, 'in *Alpay/Altan*, the ECtHR did not question the necessity of continued emergency rule 20 months after the failed coup …'. Dilek Kurban, 'A Love Letter from Strasbourg to the Turkish Constitutional Court' (Verfassungsblog, 27 March 2018) <https://verfassungsblog.de/a-love-letter-from-strasbourg-to-the-turkish-constitutional-court/> accessed 18 May 2018.

[630] On this point, Marco Perolini explained that 'the new law will embed the essence of [ECHR] emergency measures – intended as a temporary and exceptional response to a heightened risk – into a permanent feature of French domestic law'. Marco Perolini, 'France's Permanent State of Emergency' (2017) Amnesty International <https://www.amnesty.org/en/latest/news/2017/09/a-permanent-state-of-emergency-in-france/> accessed 18 May 2018.

[631] Fionnuala Ní Aoláin, 'France: The Dangers of Emergency Legislation' (2017) Just Security <https://www.justsecurity.org/45263/france-dangers-permanent-emergency-legislation/> accessed 18 May 2018.

[632] ibid.

the new measures, which were defended by French President Macron as a necessary response to an ever present threat of terrorist attacks, would not so long ago have been widely accepted as overly-intrusive.[633] A significant conclusion we can draw from this analysis is that the current global climate surrounding the issue of national security – particularly in relation to terrorism – has seemingly enabled governments to justify minimising their commitment to human rights in a manner which does not provide sufficient scrutiny of the need for them to do so.

Such developments are of course not restricted to member states of the ECHR, but are also reflected in other international jurisdictions. For example, in June 2017, Japan controversially passed tougher domestic counter-terrorist measures ostensibly designed to combat organised crime.[634] Significantly, these measures afford public authorities a much greater amount of discretion when choosing to undertake preventative action designed to avert the prospect of terrorist attacks (including at the 'preparation' stage of the offence). These measures have been heavily criticised since being adopted, perhaps most significantly for lacking clarity regarding the circumstances wherein they can be legitimately/lawfully engaged.[635] The ambiguity surrounding this specific issue has led to fear that these measures may be deployed arbitrarily, resulting in unjustifiable interferences with human rights norms. Joseph Cannataci, The United Nations Special Rapporteur on the Right to Privacy, responded to the anticipated passage of these measures by stating that he was 'concerned by the risks of

[633] As Alisa J. Rubin and Elian Peltier explained in the New York Times, '[t]he legislation, approved by a wide margin … codifies measures like search and seize and house arrest without judicial review – steps once considered exceptional – and effectively institutionalises a trade-off between security and personal liberty'. Alisa J. Rubin and Elian Peltier, *New York Times* (Paris, 3 October 2017) <https://www.nytimes.com/2017/10/03/world/europe/france-terrorism-law.html> accessed 18 May 2018.
[634] See Colin P.A. Jones, 'Japan's New Conspiracy Law Expands Police Power' (2017) 15:16 The Asia-Pacific Journal 1 <https://apjjf.org/2017/16/Jones.html> accessed 18 May 2018.
[635] Consequently, as Jones notes, '[b]y vastly expanding the universe of possible crimes, the ability of law enforcement to conduct surveillance of "suspects" will also be enhanced… The broad scope of conspiracy crimes means the bar for starting investigations and conducting less intrusive surveillance activities will also be effectively lowered'. ibid 3-4.

arbitrary application of this legislation given the vague definition of what would constitute the 'planning' and 'prepatory actions' given the inclusion of an overbroad range of crimes … which are apparently unrelated to terrorism and organized crime'.[636] In defence of the bill, the Japanese Prime Minister Shinzō Abe drew from general arguments regarding the prevalence of terrorist attacks which had occurred in recent years, alongside the need to ensure effective counter-terrorist measures are in place prior to the upcoming Olympic and Paralympic Games hosted in Tokyo.[637] Crucially, however, it is worth noting that Abe also justified the implementation of such measures as representing the necessary fulfilment of international law obligations – specifically the United Nations Transnational Crime Convention.[638] Thus, the justification for effectively diminishing the significance (and reliability) of human rights protections was not limited to issues concerning the national security of Japan, but was also argued to reflect conformance with a hierarchisation of objectives/norms established within the mechanisms of international law itself (a point subsequently rejected by various human rights organisations).[639]

Historically, as we have seen, efforts at balancing the practical implementation of human rights with foundational concerns of security have generally resulted in preferential consideration being afforded to security. This eventuality is made possible precisely because of the justificatory reasoning used to establish the need for derogations. Specifically, such

[636] OHCHR, 'Letter to the Japanese Government by the Special Rapporteur on the Right to Privacy' (2017) OL JPN 3/2017 <http://www.ohchr.org/Documents/Issues/Privacy/OL_JPN.pdf> accessed 18 May 2018.
[637] This argument was justified on the basis that the passage of these new measures represented an 'underlying intent to support counterterrorism efforts to ensure national security for Japanese citizens and international visitors'. Brandon Marc Higa, 'Japan's Anti-Conspiracy Law: Relinquishing Japan's Civil Liberties in the Name of Global Counterterrorism Efforts' (2018) 19:1 Asian-Pacific Law and Policy Journal 202, 212.
[638]Indeed, as Higa explains, 'Abe testified [that] … he needed the anti-conspiracy bill as a necessary means to fulfil Japan's diplomatic obligations as a signatory to a U.N. Convention against Transnational Organized Crime (UNCTOC) …'. ibid 207.
[639] 'While the government argues that passage of the bill is required to implement the United Nations Convention against Transnational Organized Crime, the convention itself was never intended to prevent terrorism. Instead, its aim is to prevent crimes by transnational organized criminal groups'. Human Rights Now, 'Japan: Concerns with the "Crime of Preparation for Terrorism and Other Acts" Bill' (2017) A/HRC/35/NGO/4 <http://hrn.or.jp/wpHN/wp-content/uploads/2017/05/f4e232eff719afe99b762a795f47c98b.pdf> accessed 18 May 2018.

arguments are based upon a presumption that they must be regarded as competing aims. As Douzinas suggests, in contemporary times it is consistently demonstrated that 'security trumps human rights … civil liberties are the first victims of governmental fears and public anxiety'.[640] However, as proposed in Chapter Three, by reimagining the concept of human rights as foundational claims – based upon the universalising idea of the protection of fundamental interests – it is possible to demonstrate the inherent compatibility of these objectives. To do so we should assess the concept of derogation within the context of hypothetical national emergencies. This analysis will enable us to consider the practical scope of legitimate interference in accordance with national security initiatives. Moreover, it will seek to underscore inherent limitations with the traditional approach to balancing these objectives personified with Article 15 of the ECHR.

5.3 Reimagining Security in the Context of Health

When looking to assess the legitimate use of derogations (as well as to question the practicality of absolute human rights) within a theoretical scenario, such considerations will usually be conceptualised in the context of a hypothetical terrorist attack – specifically relating to purported justifications for torture of terrorist suspects.[641] However, it is perhaps more useful to conduct this assessment by considering a less pervasive (but potentially more likely) contemporary scenario pertaining to health based risks. Specifically, the increasingly significant threat posed by the potential outbreak of a Public Health Emergency of International Concern (PHEIC),[642] exemplified by diseases such as AIDS, SARS and the Ebola virus.

[640] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 6.
[641] This is perhaps most famously represented in the 'ticking time bomb' scenario. Here, certainty of a catastrophic outcome if drastic action – in the form of torture (as a last resort) – is not taken is used to justify such measures. For more on this see Joseph Spino and Denise D. Cummins, 'The Ticking Time Bomb: When the Use of Torture Is and Is Not Endorsed' (2014) 5 Review of Philosophy and Psychology 543.
[642] WHO, 'Revision of the International Health Regulations' (23 May 2005) WHA Res 58.3 [IHR 2005] <http://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf;jsessionid=5EEF289965B56817D79E1A37ED2ED4FE?sequence=1> accessed 18 May 2018.

Indeed, changes in relation to the international response to such emerging threats are themselves demonstrative of the value of reassessing traditional conceptualisations, as well as representative of the validation of the concept of human security. The results of such an approach, represented in UNSCR 2177 (September 2014)[643], is to establish a more effective means of addressing significant international and inter-connected concerns:

> [Resolution] 2177 represents the symbolic culmination of an increasing process of securitisation of health, whereby the risk of international spread of infectious diseases is seen not so much as a public health problem to be dealt with by civilian authorities but a security threat to be addressed primarily by security, military and intelligence authorities at the national and international levels.[644]

The most important change resulting from this resolution was to conceptualise public health emergencies of international concern as 'threats to international peace and security'.[645] As discussed, prior to this such threats were principally understood in militaristic terms – of actual or imminent conflicts – or, in the case of health, by the weaponization of health and disease.[646] Historically, in the form of chemical weapons, both before and after they were prohibited,[647] as well as the dangers posed by radioactive fallout[648] from the anticipated use of nuclear weapons.[649] Crucially, as they were expected to result from deliberate acts, it was

[643] United Nations Security Council, 'On the Outbreak of the Ebola Virus in, and its Impact on, West Africa' (18 September 2014) UN Doc S/RES/2177 (UNSCR 2177) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2177%20(2014)> accessed 18 May 2018.
[644] Gian Luca Burci, 'Ebola, the Security Council and the Securitization of Public Health' (2014) 10 QIL 27, 33.
[645] ibid 27.
[646] See for example Larry Lutwick and Suzanne Lutwick (eds), *Beyond Anthrax: The Weaponisation of Infectious Diseases* (Humana Press 2009).
[647] In the modern context, prohibition of the use of chemical weapons is most famously represented within the Geneva Protocol (1925). Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 17 June 1925 (1925) 94 LNTS 65 <https://www.un.org/disarmament/wmd/bio/1925-geneva-protocol/> accessed 18 May 2018.
[648] See the dissenting opinion of Judge Weeramantry in the ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996) where he stated that nuclear weapons 'produce instantaneous radiation, in addition to which there is also radioactive fallout'. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 2 <http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-12-EN.pdf> 18 May 2018.
[649] David Holloway explains that during the Cold War 'both American and Russian military planners appear to have assumed that a future war would be a replay of World War II, with the addition of nuclear weapons'. David Holloway, 'Nuclear Weapons and the Cold War in Europe' in Mark Kramer and Vit Smetana (eds), Imposing, Maintaining, and Tearing Open the Iron Curtain: The Cold War and East Central Europe, 1939-1945 (Lexington Books 2013) 439.

anticipated that all such threats allowed for the possibility of peaceful and diplomatic conclusion (by restricting the lawfulness of military force and encouraging the pacific resolution of disputes).[650] Legitimising the perception of public health emergencies of international concern within the scope of threats to international peace and security is significant precisely because the nature of these threats is different. As noted when referencing Upendra Baxi in Chapter Four, transboundary health risks 'respect no territorial or ideological frontiers'.[651]

Indeed, public health emergencies of international concern are unanticipated and unpredictable, and cannot therefore be resolved purely with diplomacy, nor can they be effectively controlled without a truly international (inter-connected) response. As Burci notes, 'the language, if not the use, of Chapter VII is presented as an important symbolism of the need for unprecedented mobilization by the international community'.[652] Potential limitations with the focus of this reconceptualisation – for example the implicit endorsement of the amalgamation of human security within traditional national security narratives – will be addressed later in this chapter. Yet it is the nature of the threat posed by public health emergencies of international concern that makes them an interesting and relevant area for examination as it pertains to their potential impact on human rights protections. As we have seen, attempts to justify interference with the rights of criminals (including suspected terrorists) are increasingly based upon prioritising the interests of a perceived innocent collective over those of individuals adjudged to have harmed (or who have the potential/intent to harm) such

[650] This is represented within the UN Charter (1945). Specifically, within Article 2(4) denoting the general prohibition of the use of force - bar certain exceptional circumstances (e.g. Article 51 self-defence) - as well as the 'international peace and security' enforcement powers contained within CHVI (Pacific Settlement of Disputes) and CHVII (Action with Respect to Threats to the Peace). Charter of the United Nations, 24 October 1945, 1 UNTS XVI <http://www.un.org/en/charter-united-nations/> accessed 18 May 2018.
[651] Upendra Baxi, 'The Place of the Human Right to Health and Contemporary Approaches to Global Justice: Some Impertinent Interrogations' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 23.
[652] Gian Luca Burci, 'Ebola, the Security Council and the Securitization of Public Health' (2014) 10 QIL 27, 30.

interests. However, in relation to a PHEIC, attempts to justify various interferences would instead be based upon prioritising the interests of an innocent collective over other innocent people (e.g. those who are infected/carrying the relevant disease/pathogen) as the threat they are determined to pose to society will not necessarily (if at all) be based upon an intent to harm. This distinction could result in justifying interferences that could logically be viewed as being more morally difficult to condone.[653] In the hypothetical terrorist attack scenario, the absolute nature of rights is, in a sense (and in the view of the state), deemed to have been forfeited by those who demonstrate an intent (or capacity) to harm the collective interests of the state. Interference is justified, in this context, not only because of the nature of the specific threat, but due to its direct correlation with the actions of certain individuals. In the context of the War on Terror, Douzinas highlights, it is generally accepted that 'Guantanamo Bay prisoners have no rights because they are evil murderers, and a threat to Western security'.[654] Yet with regards to a PHEIC, there is no need to for a direct link between individual actions and the realities of the specific threat. Interference could thus be justified purely on the grounds of the *possibility* for greater harm and irrespective of establishing clear intent.

A PHEIC is, by definition, generally an unexpected development. The absence of anticipation can result in lack of preparation as it pertains to providing an effective response to emerging threats.[655] They are truly exceptional concerns that necessitate a prompt and focused

[653] In the sense that the harm (or threat of harm) posed is not the result of a choice. Likewise to Michel Foucault's questioning of the right to use circumstances beyond an individual's control (namely poverty) to justify exposing them to a course of action argued to be of interest to the state (e.g. enhancement of medical knowledge), how is it fair to interfere with the fundamental protections of individuals deemed to pose a threat to the state, if the threat in question is 'unconsented', in that it isn't based on a deliberate act or choice? Michel Foucault, *The Birth of the Clinic* (Routledge 2003) 101.

[654] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 59.

[655] In reflecting on this in the context of the Ebola outbreak of 2014, Gian Luca Burci explained that the 'main rationale behind the increasing securitisation of health is the perception that highly pathogenic infectious diseases spreading internationally may undermine the political, economic and social bases for a state's security, plunge it into chaos and possibly lead to massive population displacement: this in turn would reverberate regionally and cause further instability and conflict that could also affect the security perception of third states with interest in the affected region'. Gian Luca Burci, 'Ebola, the Security Council and the Securitization of Public Health' (2014) 10 QIL 27, 35.

international response once they have been identified. However, the scope of justifiable action as it pertains to interference with human rights protections within such contexts is far from clear. In the hypothetical terrorist attack scenario failure to act (i.e. justify interference) could lead to disastrous consequence for the affected state (and potentially by extension neighbouring states). In contrast, with a significant PHEIC, failure to act could arguably undermine the collective interests of *all* states (in the event that it resulted in the eventual spread of a pandemic level disease).[656] There is therefore paradoxically both greater and lesser justification for interfering with rights in response to health based threats than traditional national security scenarios – such as terrorist attacks. In order for it to be consistent with the purpose of human rights, the determining criteria for legitimising interference should once again be based upon its consistency with the underlying purpose of such protections. Yet, the issue is arguably much more ambiguous when it comes to a PHEIC due, in a large part, to the reason they are now conceptualised as threats to international peace and security – the unexpected, unpredictable nature of their development. The WHO itself, per the International Health Regulations (IHR 2005), have defined a PHEIC as 'an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response'.[657] Indeed, due to events in recent history, initiating with the attacks of the September the 11th 2001, threats posed by terrorist acts are more clearly understood by the public than those of a potential PHEIC. There is an element of certainty in relation to the perceived need for interference on these grounds because the consequences of inaction are readily accepted by populations (whether a particular threat is legitimate or not). In contrast, public health emergencies of international concern are unpredictable threats. There is an obvious lack of certainty stemming from incomplete

[656] ibid.
[657] WHO, 'Revision of the International Health Regulations' (23 May 2005) WHA Res 58.3 [IHR 2005] <http://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf;jsessionid=5EEF289965B56817D79E1A37ED2ED4FE?sequence=1> accessed 18 May 2018.

knowledge/understanding of the disease itself. Even in the case of the Ebola outbreak of 2014 - which, as noted, impelled the UNSC to acknowledge that a PHEIC could constitute a threat to international peace and security - the ultimate scope of the threat proved to be largely restricted (both geographically and in terms of aggressiveness of the infection).[658] To what extent can states justifiably authorise interference with human rights in the absence of certainty regarding the necessity of such action? An overly restrictive approach could lead to failure to prevent the rapid spread of a deadly disease. However, a more flexible approach would risk justifying arbitrary interference. The key question would therefore appear to be: is the *possibility* of an exceptional threat enough to legitimate interference with certain fundamental individual interests?

5.3.1 Assessing the Absoluteness of Absolute Rights

Reimagining the Ebola outbreak as a hypothetically more severe PHEIC (e.g. extinction level threat) can assist the process of effectively responding to this question. If a similar Ebola like virus was to emerge in the United Kingdom (or another ECHR member state), but with significantly enhanced levels of aggression, infectiousness, and international transferability, would interference with any and all human rights be justifiable as means of effectively combating it? If so, would such justification be dependent upon a proportionate approach to the issue (with less intrusive measures attempted before more aggressive measures are considered)? As demonstrated in the example of a suspected terrorist attack, an approach founded upon prioritising human rights interests above all others would surely claim that justifiable interferences should be limited (and legitimised by a proportional response). The reasoning behind such a position would be that interferences can only be condoned when they

[658] For a more detailed account of this outbreak see Tiaji Salaam-Blyther, 'US and International Health Responses to the Ebola Outbreak in West Africa' (2014) *Congressional Research Service* <https://fas.org/sgp/crs/row/R43697.pdf> accessed 18 May 2018.

are unavoidable, and even then, only when the negative consequences of inaction exceed those of the chosen response. In contrast, approaches based on the prioritisation of collective interests (namely state security), would, hypothetically at least, seemingly allow for a greater level of interference once a threat has been identified. In support of this we can draw reference to the insightful study completed by Joseph Spino and Denise D. Cummins. Here, through the conduction of a research experiment on public perception of the justifiability of torture, it was found that:

> [T]he more weight people place on expected consequences, the more likely they were to endorse torture as a means of information extraction, the less likely they were to find torture morally wrong, and the more likely they were to agree that it is obligatory.[659]

However, proponents of human rights interests would generally be incapable of endorsing this approach – at least as it pertains to 'ticking time bomb' style terrorist scenario. Such objections would be based upon the presumption that certain interests are absolute and inalienable; and that the costs of interference – as it pertains to undermining the survivability of the *identity* of the state - can never be exceeded by the consequences of failing to take action.

Specifically, this would relate to the values and ideals (e.g. democracy, civil liberties) that shape the identity of the social consciousness of states. Within the context of the U. K. a relevant example of this can be found in the dissenting opinion of Lord Hoffman in *A (FC) and others (FC) v. Secretary of State for the Home Department; X (FC) and another (FC) v. Secretary of State for the Home Department* [2004] UKHL 56. Here, Lord Hoffman maintained that:

> [The] "nation" is a social organism, living in its territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses its own political and moral values ... This is a nation which has been tested in adversity, which has survived physical destruction and

[659] Joseph Spino and Denise D. Cummins, 'The Ticking Time Bomb: When the Use of Torture Is and Is Not Endorsed' (2014) 5 Review of Philosophy and Psychology 543, 551.

> catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation.[660]

The implication of this, it is suggested, is that whilst the actions of terrorists may not directly threaten the 'life of the nation', action condoned by the governing powers of states in combating this threat may do so – in that it can facilitate the erosion of the states aforementioned 'identity'.[661] Nevertheless, it is worth considering if a human rights based determination on the legitimacy of the interference with rights would reject a health based threat to state security in the same way.

Indeed, the relevance of a states' identity is itself surely dependent upon the continuation/survivability of a peoples who retain the capacity to enjoy it.[662] Whilst this is not necessarily a concern when it comes to traditional internal militarised threats such as terrorist attacks (such as those recently witnessed in the United Kingdom and referenced earlier in this thesis), it is a relevant consideration in relation to a potential PHEIC for reasons we have previously discussed. The concept of absolute rights can, at least theoretically, survive a terrorist based attack to the collective interests of a state. However, the scope of these consequences is not truly comparable with those potentially posed by emerging public health emergencies of international concern (which by their very nature have the capacity to undermine the enjoyment of all interests - collective or otherwise - through mass loss of life and social destabilisation).[663] In this sense, it is appropriate to question the validity of the concept of absolute rights in such contexts. If a potentially deadly outbreak of an Ebola like

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[660] *A (FC) and others (FC) v. Secretary of State for the Home Department; X (FC) and another (FC) v. Secretary of State for the Home Department* [2004] UKHL 56 [91].
[661] ibid.
[662] On this see once again Jeremy Bentham's assertion '[that] which has no existence cannot be destroyed – that which cannot be destroyed cannot require anything to preserve it from destruction'. Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843) 500.
[663] This simply reflects the view, succinctly expressed by Timothy M. Maher Jr. and Seth D. Baum, that pandemics 'threaten the sustainability of human civilization'. Timothy M. Maher Jr. and Seth D. Baum, 'Adaptation to and Recovery from Global Catastrophe' (2013) 5 Sustainability 1461, 1461.

virus can be stopped through actions which unavoidably violate interests presently regarded as being absolute rights – such as via forced inoculation or medical experimentation (e.g. a violation of the prohibition of torture) of those actually (or suspected to be) infected – would it be morally right to justify these interferences? Moreover, would doing so ultimately and irreparably undermine the concept of universal human rights (as presently understood)?

On first consideration, many might be inclined to answer both questions affirmatively. To paraphrase Bentham, rights can have no real worth in the event that no one is left to enjoy them, or if they cannot be effectively protected and enforced.[664] Similarly, acknowledging the non-absoluteness of these claims, even if only in exceptional (or seemingly implausible) circumstances, appears to call into question the manner in which they can accurately be regarded as guaranteed protections (i.e. the sense in which they are actually *human rights*). However, as previously established, it is necessary to accept such conclusions only if we approach the issue in specific, restrictive terms – with the presupposition that a contemporary rights-based approach is the only possibility. As established in chapters two and three, the idea of human rights is a particular vehicle which is capable of communicating a specific (and morally significant) purpose (to actualise human agency). The true test in relation to the justifiability of interference with individual interests as established in the aforementioned hypothetical scenario would therefore seem to rest with its consistency with this overarching, universalising purpose. This is because, in practice, human rights simply represent a contemporary (and perfectible) instrument through which the purpose of such claims may be legitimated.

Theoretically, the inalienability of rights will not be compromised by interference which is consistent with the underlying purpose of these claims. Yet, this should only be

[664] Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843) 500.

satisfied in exceptional circumstances. There is a need to demonstrate the necessity of interfering and arbitrary interference should not be condoned. Thus, in the context of a suspected terrorist attack there is a clear means by which non-interference can be justified - when it is uncertain whether interference is truly necessary. Such an approach attempts to legitimate specific, exceptional interferences without compromising the integrity of the concept of universal rights as guaranteed protections. The fact that there are circumstances when interference can be denied in such contexts adds further credence to this position.[665] Yet there is a greater level of difficulty with this approach when it attempts to address the issue of PHEIC based threats to the enjoyment of human rights. Directly applying the same criteria here could be insufficient due to particular components of these unique threats – ultimately leading to the denial of interference (based on lack of understanding/certainty) which will subsequently be proved to have been necessary. The alternative is to allow for a more flexible approach which seemingly risks justifying arbitrary interference (and which is arguably representative of contemporary efforts to regulate derogations within the ECHR).[666] The universal purpose which underpins the concept of human rights can potentially justify interference with these same claims. However, can it legitimately authorise varying degrees of interference depending on the context without undermining the idea itself? That is to say - does the approach to justifying interference require consistency of application in order for it to remain credible?

In responding to these questions, it is worth re-considering some significant conclusions from the previous chapter on the right to health. Here, reassessing traditional conceptualisations

[665] Indeed, protections such as the prohibition of torture are largely accepted (at least ostensibly) to be *jus cogens* of international law. In the context of the ECHR, this is represented by the discourse surrounding the absolute (e.g. non-derogable) nature of Article 3. For a detailed examination of the implications of this protection see Natasa Mavronicola, 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2013) 12 Human Rights Law Review 723.
[666] As previously discussed, this relates to Article 15 of the ECHR which empowers member states to derogate from certain (conditional) protections in a 'time of war or other public emergency threatening the life of the nation'. Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No.11 and No.14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005 (ECHR) art 15 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 18 May 2018.

of the idea of this protection led to the determination that, due to the expansive nature of this claim, it should be understood as a right to human healthiness. It was thus identified as a foundational protection. Indeed, it is foundational in the sense that it provides a means for other claims to achieve meaning (as a lack of an appropriate level of health undermines the value and significance of other protections). Moreover, it is foundational in that successful application of this right is not dependent upon definitive, comprehensive coverage of relevant issues/aspects, nor a universally consistent standard of application. It instead provides a foundation for continued and progressive development.[667] The content and scope of the protection is ultimately evolutive, in that it should expand over time (with the ultimate aim of achieving *eventual* universally consistent application).[668] Therefore, and similarly to the concept of security itself, health based threats are arguably foundational due to their capacity to undermine all other interests or subsistence (collective or otherwise). As such, whilst lack of certainty in relation to the need to act cannot justify interference in relation to traditional terrorist based threats (e.g. isolated, localised attacks on general populations), that same lack of certainty, when it pertains to a PHEIC, will not necessarily preclude the justification of interference (due to the exceptional nature of the threat and the lack of time which may be available to organise an effective response). Indeed, in this scenario the approach is actually consistent with the one applied in the suspected terrorist attack scenario, as in both instances the justifiability of interference is contingent upon the specific nature of the 'exceptional' threat. Interference will be restricted so far as is possible without compromising the capacity to secure the continuation of these same interests.

[667] As discussed in Chapter Four in relation to the work of Aoife Nolan. In accordance with the concept of progressive realisation, this model proposes prioritising interests based upon their foundational significance to other interests. With such an approach, whilst the ultimate objective is to secure the highest attainable standard of health, the pre-requisites for health will need to be prioritised before this standard of health becomes obtainable (or, indeed, meaningful). Aoife Nolan, 'The Childs Right to Health and the Courts' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 140.
[668] ibid.

5.3.2 Reconceptualising the Fulfilment of Human Rights

From this analysis, it would appear that we can draw the following general conclusions:

1. Whilst human rights *may be regarded as* inalienable, this inalienability does not require absolute application, but can instead justify legitimate interference in exceptional circumstances (when they are consistent with the underlying purpose of such claims – to actualise fundamental interests).

2. The justifiability of such interference is dependent upon the nature of the threat. Legitimate interference must be an unavoidable means of securing the ability to continue to fulfil this underlying purpose (i.e. when the absence of interference poses a greater threat to the capacity to protect these interests).

3. Lack of certainty will, in most circumstances, preclude justifiable interference due to potentially negative costs of allowing it. Specifically, by compromising the continuation of the 'identity' of the state (i.e. by sacrificing values and liberties which make the preservation of the state a worthy objective).

4. However, some exceptional circumstances (such as with an exceptionally dangerous PHEIC), may justify interference irrespective of the immediate certainty of the need to act, if the possible consequences of failing to do so ultimately undermines the relevance of preserving this identity (when continuation of the state itself is not assured).

This is itself, of course, based upon a traditional conceptualisation of terrorism in that it presupposes future attacks/threats falling within the currently accepted model of individual, isolated acts perpetrated by specific groups. Yet it is worth noting that the meaning of terrorism has changed several times throughout history. Originally this was conceived in post-revolution

France as means of maintaining public order with Maximilien Robespierre famously declaring 'terror is nothing other than justice … applied to our country's most urgent needs'.[669] In this way, its original conception was arguably as a legitimate tool of governance. Within a contemporary context, it is now understood as a barbaric act of violent resistance - of ideological, religious, or political protest with the explicit intent to cause suffering and harm with the aim of influencing the conduct of states.[670] To date, the scope of individual terrorist attacks has been relatively restricted - in that their consequences are largely isolated in geographical terms - in the sense that a specific state will have been targeted (and more particularly, in that they will directly affect a specific part of that state.)[671] The scope of the threat is, therefore, seemingly incomparable with that truly global risk posed by a PHEIC. However, the context of these attacks is susceptible to change (expanding the confines of the consequences). This, as yet unimagined development, cannot be assessed in specific terms (as the nature of the changing threat is unknown). Despite this, realisation of the possibility of change encourages reassessment of the means by which interference with human rights protections may be justifiable. There are two possible developments in particular that should be examined: (i) the first, bioterrorism, relating to a terrorist threat which directly incorporates aspects of a PHEIC (for example by weaponising disease);[672] (ii) and the second involving a completely unique threat which represents a separate (but substantively commensurate) unknown alternative. Crucially, the established criteria for justifying interference can, at least theoretically, potentially be satisfied in both instances.

[669] Erik Männik, 'Terrorism: Its Past, Present and Future Prospects' (2009) 12 Kaitseväe Ühendatud Õppeasutused 151, 152.
[670] For more on this see Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 Journal of International Criminal Justice 933.
[671] For relatively recent examples of this see the attacks which took place at the Ataturk Airport in Istanbul, Turkey on the 28th of June 2016 or at the Promenades de Anglais in Nice, France on the 14th of July 2016.
[672] See once again Stefan Elbe, *Security and Global Health: Toward the Medicalisation of Insecurity* (Polity Press 2010) 66.

With regard to the first scenario, this is due to its direct correlation with traditional PHEIC based threats. It should, in this sense, be addressed in the same manner. A health based threat to the continuation of the enjoyment of rights can, due to the nature of this threat, justify exceptional interference with these same protections. This surely remains the case regardless of the cause of the threat (whether it is 'organic' in the sense that it develops without human interference or indeed whether it is the result of deliberate intent). Rather the most important distinction in this scenario would not relate to the scope posed by the specific threat, but rather the limitations of justifiable interference. In a traditional PHEIC scenario (e.g. as discussed in the previous pandemic example), interference with absolute rights could conceivably take the form of forced quarantining, inoculation or, exceptionally, of medical experimentation without consent (the latter of which can be argued to be commensurate to torture).[673] Following the aforementioned template, these actions would become justifiable the moment the nature of the threat had been confirmed (specifically at the initiation of the outbreak of the particular disease). Thus, they would be largely reactive in nature. A direct *response* to actual events based upon the fear of possible consequences of failing to act (and as such capable of demonstrating the unavoidable nature of the interference). Yet in the case of a terrorist based PHEIC, the scope of the need for interference would arguably change. In addition to justification for reactive measures there is the question of proactive (or preventative) ones. Specifically, the issue of whether subjecting a suspected terrorist to torture in the hopes of obtaining information conducive to precluding the attack should be considered/condoned.[674]

[673] In envisioning the possibility of justification being afforded (or even attempted) for such courses of action, one must imagine that the state in question is facing an extinction level pandemic threat. If the situation is worsening - resulting in mass loss of life, and the loosening of governmental control – would it be justifiable for state authorities to use any means possible to restore order (even at the cost of so-called absolute rights)?

[674] It would therefore be subject to similar considerations as with the traditional 'ticking time bomb' style terrorist threat. See once again Joseph Spino and Denise D. Cummins, 'The Ticking Time Bomb: When the Use of Torture Is and Is Not Endorsed' (2014) 5 Review of Philosophy and Psychology 543.

Can an *anticipated* threat of this nature provide justification for interference in the absence of certainty of its actual scope?

Objectively, consistent application of the previously established criteria would lead to the conclusion that such justification *may* be possible. This is because the determining criteria behind this method was the specific nature of the exceptional threat. In the event of a terrorist attack based upon the incorporation of a PHEIC which could be effectively mitigated preventatively - thus negating the need for significant reactive measures - then action taken in accordance with this aim will be consistent with the overarching purpose of the idea of human rights. The difficulty would once again stem from the issue of certainty of the need to act. Whilst in regular PHEIC scenarios justification can be provided even in the absence of certainty, this is arguably influenced by the cause of the threat itself. Namely, as mentioned, the fact that pandemics are unpredictable, organic developments that 'invariably cause high morbidity and mortality and great social disruption and economic losses'.[675] In other words, its existence is not predicated on a deliberate intent to harm (as they are natural, unpredictable events). However, in the reimagined terrorist scenario, the intent to harm is the fundamental cause of the possible threat. Absence of certainty, not only in relation to the suspected terrorist's capacity to perpetrate the attack (or disclose information capable of preventing/averting it), but also pertaining to the scope of the possible harm which could result become significant considerations.[676] In this sense, whilst interference may be justifiable in these contexts, it would not be absolute (or automatic). Instead there would be a requirement to satisfy, to a reasonable extent, the need for action (but perhaps to a lesser degree than with a traditional terrorist based threat).

[675] Stacey L. Knobler et al (eds), *The Threat of Pandemic Influenza: Are We Ready?*: *Workshop Summary* (National Academies Press 2005) 144.
[676] Joseph Spino and Denise D. Cummins, 'The Ticking Time Bomb: When the Use of Torture Is and Is Not Endorsed' (2014) 5 Review of Philosophy and Psychology 543.

The second scenario would also seemingly justify interference in the event that the scope of the harm was considerably greater than contemporary terrorist attacks. Once again, the threat with regard to its potential impact on the capacity to secure the continuation of the enjoyment of rights based protections is of paramount importance. Interestingly, attempts at identifying possible developments in accordance with this lead to considering threats which themselves pose significant difficulties/concerns for matters of health: for example, the detonation of a nuclear or chemical weapon.[677] Similarly, as with the previous example, the issue of justifying preventative measures is present. As highlighted, such interference should only be justified exceptionally. The threshold for establishing/demonstrating the necessity of interference is also significantly higher than the reactive measures considered in a traditional PHEIC. This is simply because it is easier to demonstrate the need for action when the immediacy of the threat is undeniable (in that has happened/is continuing to happen). This is true irrespective of whether the scope of the harm caused by this threat ultimately proves to be less than expected or anticipated. The possibility of greater harm, coupled with the lack of appropriate time to establish the certainty of the need to act, enables justifiable interference in its absence. A threat which has yet to occur, or which exists purely hypothetically, cannot provide the same scope for justifying interference. It cannot truly be known whether interference is necessary when the aim of proposed measures would be preventative rather than reactive.

5.3.3 Striking a More Effective Balance: Considerations for Possible Reform

Following on from this analysis, it is useful to consider some recommendations for reform regarding the manner in which the objectives of safeguarding security and human rights

[677] As Elbe notes, this was personified with the 'destructive nuclear arms race between the United States and the Soviet Union during the Cold War'. Stefan Elbe, *Security and Global Health: Toward the Medicalisation of Insecurity* (Polity Press 2010) 72.

may be effectively balanced (and fulfilled). It has been established that these aims are not in fact incompatible (in contrast to what much of the current discourse appears to suggest). The fulfilment of the purpose of rights can require interference with their implementation in certain exceptional circumstances. Thus, it is to be acknowledged that rights cannot be absolute in either substantive content (e.g. represented by definitive accounts of these protections), or in application. Crucially, this observation affirms that all rights are derogable - albeit with varying degrees of derogability (e.g. with certain rights easier to justify interference with than others). With rights presently regarded as absolute/non-derogable (such as Article 3 of the ECHR),[678] the degree of derogability would be much narrower than with protections which are already accepted as being susceptible to lawful derogation (such as Article's 8, 9 & 10 of the ECHR).[679] Acceptance of the possibility of lawful derogation from any human right can ultimately result in the enhancement of the legitimacy of the concept of rights itself. This is achieved by ensuring that the purpose of such protections can consistently (and continuously) be fulfilled; even if such fulfilment requires interference with the practical application of these protections. Similarly, by allowing member states to derogate from *every* human right in genuine emergencies, we reduce the credibility of the argument that rights act as obstacles to the successful obtainment of a national security.

Within the context of the ECHR, the embracement of this theoretical approach could also result in the enhancement of the perceived legitimacy (as well as sufficiency) of the ECtHR. As we have already addressed, the use of existing derogation machinery of the ECHR (e.g. Article 15) is ineffectively governed by the Strasbourg Court.[680] In particular, it has been

[678] Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No.11 and No.14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005 (ECHR) art 3 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 18 May 2018.
[679] ibid art 8-10.
[680] Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 German Law Journal 1764, 1782.

noted that the Court has consistently deferred to the affected member state regarding the actual existence of an emergency situation (presupposing the validity of the need to derogate), and instead restricted itself to conducting robust judicial review of the proportionality of the measures undertaken in response.[681] Thus, it is clear that there is presently no effective test applied to determine whether an emergency actually exists (and therefore to determining whether derogation was actually necessary). This thesis argues that reforms based on the analysis conducted in this chapter could help to resolve some of these issues. There are two aspects to this proposed reformed approach. The first would require the adoption of a stricter first test which would look to determine the legitimacy of the need to derogate more effectively. In order to satisfy this test, it would not be enough for affected states to highlight security needs (e.g. an ostensible emergency situation) as providing justification for their actions (as is presently the case),[682] but would also require that this justification be made in accordance with the objective of securing the continued fulfilment of purpose of human rights. This should minimise the potential abusability of the derogation framework - by ensuring that member states acknowledge that permission to derogate is not to be interpreted as confirmation of the general superiority of security over human rights norms (and thus prevent states from adopting an overly-broad approach that risks unjustifiable/unnecessary interference with the Convention).

Similarly, the Court is provided with more credible (and effective) criteria for regulating the legitimate scope of interference with human rights – as it pertains to both the necessary length of derogation as well as the specific protections requiring suspension

[681] See for example *Lawless v Ireland (no. 3)* (1961) 1 EHRR 15; *Ireland v. the United Kingdom* (1978) 2 EHRR 25; *Brannigan and McBride v. the United Kingdom* (1993) 17 EHRR 539; *Aksoy v. Turkey* [1996] ECHR 68; *A and Others v. the United Kingdom* (2009) 49 EHRR 29; *Mehmet Hasan Altan v. Turkey* [2018] ECHR 251; *Sahin Alpay v. Turkey* [2018] ECHR 253.

[682] For example, the continuing 'state of emergency' initiated in Turkey almost two years after the failed *coup d'état*. For an effective critique of Turkey's apparent misuse of emergency powers see *Amnesty International Report 2017/8: The State of the World's Human Rights* (London: Amnesty International 2018) 367-72.

(significantly increasing the possibility of finding against the affected state at the first test stage). This aspect of the proposed reformed approach should ultimately result in the preclusion of the possibility of non-temporary derogations, as well as significantly reduce the prospect of affected states escaping accountability for unjustifiable interferences with Convention rights through misuse of Article 15.

The second aspect would require member states to accept the non-absoluteness of human rights as it pertains to their implementation. As previously discussed, this would simply relate to the acknowledgement that all rights are derogable (as fulfilment of the purpose of such protections may require temporary interference with their provision). In accordance with this position, the second test would basically mirror the current approach of the ECtHR (and the adoption of a strict review of the proportionality of the derogating measures) but with wider scope; allowing for proportionate/lawful derogation from protections currently regarded as non-derogable – such as Article 3 – in exceptional circumstances (and in order to ensure the continual fulfilment of such protections). This would potentially secure a number of positive benefits that could enhance the credibility of the ECHR itself. In the first instance, by demonstrating that the fulfilment of the purpose of human rights protections can (in exceptional circumstances) be used to justify legitimate interference with their implementation (and the subsequent prioritisation of national security), this is achieved by disarming the narrative that human rights and national security are competing aims (with provision of the former presented/perceived as inhibiting the guaranteed safeguarding of the latter). This, in turn, would minimise the prospect of the ECtHR allowing for arbitrarily overbroad interference with human rights norms (e.g. as arguably witnessed within the jurisdiction of the ECHR in the context of

France,[683] as well as on a wider international level in the context of Japan[684] in recent years) by ensuring that legitimate interference would be held to be dependent upon the affected state satisfactorily establishing that their chosen derogations represented the optimal means of fulfilling the purpose of such protections.

5.4 The 'Securitisation' of Human Rights: Subsistence as Security

It has previously been addressed that the securitisation of rights is achieved through political discourse. In addition to promoting the idea that the fulfilment of human rights and the provision of state security are competing objectives, this has results from what Stephen Hopgood defines as 'the politicization of human rights language'.[685] Ultimately, Hopgood suggests that this represents the fact that

> [The] language of human rights is just too contaminated in many places, as well as suffering from a kind of familiarity and vagueness that makes almost any demand for equal treatment, justice or freedom expressible in rights language, whether or not such a demand is truly justified.[686]

These factors serve to undermine the feasibility (and desirability) of the idea of human rights as necessary, fundamental protections.[687]. In response, sovereign authorities exploit the nature of these protections to challenge their very realisability, by promoting a 'universality' which is merely a variation of the subject of the political construct (e.g. the law-abiding citizen). Rights are thus securitised against their claimants, with their universal relevance

[683] Specifically, the recent enactment of tougher counter-terrorist laws which have been criticised for effectively enabling a 'permanent' state of emergency. For an effective summary of the controversy surrounding these new emergency powers see Fionnuala Ní Aoláin, 'France: The Dangers of Emergency Legislation' (2017) Just Security <https://www.justsecurity.org/45263/france-dangers-permanent-emergency-legislation/>

[684] This is reflected in the recently enacted legislation which looks to tackle organised crime (including terrorist acts) more effectively. This law provides the state with greater scope and discretion in taking preventative action. However, ambiguity regarding the circumstances in which these powers may be lawfully engaged raises fears that they are open to abuse. For an insightful critique of these measures see OHCHR, 'Letter to the Japanese Government by the Special Rapporteur on the Right to Privacy' (2017) OL JPN 3/2017 <http://www.ohchr.org/Documents/Issues/Privacy/OL_JPN.pdf> accessed 18 May 2018.

[685] Stephen Hopgood, 'Challenges to the Global Human Rights Regime: Are Human Rights Still an Effective Language for Social Change?' (2014) 11 SUR – International Journal on Human Rights 67, 69.

[686] ibid 70.

[687] ibid.

anchored to a pragmatic denial of universal applicability.[688] As mentioned, principally the securitisation of rights is premised on the idea that human rights and national security are competing aims for the sovereign authority of states.[689] Whilst this approach does not necessarily suggest that these aims are fundamentally incompatible, it seeks to illustrate that (ultimately) there is no certainty of continual mutual fulfilment. The securitisation of rights is therefore indicative of the inherent challenges of the human rights concept in contemporary times. In addition to ostensibly establishing the non-universality of such protections in practical terms, it further highlights the limitations of prevailing approaches (through the demonstration of the lack of accountability of member states and the hierarchisation of interests) – which results in the relegation of human rights based claims to matters of subsidiary or incidental concern.[690] The securitisation of rights may be examined within the specific context of human healthiness – as we have seen itself now securitised for national security aims (as established in the preceding section). Health is therefore an appropriate subject to examine significant implications of the securitisation of rights. Moreover, as mentioned above, it allows us to further establish the inter-connectedness of both national security and the universalising idea of human rights.

To begin, we should look to contextualise the concept of human security within the securitisation discourse itself. In Chapter Two, we addressed the concept of a 'referent subject' of rights. The conclusions of this study depicted two separate but inter-connected components

[688] In that it is argued (legitimately or not) that for the 'law abiding citizen' to be able to enjoy these protections it should be accepted that terrorists, as well as suspected terrorists and others seeking to cause severe harm to the state, should not qualify for human rights protections on account of their conduct (or possible conduct).
[689] Philip Ruddock summarises this position as the (fallacious) choice between 'protecting either national security, or civil liberties'. Phillip Ruddock, 'A New Framework: Counter-Terrorism and the Rule of Law' (2004) 16 The Sydney Papers 112, 117.
[690] As represented with the examples of France, Turkey, and Japan examined in section 5.2.2 of this chapter.

of this 'subject'.[691] The first was the abstract concept of 'man' consistently referred to in human rights treaties and declarations; the possessor of universal claims. The second was the political construct represented as the 'citizen', the officially recognised, and practically significant, individual with sufficient means to put such claims into practice; the beneficiary of rights.[692] This is relevant to our current investigation in that it illustrates the benefits of adopting a critical approach to accepted knowledge as means of sublimating understanding. For the 'subject' of human rights, this allows us to deconstruct the idea of a 'universal man' for the purposes of identifying limitations with traditional or historical interpretations of this concept. Indeed, the inescapability of the universality of humankind, at least as it pertains to shared species membership,[693] is countered, in practice, by the particularity of circumstance required to transform 'universal rights' from rhetorical claims into reliable protections. In the context of security, a critical approach to the discourse could look to disentangle its focus from more traditional interpretations; specifically, the national security paradigm. In its place, it could emphasise that various forms of established militarised threats are but one aspect of a complex and evolutive concept. Furthermore, it would look to centre contemporary efforts at enhancing comprehension on emerging (and under-appreciated) components - such as human security. The significance of such an approach is that it allows us to reaffirm the significance of security to the human rights discourse – and, in particular, the universality of such

[691] This resulted from an examination of a hypothesis of Costas Douzinas which stated '[the] "man" of the "rights of man" has no concrete characteristics, except for free will, reason and soul ... Yet the empirical man who actually enjoyed legal rights was literally a man — a well-off, white, Christian, urban male. He condenses the abstract dignity of humanity and the privileges of the powerful'. Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking <http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.

[692] In Chapter Two, this position was reinforced by referencing the work of Hannah Arendt. Peg Birmingham remarks that the significance of the possession of a sufficient level of recognition to the enjoyment of rights was well known to Arendt who, as a refugee, 'lost her status as a citizen, lost all claim to human rights'. Peg Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* (Indiana University Press 2006) 35.

[693] The idea of human beings being 'equally human' is personified by Article 1 of the Universal Declaration of Human Rights which states: 'All human beings are born free and equal in dignity and rights'. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) <http://www.un.org/en/documents/udhr/index.shtml#a25> accessed 18 May 2018.

protections - through a modern reconstruction of this concept. Indeed, the causative link between the concept of health as a threat to security and the enjoyment of human rights is evidential (as established in the preceding section). This is because health based threats such as pandemics can lead to mass loss of life, population displacement, and regional insecurity. As Burci concludes, within the global arena there is an 'increasing perception that the threat of an infectious disease – whether natural or as a result of an act of terrorism – could threaten regional and global security'.[694]

Perhaps less transparent, however, is the actual scope of the implications of this link. Whereas consideration of militarised health based threats has been a regular factor in security discourse for many years, appreciation of the significance of non-traditional (but ironically organic) health based threats, such as pandemics, is a relatively recent development.[695] As we have just established, as a modernised variation of traditional militarised threats, the weaponisation of health, or disease, could theoretically provide states with sufficient justification for denying the enjoyment of human rights in a manner commensurate with existing derogation machinery. Irrespective of the actual justifiability of such action, this would clearly represent the 'denial' of application (in the form of direct, intentional interference with fundamental claims). Alternatively, human exposure to health based threats – such as pandemic diseases – would constitute an obvious diminishment of the 'enjoyability' of universal rights. In contrast to the previous example, this depreciation of enjoyment would seemingly happen regardless of state action; it would thus represent an unintentional restriction of the actionability of such claims.

[694] Gian Luca Burci, 'Ebola, the Security Council and the Securitization of Public Health' (2014) 10 QIL 27, 32.
[695] As discussed, this is epitomised with UNSCR 2177 and the confirmation contained therein that the Ebola outbreak constituted 'a threat to international peace and security'. United Nations Security Council, 'On the Outbreak of the Ebola Virus in, and its Impact on, West Africa' (18 September 2014) UN Doc S/RES/2177 (UNSCR 2177) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2177%20(2014)> accessed 18 May 2018.

5.4.1 The 'Object' of Human Rights: In Pursuit of Security

For our purposes, it is the relevance of these aforementioned threats to the universality of universal human rights that is of primary interest. In this context, specific focus is to be given to the developing discourse surrounding the purported securitisation of rights. The concept of securitisation itself relates to the identification of 'referent objects' – in the form of ideals – which face a direct threat to their preservation or continuation (and which the affected state/states ultimately deem necessary to protect):

> Different forms or logics of security revolve around claims about referent objects and their existential character. For instance, societal security is organized around the concept of identity, while state security is organized around the concept of sovereignty … the referent object of humanitarianism is human life and dignity.[696]

A fundamental purpose (and supposed advantage) of a securitisation model for determining threats is that, by expanding the focus beyond a traditional national security paradigm, a greater number of legitimate threats may be identified. This expansion is made possible because, as Vladimir Šulović explains, a securitisation approach is based on the belief that 'security is about survival; it is when an issue, presented as posing an existential threat to a designated referent object, justifies the use of extraordinary measures to handle them'.[697] As such, the concept of securitisation is also useful to our analysis: principally with regard to efforts at identifying a 'referent object' of human rights. In a similar fashion to the 'referent subject' of rights previously discussed, it is proposed that this 'object' takes two forms; (a) national/state security and (b) human security – with each seemingly centred upon juxtaposing ideals. With the former, this is indicative of the foundational interest of states and, by implication, also the

[696] Scott Watson, 'The 'Human' As Referent Object? Humanitarianism as Securitisation' (2011) 42 Security Dialogue 5, 5-6.
[697] Vladimir Šulović, 'Meaning of Security and Theory of Securitisation' (2010) Belgrade Centre for Security Policy 1, 3.

greatest threat to the feasibility of inviolable claims; with the security of the state, of the collective, providing justification for interference with the fundamental rights of the individual. The securitisation of rights here is centred on an ideal – state security – which is seen to be threatened by the fulfilment of individual claims. This position is founded on the understanding that the concept of absolute individual protections constrains the feasibility of state security by limiting its ability to respond to emergent threats. It is thus Benthamian in nature in that the viability of state security is predicated on accepting the impossibility of absolute rights.[698]

In contrast, with the latter, this 'object' is representative of the foundational threat to the enjoyment of human rights for the *individual*; namely human security (specifically by securing autonomous agency).[699] Here, the ideal – human subsistence – is seen to be threatened by the non-fulfilment of individual claims. Under this interpretation, the state is constructed as the entity responsible for providing such protections, and as such, is also identified as the most likely means by which their enjoyment will be frustrated. This frustration could conceivably take the form of denial, suspension, or modification of application as it pertains to these rights on both an individual and/or collective level.[700] It is therefore universalising, in relation to the 'referent subject' of rights, in that it is of equal relevance to both the abstract man and the political construct. The relevance of health - in the form of the human body (physiological subsistence) - to the referent object of 'human security' is self-evident. It is the foundational component of this discourse. In the context of human rights, this subsistence is generally articulated (at least initially) in the form of the right to life – with the concept of 'life' understood to represent the most basic of human needs. Yet it is important to consider that the

[698] As Bentham asserts, 'there is no right which, when the abolition of its advantageous to society, should not be abolished'. Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843) 501.
[699] Thus, it is dependent upon the provision of necessary components of human subsistence as discussed in Chapter Four. For a detailed examination of the concept of 'human subsistence', see Chapter Four, section 4.3.
[700] Within the context of the U.K. this is most obviously represented by the derogation powers of the ECHR once again (e.g. Article 15).

idea of 'life' – and human life in particular – is itself inherently complex. Indeed, whilst the right to life is often depicted as the most obvious, basic protection, its relevance will be contingent upon a state of pre-established existence (a fact reflected in existing normative accounts of this protection - such as Article 2 of the ECHR).[701] In purely practical terms, a universal right to life cannot realistically be interpreted as an actionable claim for its creation, but only its preservation.

Amtai Etzioni offered a more ambitious account but along similar lines when she defined this protection as 'a right to be free from deadly violence, maiming, torture, and starvation'.[702] Even more expansive theoretical accounts, such as provided by James Griffin, suggest that the right to life is better understood (and conceptualised) as a right to *live.*[703] Under this interpretation, life is to be protected, not only through the preservation of physical existence, but a process of actualising autonomous agency. The relevance of this is that it would appear to challenge the perception, epitomized by Etzioni's conclusion, that the right to life is the most basic protection simply because 'dead people cannot exercise their rights'.[704] This is because, whilst it is clear that physiological existence is required for rights to become effectual, it is also apparent that human subsistence – characterised as a worthwhile life (of a life worthy of a human being) – is contingent upon more than physical security/subsistence. In this way 'life' can be regarded as a product of human healthiness.

Whilst the relevance of human health to the referent object of human security is self-evident, it should be noted that even with the referent object of 'national security' human health

[701] It is worth noting that the judicial definition afforded to the right to life under the ECHR is extremely narrow. For our purposes, the relevant language is found in the expression that: 'Everyone's right to life shall be protected by law'. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950 <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 18 May 2018.
[702] Amitai Etzioni, 'Life: The Most Basic Right' (2010) 9 Journal of Human Rights Law 100, 100.
[703] Principally, this is achieved by protecting our 'personhood'; understood as the ability to function as autonomous agents. See James Griffin, *On Human Rights* (Oxford University Press 2008) 215-220.
[704] Amitai Etzioni, 'Life: The Most Basic Right' (2010) 9 Journal of Human Rights Law 100, 105.

is seemingly integral to its fulfilment. In establishing this, it is useful to draw more directly from the works of Stefan Elbe. In *Security and Global Health: Towards the Medicalisation of Insecurity*, Elbe discusses the increasing significance of health to the field of securitisation, and particularly the national (and international) security discourse. There are various components to this, but the most significant for our analysis relates to the purported securitisation of the human body. Traditionally, this discourse has focused on a particular interpretation of the idea of 'human security' - as Elbe aptly notes:

> Health is essential to human security … [the] very heart of security is protecting human lives.[705]

Here, the founding proposition is that there are specific interests stemming from (or relating to) the human experience within a state – and operating beyond simple military defence – which contribute to the level of security enjoyed by that state. An underlying objective behind the human security discourse is to deconstruct the concept of security so that it may be refocused in a more robust and effective manner (e.g. by addressing both internal and external factors/threats).[706] However, within international law, the relevance of human health itself is generally confined to alternative or contributing means by which national security is to be achieved (with human security personified as an additional component of the traditional security discourse, rather than as a separate objective). This is perhaps best personified with the aforementioned UNSC Resolution 2177.[707] Although this played an important part in legitimating the concept of human security, by choosing to adopt traditional security language, this resolution ultimately allows for human security to be perceived (if not explicitly presented)

[705] Stefan Elbe, *Security and Global Health: Toward the Medicalisation of Insecurity* (Polity Press 2010) 101.
[706] See Vladimir Šulović, 'Meaning of Security and Theory of Securitisation' (2010) Belgrade Centre for Security Policy 1.
[707] United Nations Security Council, 'On the Outbreak of the Ebola Virus in, and its Impact on, West Africa' (18 September 2014) UN Doc S/RES/2177 (UNSCR 2177) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2177%20(2014)> accessed 18 May 2018.

as a subset of state security.[708] Various aspects of human health – regarded as being necessary for the enablement of human subsistence - are presented as requiring protection if a sufficient level of national security is to be attained. Yet, structuring the security discourse in this way ultimately risks relegating the significance of human security, in purely practical terms, by presenting the securitisation of human health – of the exploitation of the human body – as a means by which national security may be preserved (e.g. and thus counter to the concept of human security). In support of this we can draw from the work of Burci once again who, in reflecting upon the significance of UNSCR 2177 remarked that:

> [C]haracterising diseases as security threats pushes responses away from civil society toward military and intelligence organisations as well as towards an authoritarian approach and coercive measures that may easily lead to human rights violations and stigmatizes victims without evident public health benefits.[709]

Indeed, in present times, as Elbe highlights, governing powers already accept that the preservation of state security is dependent upon the imposition of various forms of regulation or monitoring on the physical health of the population of the state.[710] When conducted in this way, such action does not evidence an acknowledgement of human health (and security) as a commensurate consideration to national security, but rather another means by which national security is itself to be secured. It is therefore an appropriation of the object of human security for the purposes of advancing national security initiatives exclusively. Thus, the distinction between interpretations of the securitisation of health centred on human or national security perspective would appear to be that, whereas the former represents the belief that the human

[708] For example, by framing the resolution within the UN's 'primary responsibility for the maintenance of international peace and security'. ibid.
[709] Gian Luca Burci, 'Ebola, the Security Council and the Securitization of Public Health' (2014) 10 QIL 27, 36.
[710] Specifically, this relates to linking public health with sufficiency in combating emerging pandemics, or disease. Put simply, a healthier population is seen to be less susceptible to the proliferation of such a threat. Accordingly, Stefan Elbe notes that there has been an increase in state led efforts to enhance the physical healthiness of populations through measures such as 'trying to influence what foods and nutrients people "put" into their bodies, and trying to increase the time people spend exercising their bodies'. Stefan Elbe, *Security and Global Health: Toward the Medicalisation of Insecurity* (Polity Press 2010) 171.

body is itself deserving of protection irrespective of any positive implications (either intentional or incidental) of doing so to the state, the latter purports that this body is ultimately worthy of protection so that it may be utilised in order to protect the state. To reference Elbe once again, both interpretations are founded on an increasing realisation that the human body exists as an 'entry point for providing security'.[711] For Elbe, two principal areas where the securitisation of health is becoming increasingly influential are (1) biosecurity and (2) bioterrorism. In brief, they can be summarised as follows:

1) Biosecurity: defined as health based threats originating from natural causes (to be understood as those which are independent of human intent/action).

2) Bioterrorism: defined as health based threats deliberately predicated on human intent/action.

Elbe explains how the effectiveness of biosecurity measures and initiatives, in response to threats such as AIDS, SARS, and H1N1, has been undermined due to their unnecessarily restrictive scope. In effect, he suggests that the 'focus on medical intervention …means that pandemic preparedness debates rarely interrogate or address a range of wider global developments that are contributing to the increased threat of an influenza pandemic'.[712] Instead, the discourse frames the sustainability (and continuation) of security in the form of the preservation of a healthy human body. However, in doing so, as Elbe notes, contributing factors to the development of such threats are largely ignored.[713] Insufficient emphasis is given to the conditions within which such threats may be presented. In the form of biosecurity, this relates to social and economic conditions, as well as various technological and political developments, that perpetuate poverty, inequality, and generally provide space for health based threats to

[711] ibid 172.
[712] ibid 168.
[713] ibid.

proliferate and emerge.[714] With regards to bioterrorism, this limitation would relate to various political, social, ideological and/or religious factors which motivate individuals to undertake violent action against the state.[715] In failing to adequately address these issues, Elbe suggests, states inadvertently impair their own security initiatives. They become, essentially, an attempt to secure human health in the absence of the required conditions of sustainable healthiness.

With such an interpretation, human health may be regarded as the precursor for security, but with the understanding that such health is itself contingent upon various contributing factors. In other words, the healthiness of the human body would not be exclusively regarded as the 'entry point' for the provision of its own security. However, as such factors are themselves caused by the results of human actions (or inactions), it is perhaps unhelpful to completely disregard the human body as the foundation of the biosecurity/bioterrorism discussion. The causal link between these contributing factors and human health is undoubtedly human agency – or, specifically, action undertaken on behalf (and on account) of such agency. As such, their continuing relevance is dependent upon such agency. Framing the debate around the concept of a healthy human body is therefore arguably necessary as it human beings, exclusively, who possess the power to attempt to rectify the contributing factors that perpetuate their own un-healthiness. The legitimacy of the concept of biosecurity cannot be separated from the continuation of human survival – in that the significance of biosecurity threats is contingent upon having something to threaten.[716] Therefore (and as with the right to health itself), this survival must be framed – at least in the first instance - within the context of physiological

[714] Specifically, as represented by 'overseas tourism, wetland destruction, a corporate 'livestock revolution', and Third World urbanisation with the attendant growth of megaslums'. ibid.
[715] In relation to this point, Elbe confirms that 'the emphasis has thus been on developing medical interventions that can be rapidly deployed in the event of such an attack taking place …all too few participants in biosecurity debates reflect on the wider international political factors that are driving the formation of terrorist groups, or the reasons why these groups wish to attack populations in the West'. ibid 170.
[716] This is therefore similar to the logic used to legitimate conceptualising health as a foundational claim. Specifically, this is achieved by identifying that the validity of the idea of human rights cannot ignore the significance of a subject capable of making a claim - and as such cannot deny the importance of human healthiness/subsistence - or the need for a governing entity capable of implementing it.

subsistence.[717] Thus subsistence is a necessary foundation for the meaningfulness of other protections, whilst security is a necessary foundation for this subsistence. In acknowledging this we reach the conclusion that the alleviation of the contributing factors of unhealthiness and the securitisation of the human body represent complimentary means of achieving the same objective. Whereas resolution of the contributing factors would provide a stronger foundation for the realisation of sustainable levels of (sufficient) human healthiness, the securitisation of the human body provides for the continuation of the subjects required to achieve this (i.e. human beings). One, therefore, is seemingly focused on long term survivability, and the other on immediate preservation. However, it should be noted that the purpose of the latter is simply to provide means by which fulfilment of the former may be achieved.

5.4.2 The 'Subject' of Rights: Perspectives from Health and Security

The relevance of this discussion on human health to the referent subject of human rights becomes evident when we consider existing parallels between both concepts within the context of security. As mentioned, it has been suggested that the entry point for the provision of security is the human body (understood as a physiological entity). It has also been noted that the foundational state of the referent subject of rights is the abstract man of declarations (itself represented by a physiological entity in the specific form of normative human beings). The malleability of the image/perception/identity of this abstract figure is redundant to this point. Rather, it is the consistent presence of the human being as a physiological entity that is relevant to this discussion. Put simply, in modern times the entry point to the discourse on human rights is *humanity* – the acknowledgement that certain interests are fundamentally human, and, as

[717] Within the context of the right to health it was held that 'one cannot be concerned about freedom without being concerned with subsistence …'. Lisa Foreman, 'What Future for the Minimum Core?' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012) 65.

such, all human beings are entitled to their provision or protection.[718] It was previously established that the purpose of such rights is generally acknowledged as providing security to individuals regarding these fundamental interests (as means by which their humanity may be actualised and preserved). Such security is to be achieved - and is inherently achievable - for human beings by obtaining recognition as a political construct: the possessive subject of actionable claims.[719] Furthermore, in obtaining their own personal security (through the fulfilment of individual rights), political constructs must themselves agree to becoming subjected to the political will of the sovereign entity of the specific state in which they reside (as exchange for the states willingness to guarantee their individual protection).[720] The creation of this social contract results in political constructs contributing to the process of legitimising the balancing of individual rights with collective interests. As consequence, their bodies become susceptible to being securitised by the state in the form of any measures deemed necessary to the states protection or survival. Within the context of the securitisation of rights, the abstract man of declarations can therefore be interpreted to represent claims to the provision of security, with the political construct representing both the possessor of actionable claims to individual interests and, once their personal security has been secured – resulting in adequately protected physiological entity - a means by which collective security may be maintained through necessary action or regulation. In this sense, a robust/completed understanding of the 'object' of human rights would perhaps better understand this as the *pursuit* of security.

[718] This is exemplified with Douzinas' assertion that to have human rights is 'synonymous to being human'. Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 255.
[719] That which Douzinas termed 'the empirical man who actually enjoyed legal rights'. Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking <http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.
[720] This is commensurate with the social contract formation envisioned by Thomas Hobbes 'condition of war … of everyone against everyone'. Thomas Hobbes, *Leviathan: Revised student edition (*Cambridge University Press, 1996) 91-92.

As noted earlier, the referent object of humanitarianism is defined as 'human life and dignity'.[721] Indeed, the protection of human life and dignity is a widely regarded as being a founding purpose of the concept of human rights. Moreover, human health may be regarded as the foundational aspect of such rights by providing the opportunity for other rights to be enabled. In this sense, physiological health - the human body – could be understood as the foundation of such health. As humanitarianism is purposed with protecting and preserving human subsistence by securitising various 'fundamental' interests – primarily within the context of human security - it is possible to therefore establish health as the foundation of such security. Interestingly, this conclusion would appear to legitimate the inclusion of rights based ideals and principles even within traditional national security considerations (as opposed to regarding them as competing objectives or ideals).

There are two components to this proposal. Firstly, and as addressed in the preceding chapter, human subsistence relates to more than simple physiological survival: a sufficient level of 'human healthiness' results in a life which exhibits actualised autonomy. It has been argued that such a result is only possible if various fundamental interests are protected. The provision of such protection falls within the contemporary remit of human rights (although, as expressed in Chapter Three, the universalising idea/purpose which legitimates them is not contingent upon contemporary - or historical - perceptions of rights). Consequently, the concept of human security evidently transcends mere physiological health. Secondly, the integrity of national security – that which was historically understood as state security - is today largely accepted as requiring the acknowledgement of legitimacy of human security as a corresponding

[721] Scott Watson, 'The 'Human' As Referent Object? Humanitarianism as Securitisation' (2011) 42 Security Dialogue 5, 5-6.

component[722] (even if in practice it is generally treated as an additional component of national security). By incorporating the objectives of human security – which, as we have seen, expand beyond basic physiological subsistence - within the national security paradigm, human rights themselves may become a vehicle of such security. That is to say, through securing acknowledgement that the fulfilment of the *purpose* of such rights is a necessary aspect of the attainment of a satisfactory standard of state security. It could be argued that acceptance of this position is already represented by the general recognition of the validity of the concept of humanitarian intervention (as we will examine in more detail in section 5.5 of this chapter).

Yet, the contemporary political focus of states within the international community seemingly fosters the perception that the fulfilment of security (particularly national security) and the provision of individual rights are competing concerns:

> National security has been the privileged term giving the state discretion to override policies and human rights when it feels threatened by real or imaginary enemies.[723]

Indeed, it is clear that through repeated attempts to 'other' the concept of human rights, sovereign authorities have diminished the reputation of such protections amongst their respective populations. Such action is purposed upon a desire to enhance the authority of these governing powers – ostensibly under the auspice of increased capacity to protect – through the reduction of various restrictions relating to their ability to act in response to perceived threats. In effectively contextualising individual protections as a hurdle of their own protection, states reduce the potentiality of the universality of rights (at least as it pertains to universal application

[722] Sakiko Fukuda-Parr and Carol Messineo confirm that the concept of human security 'has become increasingly widely used since the mid 1990s ... initially used primarily with reference to state policies and the search for new international security and development agendas after the end of the Cold War, it is increasingly being used in policy advocacy by civil society groups on a broader range of contemporary issues from civil war to migration to climate change'. Sakiko Fukuda-Parr and Carol Messineo, 'Human Security: A Critical Review of the Literature' (2012) Working Paper No. 11 Centre for Research on Peace and Development, 1, 2.
[723] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 184.

in contemporary times). This is exacerbated by the defined scope of interpretations of the justificatory purposes of human rights we have previously addressed.[724] By encouraging interpretations which amalgamate consequentialist and deontological components, the rights discourse has allowed for the concept of human rights to be regarded, schizophrenically, as fundamental universal human claims deserving of protection and fulfilment that cannot be violated, but which can only reasonably be expected to be defensible and enforced when their violation is not deemed politically expedient by the sovereign power of that state. The academic discourse thus represents the continual promotion of a utopian ideal which is prone to collapse upon itself when put into practice. In this way, modern failures of the human rights movement, specifically relating to scope and the reliability of coverage, can be regarded as being emblematic of its own success. By effectively communicating the idea of human rights as being transcendent (in attempts to provide it with a robust justificatory foundation), proponents of rights have restricted its practical realisability. Speaking on both the power and limitation of utopian ideals Costas Douzinas explained:

> Utopia is the name of the power of imagination, which finds the future latent in the present even in the ideologies and artifacts it criticises. Utopia unsettles the linearity of empty historical time: the present foreshadows and prefigures a future not yet and, one should add, not ever.[725]

As a consequence of this dichotomy, human rights are therefore becoming increasingly easy to marginalise, especially in relation to the 'competing' issue of national security. This is due to the fact that the sovereign powers of states are able to reference a duty to protect the collective interests of their population as justification for a reduced commitment to human

[724] This is personified by the so called 'rights inflation'. When speaking on this James Griffin explained that '[i]t is not just the twentieth-century inflation in the number of rights that has to be challenged: the inflation of the content of individual rights does too'. James Griffin, *On Human Rights* (Oxford University Press, 2008) 175.
[725] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 296.

rights. As such, an examination of the concept of sovereignty will seek to assess the contemporary realisability of such protections.

5.5 Sovereignty and the Actualisation of Rights

Earlier in this chapter we addressed the task of determining a referent object of human rights. Here, the discussion highlighted how referent objects represent ideals which are integral to the integrity of relevant concepts (and which therefore must be protected). This analysis concluded with the proposal that the referent object of human rights is the pursuit of security (itself represented by different forms of subsistence – human and national/state). As way of contextualising the concept of referent objects we drew from the work of Scott Watson. This is relevant to us once again as, in addition to establishing human life and dignity as the referent object of humanitarianism, Watson identified sovereignty as the referent object of state security.[726] Indeed, for governing powers to retain the capacity to secure the space/state over which they preside, they must logically possess a requisite level of authority (and power). This authority/power is perhaps best represented by sovereignty – the ability to act (or not to act) in accordance with interests of the state based upon autonomous determinations of the governing entity (autonomous in the sense that they are not entirely predicated on the will of other entities). Indeed, as Douzinas confirms, a sovereign is defined:

> [T]hrough the power to institute a state of exception and suspend normal legality in order to save the social and legal system from radical threats. The decision to suspend the law, which marks out the sovereign, is both outside law's procedures and inside the law as a precondition of its operation.[727]

As consequence, the absence of sovereignty critically undermines the concept of state security – in that the governing power will lack sufficient means of preserving the state when

[726] Scott Watson, 'The 'Human' As Referent Object? Humanitarianism as Securitisation' (2011) 42 Security Dialogue 5, 5-6.
[727] Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press, 2013) 100.

it is threatened. Moreover, and as addressed in Chapter Three in relation to our examination of the use of subsidiarity mechanisms by the ECtHR,[728] when considering the legitimacy of interfering with fundamental protections sufficient attention must be afforded to the issue of sovereignty. This is significant not only because it governs the process within which the determination to protect rights or not is ultimately made but also – and in reference to the political construct of the referent object of rights - provides us with confirmation of where the power to make this decision ultimately presides.[729] Historically the implementation and enjoyment of rights has been dependent upon the will of the state. In modern times, member states have shaped the substantive content of these protections, and through the process of voluntarily participation, also determined the scope of the obligations accepted within specific jurisdictions.[730] In addition, and as we have addressed, they have also identified circumstances in which the governing entities of member states should retain the power to suspend these protections (theoretically on a temporary basis). As highlighted earlier in this chapter, this is perhaps best exemplified with Article 15 of the ECHR. It has been seen that the legitimacy of the utilisation of this provision has been heavily questioned by contemporary legal scholarship. For academics, such as Alan Greene, whilst the ECtHR have demonstrated a willingness to review the proportionality of interferences with human rights after a declaration of emergency has been declared, they have not adequately addressed the issue of whether an emergency truly exists (and thus suspensions of protections are necessary and legitimate) with the same level of scrutiny.[731]

[728] See Chapter Three, section 3.3.1.
[729] Of specific interest here is the notion that the concepts of sovereignty and rights are inseparable. This was famously suggested by Hannah Arendt when considering the practical realities of universal rights. For detailed analysis of this see Peg Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* (Indiana University Press 2006) 44-45.
[730] See for example the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950), the International Covenant on Civil and Political Rights (1966) et al.
[731] Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 German Law Journal 1764.

The limitations of the derogating mechanism incorporated within the ECHR can arguably be traced back to its justificatory purpose of balancing between two presumptively conflicting interests – individual rights and national security. However, as previously addressed, there are several convincing reasons for concluding that this presumption is erroneous. Whilst the practical effectiveness of rights must be dependent upon issues of sovereignty – specifically in the form of an existent power and will to implement them – it is not immediately apparent why their significance should automatically be diminished through interference when justified purely as a means of preserving such sovereignty (without first establishing the legitimacy of such action as it relates to fundamental human interests). Crucially, this conclusion does not aim to preclude the possibility of legitimate interference. Rather it simply seeks to ensure that this matter is regulated in a valid and effective manner. Theoretically, as we have just discussed, it is evident that interference can itself be regarded as consistent with the objective of protecting fundamental interests when its justification is conducive to the foundational aim of such protections – to protect human needs integral to the actualisation of normative agency.[732] Specifically, this is accomplished by preserving a practical space within which the benefits of such protections are to be given meaning.[733] This appears to be a logical conclusion when it is considered that the absence of such space would automatically negate the relevance and thus significance of human rights (at least as it pertains to practical benefits of implementation) or indeed human subsistence.

It follows that, just as the human body, physiological health, acts as the foundational component of the enablement of human rights in general, national security provides the

[732] Crucially, this objective, foundational form of protection is to be distinguished from the historical use of entitlements as means of quantifying accepted standards of humanity (and the justification of the exclusion of those not seen to be deserving). For more on this see Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51.

[733] As established, this is based on Jeremy Bentham's argument '[that] which has no existence cannot be destroyed – that which cannot be destroyed cannot require anything to preserve it from destruction'. Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843) 500.

foundations for state/sovereign subsistence by securing the capacity to implement the will of governing powers on its population. This would appear to be commensurate with the type of historical sovereignty described by Michel Foucault and exemplified with the sovereigns 'power of life and death'.[734] In analysing the operation of this power, Foucault ultimately concluded that it 'was in reality the right to *take* life or *let* live … a right to appropriate a portion of the wealth, a tax of products, goods and services, labor and blood, levied on the subjects'.[735] This represents the state's power to sustain itself, financially – through taxation (upon which its internal functions depend) – and also physically, with regard to the authority to kill when its survival is endangered.

Interestingly, under such an interpretation the protection of human beings – and thus human health - would once again become a fundamental factor of both human rights *and* state sovereignty. Indeed, for any state where human rights are presently enforced it has already been accepted that certain interests conducive to human subsistence should be protected. This acknowledgment results, not only from appreciation of the value of protecting the individual interests themselves, but also the fact that fulfilment of such protections provides means of preserving the sovereign authority of the state (by ensuring the continued existence of subjects).[736] This seemingly further evidences the inter-dependency of human rights and state security (as security is a necessary component of the enablement of human rights, and such enablement is necessary to ensure state security). As previously discussed, a difficulty which exists here relates to the potential amalgamation of these objectives in a manner which serves the interests of one exclusively (e.g. state security). This is particularly apparent within the

[734] Michel Foucault, *The History of Sexuality, Vol 1: An Introduction* (Robert Hurley tr Vintage 1990) 136.
[735] ibid.
[736] Douzinas suggests that the apparent interdependency of sovereignty and subject is made explicit through the implementation of law. On this point he notes that '[a]s the creation and creator of law, the subject is law's indispensable partner and servant. Its historical continuity and institutional permanence indicate that the law is not just the creation of popular sovereignty; it is also the carrier of the dictates of social reproduction'. Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 227.

context of the 'War on Terror'. To be precise, through the political hierarchisation and politicisation of the human rights discourse, states may now seek to justify denying protection to certain individuals – such as terrorists or suspected terrorists – as a supposed necessary cost of ensuring the enjoyment of such protections for the majority of the population. To Douzinas the significance of this was clear, for '[when] national security becomes human security, when the 'others' are defined as anyone who may be affected by a terrorist act (potentially everyone) there is very little these overbroad qualifications disallow'.[737] We see therefore that the principal danger with this approach is that justification to interfere with fundamental protections can be made in accordance with the interests of the governing powers of the state exclusively (as it pertains to ensuring its own subsistence or preserving its own authority) – and thus insufficient consideration is given to the legitimacy (or necessity) of the interference itself with the enjoyment of the protections.[738] The decision to enact or interfere with human rights is therefore reduced to a results based determination centred on the perceived interests of the state – with fulfilment of individual objectives (such as human rights) largely incidental.

5.5.1 Redefining Sovereignty: Contemporary Developments

The reason this is mentioned is because it is arguably represented within the derogating processes presently adopted by member states of the ECHR. By enabling states to derogate without robust consideration, as well as explanation, of the need to do so, the judicial instruments responsible for regulating the use of such powers instead become complicit in their very diminishment.[739] In response to the perceived lack of scrutiny regarding the utilisation of Article 15, some have defended the approach of the ECtHR by suggesting that the sovereignty

[737] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007) 60.
[738] An insightful examination of this point in relation to the use of derogation powers in the context of ECHR member states can be found in section 5.2.2 of this chapter.
[739] Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 German Law Journal 1764, 1782.

of states would be unfairly (and unsustainably) jeopardised if they were to be retroactively held accountable for mistaking a situation as an emergency when deciding to act during a time of significant uncertainty.[740] This argument suggests that, in addition to jeopardising the sustainability of the ECHR itself (as member states would be less willing to participate in such a system), it would also seemingly threaten the principle of 'exclusive domestic jurisdiction' - a founding tenet of international law.[741] As Fernando R. Teson explains, this concept represents acknowledgement that '[the] essential attributes of the sovereign state require that certain matters be left to the state's own sovereign judgement'. [742] In effect, it reflects that as a matter of principle all states have absolute jurisdiction within their own territories (widely understood as geographical regions where they exercise jurisdiction) when regulating domestic affairs.[743]

However, the absoluteness of this sovereignty is of course limited by other provisions of international law.[744] Indeed, this principle cannot usually exempt states from fulfilling obligations that they have previously accepted in the global arena. Moreover, in the context of human rights abuses intentionally inflicted upon a civilian population, there is increasing acceptance that exclusive jurisdiction can no longer reliably protect states from the possibility of collective humanitarian intervention. In effect, the concept of humanitarian intervention is grounded in the supposed moral and legal legitimacy of taking 'military action in cases of humanitarian necessity …'.[745] This concept is relevant to our current discussion for several reasons. Most importantly, as suggested above, recent embracement and utilisation of this

[740] For a detailed assessment on the necessity of the deferential approach adopted by the ECtHR see Joseph Zand, 'Article 15 of the European Convention on Human Rights and the Notion of State of Emergency' (2014) 5 Journal of the Faculty of Law of Inonu University 159.
[741] This is exemplified within Article 2(7) of the United Nations Charter where it stipulates: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state …'. Charter of the United Nations, 24 October 1945 1 UNTS XVI <http://www.un.org/en/charter-united-nations/> accessed 18 May 2018.
[742] Fernando R. Teson, 'Collective Humanitarian Intervention' (1996) 17 Michigan Journal of International Law 323, 327.
[743] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 447.
[744] ibid 447-455.
[745] David Mednicoff, 'Humane Wars? International Law, Just War Theory and Contemporary Armed Conflict' (2006) 2 Law, Culture and the Humanities 373, 373.

idea by the international community demonstrates general acceptance of the non-absoluteness of state sovereignty.[746] Instead, it would appear that such sovereignty is to be respected (and preserved) so long as doing so does not disproportionately disadvantage (or undermine) the basic human rights of the populations of states.[747] This, in turn, demonstrates a general acknowledgement of the legitimacy (and significance) of human security by these same states (e.g. in relation to the fact that state security is held to be contingent upon human security – and as such interference/violation with state sovereignty can be regarded as a valid means of providing security). Finally, the logic adopted to justify the non-absoluteness of state sovereignty here may be also be used to validate the process of derogating from universal human rights as means of guaranteeing their fulfilment (e.g. as in the emergency scenarios discussed above). If state sovereignty cannot be absolute because, in accepting as much, we limit the realisability of basic human needs/interests, then the very rights which seek to fulfil/guarantee these needs cannot be absolute either (in terms of practical inviolability), as such an inflexible position has the potential to undermine the security of such interests (e.g. by restricting the capacity for governing powers to act). By demonstrating how a concept may be protected through violation, these conclusions would appear to support the rejection of binary interpretations of 'universal' and 'absolute'. Moreover, they illustrate how a transcendental ideal may require reinterpretation and reappreciation through continual assessment in order to secure its own subsistence (e.g. reflecting the 'critical' approach advocated by Nietzsche as discussed in Chapter Three).[748] This process, witnessed in relation to both sovereignty (as we will discuss in more detail in the subsequent section), as well as

[746] Mohammed Ayoob explains the rationale behind this as 'intervention that is undertaken to achieve "humanitarian" objectives … these objectives are intrinsically far too valuable to be held hostage to the norm of state sovereignty and, therefore, ought to override that norm'. Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty' (2002) 6 The International Journal of Human Rights 81, 83-84.
[747] ibid.
[748] This approach is represented in Nietzsche's contention that '[m]an must have the strength to break up the past, and apply it, too, in order to live. He must bring the past to the bar of judgement, interrogate it remorselessly, and finally condemn it'. Friedrich Nietzsche, *The Use and Abuse of History* (Macmillan for the Library of Liberal Arts 1957) 26.

human rights, is representative of the perfectibility of ideas/concepts with contextual reconstruction facilitating the continuation of their significance/relevance.[749]

The relevance of highlighting these issues is to establish that, although the concept of sovereignty is highly respected, it is far from irreproachable. Humanitarian interventions evidence this fact by authenticating the process of disregarding the principle of sovereignty in favour of another, allegedly higher/superior interest (namely protecting the human security of population of the affected member state). It would appear that such an outcome is to be accepted as justifiable when the consequences of inaction would have wider ramifications for the integrity of international law (e.g. when non-interference with state sovereignty in accordance with international law – such as Article 2(7) of the UN Charter – ultimately renders it becoming complicit in widespread human rights violations). In brief, the concept of humanitarian intervention is based upon an acknowledgement of the legitimacy of human security, as well as the inter-dependency of rights and security with regard to ensuring their respective fulfilment. Moreover, as cases of grave human rights violations have been held to justify interfering with the right to exclusive jurisdiction of other member states,[750] it is also worth considering whether similar action should be possible with unjustifiable derogations or interferences with such protections. Is the legitimacy of human rights dependent on ensuring that sovereign power is held accountable for justifying the need to interfere with the human rights of their population in all contexts? In response to this question, it is of course important to note distinctions between interferences with rights which are directly caused by member states – where their conduct threatens fundamental interests of their own population (such as those which would justify humanitarian interventions) – or instead simply result from a

[749] For a detailed account of the potential importance of this approach for the concept of universal human rights, see Chapter Three, section 3.4.
[750] For a relatively recent example of this see the invasion of Libya (2011). An insightful assessment of this UNSC authorised intervention can be found in James Pattison, 'The Ethics of Humanitarian Intervention in Libya' (2011) 25 Ethics and International Affairs 271.

necessary response to threats against their own integrity (such as with lawful derogations in emergency situations). This chapter has already addressed the fact that parties to international human rights treaties are afforded the opportunity to suspend certain protections in times of emergency (as reflected in Article 15 of the ECHR). It has also been noted that the approach to regulating use of the derogation machinery is arguably ineffective (allowing member states too much discretion in determining when derogations are necessary). In defence of this deferential approach, a strict consequentialist account could argue that protections are only sustainable (and desirable) if the wider benefits of application outweigh those of interference.[751] As soon as this is legitimately threatened, governing entities are justified in taking whatever measures they deem necessary to protect the interests of the population at large. However, and as discussed in Chapter Three, the limitation of this approach is that it reduces rights to simple tools of political expediency and provides no guaranteed protection.[752] Moreover, there will also be no assurance that the decision to derogate will actually be in the interests of the fundamental claims themselves – as was proposed as a necessary safeguard when considering possible reforms of derogation machinery of the ECHR earlier in this chapter.[753]

Nevertheless, it is evident that a deferential approach to determining a state of emergency may be justified on the basis of preserving state sovereignty. Regarding this issue, Alan Greene notes that 'judges often defer on the issue of the existence of a state of emergency … leaving the issue to political actors and according them a wide margin of discretion'.[754] This approach is supposedly justified on the basis that, as they are best placed to weigh up all

[751] For a concise summary of a consequentialist defence of human rights see William Talbott, *Consequentialism and Human Rights* (Philosophy Compass 2013) 1030-1040.
[752] Specifically, allowing politics to dictate the scope and focus of rights, thus rendering them 'the handmaiden of the particular'. For more on this see Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000) 138.
[753] See section 5.3.3 of this chapter.
[754] Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 German Law Journal 1764, 1774-5.

relevant factors (having access to the greatest level of intelligence), it is inappropriate to question them (or their motives).[755] Consequently, we can never truly know whether action was necessary in the absence of a robust judicial review from the ECtHR in the case of ECHR member states, which we have highlighted is unlikely to occur for similar reasons – to preserve the sovereignty of member states.

We see therefore that the practical effectiveness of human rights is inextricably connected to the concept of sovereignty – specifically regarding the cooperation of governing entities of member states - as they alone have the right to determine when action is necessary (including measures aimed at limiting the reliability of certain ECHR provisions in times of emergency). Jean Bodin famously expressed that the concept of sovereignty encapsulates the responsibilities a sovereign will have for their 'estates'[756] - understood in contemporary times as the general population. These responsibilities are argued to be grounded in natural law and are inherent to the act of governing. Indeed, a sovereign exists for the very purpose of protecting the collective interests of the state and its population. However, states will naturally have many differing obligations and interests. As such, Bodin asserts the sovereign can wilfully choose to disregard any of their responsibilities when acting in accordance with public interests interpreted as being of greater significance and importance.[757]

When considered in the context of human rights specifically, this would appear to support a flexible approach to justifying interference. This is because, as discussed, individual interests are widely regarded (at least by some member states) as subsidiary concerns that

[755] This view is echoed in the argument presented by the government of the Republic of Ireland in the ECtHR case of *Lawless v Ireland (no. 3)* (1961) 1 EHRR 15. Here, it was maintained that it would be 'inconceivable that a government acting in good faith should be held to be in breach of their obligations under the convention merely because their appreciation of the circumstances which constitute an emergency, or of the measures necessary to deal with the emergency, should differ from the views of … the Court'.
[756] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005) 8.
[757] ibid 8-9.

cannot override means of collective survival. Indeed, claims in relation to the inalienability of such protections could be held to be unfeasible if their practical worth is entirely dependent upon the existence of a sovereign which possesses the will and means to enforce them – something that cannot be guaranteed. Yet, the legitimacy of the concept of human rights, as foundational claims, is not invalidated simply through the identification of other (allegedly superior) foundational concerns. This is due to the fact that a state's survival is not contingent purely upon preserving a physical space, but will also incorporate principles and ideals which are integral to its *identity*. It has been suggested within this chapter that preservation of this identity is highly dependent upon respect for the rule of law in accordance with the fundamental interests of the individuals such laws exist to protect. Thus, whilst the preservation of sovereignty is logically a priority, the manner in which this is secured is arguably more important to the survival of the state. Accepting the validity of this position leads us to conclude that, in actuality, and contrary to apparent view of many contemporary politicians and academics, a 'state's most important duty is to protect individual rights'.[758]

The prioritisation of foundational interests, therefore, cannot truly disregard the idea of the concept of human rights. Although the sovereign has the authority to identify exceptions to existing legal norms, and thus circumvent these norms for the public interest, as the justificatory idea underpinning such protections is an inherent aspect of the identity of all member states, the concept of human rights cannot be divorced from this consideration. Indeed, as our analysis of the co-dependency of both human and national security demonstrates, the legitimacy of the concept of human rights is based upon the assertion that it can never be in the publics or states' interest to completely ignore these protections.[759] As such, the sovereign,

[758] Costas Douzinas, *Philosophy and Resistance in the Crisis* (Polity Press 2013) 92.
[759] Due to the belief that such protections are necessary for a worthwhile life. For more on this see James Griffin, *On Human Rights* (Oxford University Press 2008) 147.

even when justified in circumventing established legal norms, cannot legitimately do so in a manner which negates the purpose of these fundamental claims.

5.5.2 Reimagining Sovereignty in the Context of Health

This is furthered with the realisation that contemporary developments within the context of international law have arguably resulted in the erosion of a fixed, restrictive interpretation of the concept of sovereignty itself. Indeed, this concept is increasingly multi-faceted, and is no longer solely defined by state centric authority (as noted in relation to the re-emergence of humanitarian intervention).[760] The first development worthy of consideration pertains to the idea of what could be termed 'International Sovereignty'. It is suggested that international sovereignty is represented by various influential instruments within the international order (e.g. the UN). Here, by looking to regulate the operation of agreements achieved within international law (e.g. treaties), this sovereignty embodies the authority to hold member states accountable for decisions based upon the exercise of their own national sovereignty within the global arena. The second development could be defined as 'Human Sovereignty'. In contrast to the more expansive approach taken with international sovereignty, human sovereignty represents the authority of all human beings as *individuals* to shape their own experience. As Andrew Fagan explains, 'human sovereignty is achieved through the representation of the material environment as an object of our collective and individual will'.[761] It is therefore influential to the field of human rights specifically, as it defines the power (and importance) of personal autonomy.

[760] Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty' (2002) 6 The International Journal of Human Rights 81, 83-84.
[761] Andrew Fagan, 'Paradoxical Bedfellows: Nihilism and Human Rights' (2005) 6 Human Rights Review 80, 97.

To develop this further, it is useful to examine the operation of sovereignty within the context of health:

1) National sovereignty: regarding the surveillance of health based threats and the implementation of 'solutions' to such emerging hazards. This represents a states' right to act (or not to act).

2) International sovereignty: regarding the sharing of information between states pertaining to initiatives to eradicate or respond to known and emerging health based threats. With regard to public health emergencies of international concern, this potentially supplants the superiority of national security with collective security.

3) Human sovereignty: regarding the 'sovereignty of the body' – the idea that individual human beings have absolute authority in relation to the medical treatment of their own bodies. This seeks to limit the scope of national sovereignty by ensuring that governing entities are accountable to their populations.

Conflict between the first and second would appear to be focused upon the issue of prioritisation of interests within an increasingly globalised and inter-dependent world. It presents states, both individually and collectively, with the task of resolving disparities between traditional Westphalian sovereignty[762] – where states have near absolute authority within their own jurisdictions – with contemporary sovereignty, where states must balance such authority with international interests and initiatives.[763] As mentioned, the (re)emergence of humanitarian intervention in recent years acutely evidences this ongoing debate. This example is relevant to

[762] As Stephen D. Krasner explains, 'the fundamental norm of Westphalian Sovereignty is that states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behaviour'. Stephen D. Krasner, *Sovereignty: Organised Hypocrisy* (Princeton University Press, 1999) 20.

[763] This would have some similarity with Krasner's depiction of 'international legal sovereignty', which he proposed was based upon the equality of states. Specifically, he suggested that international legal sovereignty was 'concerned with establishing the status of a political entity in the international system …[the] basic rule for international legal sovereignty is that recognition is extended to entities, states, with territory and formal juridical autonomy'. ibid 14.

this discussion as it highlights general (or at least increasing) acceptance in the non-absoluteness of exclusive jurisdiction. In the context of health, this debate is founded on differing interpretations of the concept of security (as previously addressed within this chapter). The securitisation of health allows states to regulate the physiological operation of human beings within their own territories, whilst also attempting to influence the regulation of this health within other jurisdictions with the purpose of preventing the development of a health-based security threat to their own state. The Decision Instrument contained within Annex Two of the International Health Regulations (2005)[764] is representative of this purpose. Similarly, the insufficient utilisation of this instrument by those states directly affected by the Ebola outbreak in 2014 is demonstrative of the impact the conflict between interpretations of sovereignty has on its effectiveness.[765] A second component of national sovereignty (within the context of health) relates to medical surveillance: the collection of medical data for the purposes of identifying emerging health based threats (based on the examination of relevant symptomatic factors). As Elbe suggests, the objective behind such measures is to achieve the modification of human diet, lifestyle, as well as general physiological operation.[766] In modern times, this process is legitimised by the state under the auspice of protection:

[764] This instrument provides guidance on when member states should notify the WHO regarding the emergence of a possible PHEIC. It comprises of four questions, if two or more are satisfied the member state must notify the WHO of the emerging threat. In brief, the questions ask is/does the event (1) Serious; (2); Unexpected (3); Pose Significant Risk of International Spread (4) Pose Significant Risk of Travel/Trade Restrictions? WHO, 'Revision of the International Health Regulations' (23 May 2005) WHA Res 58.3 [IHR 2005] <http://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf;jsessionid=5EEF289965B56817D79E1A37ED2ED4FE?sequence=1> accessed 18 May 2018.

[765] In particular, this relates to the unwillingness of the affected states (e.g. Guinea, Liberia, and Sierra Leone) to notify the WHO of the Ebola outbreak (in accordance with satisfying the IHR criteria) until several months after it had emerged. The bureaucratic nature of the operations of world health governance ensured that the WHO were unable to act until they had been notified. When remarking on this Deloffre concluded that, 'paradoxically, the standard operating procedures and legal framework meant to guide the WHO also constrained its ability to act quickly in face of a public health crisis'. Mary Zarnegar Deloffre, 'Human Security in the Age of Ebola' (2014) E-International Relations <https://www.e-ir.info/2014/10/25/human-security-in-the-age-of-ebola-towards-people-centered-global-governance/> accessed 18 May 2018.

[766] Stefan Elbe, *Security and Global Health: Toward the Medicalisation of Insecurity* (Polity Press 2010) 179-188.

> Today the medicalization of security is ultimately demanding of citizens that, in order to be secure, they must also allow security to be practised through their bodies.[767]

Human sovereignty (that which was previously defined in Chapter Three as the 'sovereignty of the body') seeks to limit the scope of national sovereignty. It represents the inherent value and worth of the human body to individual human beings: the foundational possession of human life. At the heart of this idea is the belief that the utilisation of the human body should be contingent upon the autonomous operation of its possessor – of the presence of an opportunity to make a choice.[768] However, as with national sovereignty, the sovereignty of human beings cannot be regarded as absolute. Indeed, we would be mistaken to limit the scope of such sovereignty to deliberations based on the perceived necessity of immediate concerns. Indeed, human sovereignty does not provide justification for decision making based entirely upon ensuring the temporary subsistence of an individual, as it must also consider the impact of such decisions on long term survivability of everyone else (e.g. as discussed in relation to proposed derogations in the reimagined Ebola outbreak scenario). For example, if containment of an extinction level pandemic disease is dependent upon inoculating the entire population of a specific state, would it be reasonable to suggest that the concept of human sovereignty should protect the choice of an individual who refused to consent to this practice? In effect, this concept can therefore be regarded as having direct correlation with that of international sovereignty. The scope of human sovereignty is determined by addressing whether an individual subject can, through the refusal to provide consent, justifiably undermine the interests of other subjects. Similarly, the legitimate functionality of international sovereignty is established upon the consideration of whether the interests of a plurality (or simple majority)

[767] ibid 165.
[768] This is represented by the sort of 'normative agency' described by James Griffin which allows individuals to make autonomous choices in pursuit of a 'worthwhile life'. James Griffin, *On Human Rights* (Oxford University Press 2008) 45.

of subjects (e.g. states) could justify non-consensual interference in the interests of a minority of others.

In reflecting on the significance of human sovereignty, it is important to address an apparent contradiction relating to attempts to limit its actionability with the idea of normative agency. Indeed, throughout this thesis it has been suggested that the purpose of rights is best understood as the objective of actualising normative agency. In Chapter Four, it was suggested that the right to health is perhaps better understood as the right to human healthiness, with the ultimate purpose of this protection to secure the enablement of normative agency. In accordance with this purpose, it was further suggested that this right could therefore provide individuals with a right to die, if choosing to die represents an autonomous choice (and thus the enablement of agency).[769] It was clarified that the validity of this decision would not be contingent on matters of physical health (e.g. the presence of a terminal illness).

Ultimately, this right to die was defined as the right to *choose* to relinquish the continuance of normative agency. It was argued that this choice is to be respected (and should be fulfilled) as it represents the exercise of such agency.[770] In contrast, with this chapter we have established that the denial of protection/provision of rights can be justifiable if such action represents a necessary means of securing subsistence (and thus the continuance of normative agency). The legitimacy of such interference with human rights is held to extend beyond the wishes of the individuals themselves and can therefore be acknowledged as valid irrespective of whether the interference is willingly accepted. Whilst these conclusions appear to contradictory (i.e. by seemingly suggesting that the objective of enabling normative agency

[769] 'A right to suicide is an instance of the general anti-paternalist rights to autonomy and liberty. In general, to respect a person's autonomy and liberty is to let the person decide and then carry out the decision'. James Griffin, *On Human Rights* (Oxford University Press 2008) 222.

[770] On this point James Griffin suggests that '[i]f one is denied that momentous decision, or the possibility of implementing it, then one's right to autonomy and liberty are hollow shams. If one has a right to anything, one has a right to death ... rights are to *living autonomously and living at liberty*'. ibid 221.

can justify allowing individuals to make a choice in one context, but not in another), it should be noted that they are in fact consistent and compatible. This is because both instances represent the fulfilment of the same purpose (i.e. protecting the enablement of normative agency).

For the choice of denying quarantine/inoculation to be truly commensurate to the right to die scenario (and thus represent a choice that should be protected), we would have to satisfy that this denial was, in effect, a voluntary relinquishment of normative agency. If this can be satisfied then the issue becomes moot - as instead of forced inoculation/quarantine, the individual should instead be provided with a humane means to end their life (as in the regular right to die scenario). However, if this choice is not based upon a willingness to die, then, and in accordance with the purpose of human rights, it cannot be given precedence over interference with the enjoyment of such protections deemed necessary to the continuation of the exercise of the individual's normative agency (as to do so would be contradictory).

From this analysis it is evident that one of two things must be true in a scenario such as this:

1. The individual does not wish to die, and the decision to deny medical treatment/forced quarantine is not commensurate to the right to die scenario. As such, and because this evidences a desire to secure the continuation of normative agency, interference/denial of protection can be justified in exceptional circumstances (as necessary means of securing such agency);

2. The individual, in choosing to deny medical treatment/forced quarantine, is in actuality exercising an autonomous choice to die. In this case the right to die should be afforded to them in place of the aforementioned emergency measures (e.g. forced quarantine/inoculation).

Either eventuality could be justified on the basis of fulfilling the objective of actualising normative agency (and can thus be seen to be consistent with the purpose of human rights).

Returning to the three interpretations of sovereignty proposed in this section, it is to be noted that, hypothetically at least, justifiable interference with fundamental protections can be ensured by affording sufficient consideration to each form. In practical terms, this begins by accepting that individuals have a right to make decisions about their own medical needs. Similarly, it is to be understood that the scope for this is limited by the state, who may claim the right to either ignore the action chosen by the individual or to make decisions on their behalf in exceptional circumstances. Finally, the state, in turn, is to be restricted from abusing this ability by international sovereignty – the will of the international community – which may use unjustifiable interference with the human sovereignty of the affected state – of diminishment of human security - to validate interference with its exclusive jurisdiction. Each form of sovereignty thus acts as a safeguard against potential abuses of others.

As we have established, a genuine universal aspect of the concept of human rights is the enduring idea behind the need to protect upon which they are founded. History has demonstrated the significance of this need in the sense that all communities, regardless of their cultural origin, have been constructed upon some variation of it.[771] The specific content of such needs - the matter of determining which interests should be prioritised over others - is, of course, susceptible to change depending upon such cultural differences. This point has famously been used to undermine the universality of the concept of human rights.[772] However, the existence of alternative approaches to a similar objective does not, in and of itself,

[771] See Conor Gearty, 'Human Rights: The Necessary Quest for Foundations' in Costas Douzinas and Conor Gearty (eds), *The Meaning of Rights: The Philosophy of Social Theory and Human Rights* (Cambridge University Press 2014) 21-38.

[772] An excellent summary of this position was provided by Peter Jones who suggested that we live in 'a world in which people live in different circumstances, bear different cultures, and pursue different forms of life. At best, that diversity can inconvenient for, and at worst fatal tom the universality claimed for human rights'. Peter Jones, 'Human Rights and Diverse Cultures: Continuity or Discontinuity?' in Simon Caney and Peter Jones (eds), Human Rights and Global Diversity (Frank Cass Publishers 2001) 27.

disqualify the universal applicability of the aim. Indeed, the process of determination, of establishing a means by which the prioritisation of fundamental interests can occur is evidently present within all communities (even if in some cases this process appears irreconcilably at odds with the concept of human rights itself).[773]

For this reason, it has been suggested that the universality of human rights is perhaps better understood as the purpose which legitimates the significance of foundational individual interests. In the context of rights, absolute does not need to translate into constant adherence to specific practices. A right may accurately be considered absolute if its overarching purpose cannot be disregarded. Fulfilment of these protections can therefore be achieved through derogation in certain exceptional circumstances. However, action which attempts to interfere with such protections for a cause which conflicts with their purpose cannot be justified. As such, at least conceptually, they can accurately be regarded as absolute rights, even though their practical application is never completely guaranteed.

5.6 Conclusion

This chapter has demonstrated that the supposed incompatibility held to exist between human rights and national security is non-fatal to the idea of universal protections. Whilst contextual circumstances certainly lend credence to the view that national security initiatives must logically be held to be superior to human rights, it has been demonstrated that their respective causes can be fulfilled in a manner which is consistent with the purpose of human rights claims. This is true even in the event of necessary intervention or interference with these protections. In establishing this position, it has been argued that the fundamental purpose of state security and human rights are intertwined (and inter-connected). This was supported

[773] For example, in Islamic or Asian states and based upon the understanding that human rights are a 'Western construct with limited applicability'. As discussed by Adamantia Pollis and Peter Schwab, *Human Rights: Cultural and Ideological Perspectives* (New York; Praeger 1979) 1-18.

through an examination of various important evolutions of the concepts of security and sovereignty – particularly within the context of human security. The integration of this concept into international law (and political discourse) enables human rights interests to incorporate themselves into national security initiatives. Whilst it was shown that, to date, human security is still routinely utilised (and ultimately regarded) as subsidiary (or indeed supplemental) concern to traditional national security perspectives, it was suggested that the emergence of the concept is itself a notable development. Contextual utilisation of this concept may currently appear insufficient at effectively altering national security initiatives in a manner which affords greater consideration to human rights interests in a practical (and reliable) manner. Yet, in accordance with discussions in previous chapters, it is proposed that the concept of human security is inherently perfectible and will continue to develop, resulting in greater appreciation of rights based interests within matters of state security.

This chapter further suggests that the concept of human rights can be justified as a universally realisable concept, even within the context of national security/counter-terrorist discussions. In establishing this position, it was shown that the principal purpose of rights is to actualise human agency. In Chapter Four, it was argued that its successful fulfilment is therefore logically dependent upon securing a necessary level of healthiness/subsistence. Similarly, with this chapter it has been shown that a pre-requisite for such healthiness is a stable, secure space in which it can be enabled. This ensures that the protection of this space can legitimately be held to be a superior concern when it is genuinely threatened in a serious manner. Consequently, it further emphasises the impossibility (and undesirability) of absolute human rights. If their legitimating purpose is better (more optimally) served through intervention, then states must be allowed to do so. To propose otherwise is to undermine the validity of such protections (as it will evidence impossibility of performance of their justificatory purpose). The safeguard with such an approach is that only legitimate, severe

threats to the subsistence of the state should provide governing powers with justifiable grounds for interfering with these protections. This approach was distinguished from existing derogation machinery which affords governing powers excessive opportunity to interfere with human rights claims (and in a manner not conducive to fulfilment of the purpose of the claim, but instead based upon political interests of the governing powers).

It is proposed that the approach advocated within this chapter would be a preferable alternative (e.g. more sufficient), as it seeks to provide clearer criteria wherein derogation may be justified. Specifically, by requiring the relevant regulative body (e.g. the ECtHR) to adopt a scrutinous approach to determining the presence of an actual emergency (and thus the legitimacy of the need to derogate). Moreover, as it is based upon acknowledgement of the non-absoluteness of human rights, and in accordance with the manner in which this is communicated (by prioritising the purpose behind such protections), it is argued that this would provide the concept with enhanced credibility (especially within the present counter-terrorist/security dominated context). This is achieved by ensuring that all human rights are acknowledged as being derogable, with derogations only accepted as being justifiable when interference with human rights norms represents the most optimal means by which their purpose is ultimately fulfilled. It is proposed that this approach is preferable to alternative accounts (e.g. based on perceived non-derogability of certain protections) as it has a greater capacity to provide for the continual fulfilment of the purpose of such protections, even when this is represented by interference with their practical application. Furthermore, as this approach accepts that security could take precedence in certain exceptional circumstances *only* as means of providing for the continuation of the enjoyment of human rights, it evidently diminishes the potential for sovereign states to unjustifiably reduce their commitment to human rights norms in the name of national security initiatives (e.g. in the absence of a genuine need to derogate).

Finally, in comparison (and in distinction) with traditional interpretations of national security threats (e.g. terrorism), this point was demonstrated within an examination of health based threats to security (and the fulfilment of rights). Through this analysis it was determined that, whilst interventions may be justifiable, this does not invalidate the universal realisability of human rights – as it pertains to either their desirability or applicability. This conclusion was based upon the fact that the cause for intervention is commensurate with the purpose of such fundamental protections – the enablement of autonomous agency. Notably, it is evident that all human beings (as normative agents) are capable of recognising the significance of this purpose, and its continual fulfilment, irrespective of whether this is secured by virtue of the provision or non-provision of certain protections. In Chapter Three it was established that the legitimacy of concepts and ideals must be continually assessed and reaffirmed in order to determine their sufficiency within the present context. It is proposed that the sufficiency of human rights is dependent upon consistent (and optimal) performance of its underlying purpose. In this way, as our investigation has determined that it is possible for this purpose to be more optimally fulfilled through violation in certain exceptional circumstances, the absoluteness of these rights cannot be made contingent upon a need for permanent application. Instead, the nature of absolute should be understood to stem from a *permanence of purpose* rather than the certainty of practical implementation.

6 Conclusion

It is uncontentious to suggest that human rights have made significant contributions to contemporary politics, morality, and international law.[774] Their continuing presence within each of these discourses has resulted in an unprecedented level of public exposure to the idea of rights. The politicisation and securitisation of the rights discourse has allowed for these perceptions to be shaped and reshaped by states in ways which suit the contextual needs of specific times. In the Western context, this is represented by the changing focus of member states of relevant human rights treaties away from individual rights and towards collective security and survival (in the face of a purported 'existential terrorist threat').[775] The idea that all human beings are equal in status and entitlement to such rights/protections[776] is becoming increasingly untenable. In Western and non-Western states alike, there is a growing willingness to prioritise the interests of those regarded as being of value to the state over those who wish to cause it harm.[777] The language of human rights is used to justify this process by articulating its motivating purpose as being the protection of collective rights/interests. In accepting this narrative, populations validate the functionality of such rights as the constructors of human identity/human worth (e.g. the idea that human rights construct humans).[778] Separately, proponents of the utopian ideal of human rights – as absolute, universal claims – exploit the non-universality of human experience (as it pertains to human subsistence) so as to establish the need for robust enforcement of such protections. Crucially, however, even here, the primary focus does not appear to be on contesting the presence of a legitimate gradation of worth through the construction of the modern political

[774] See Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20 Constellations 51.
[775] See Ipek Demirsu, *Counter-Terrorism and the Prospects of Human Rights* (Palgrave Macmillan 2017).
[776] See Jack Donnelly, *Human Rights in Theory and in Practice* (Cornell Press 2002).
[777] See Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14 European Journal of International Law 241.
[778] See Costas Douzinas, 'Human Rights for Martians' (2016) Critical Legal Thinking <http://criticallegalthinking.com/2016/05/03/human-rights-for-martians/> accessed 18 May 2018.

construct – as a law-abiding citizen. Instead, disparities in the quality of human experiences - generally in the developing world – and which are not predicated (or authenticated) on/by a national security narrative, are highlighted to galvanise Western efforts to facilitate the emancipation of 'deserving' (but as yet unprotected) individuals.[779] This is to take place either in the form of militarised 'humanitarian interventions' or the provision of financial and medical aid. The concept and language of human rights are thus presently utilised for separate purposes. This ultimately convolutes the discourse and negatively impacts upon public perceptions (by promoting contradictory interpretations that ensures that no fixed definition of the concept is adopted).

As seen, there appears to be limited possibility of universal agreement in relation to defining the primary purpose or function of such protections. This in turn creates space for the emergence of robust critiques targeting the feasibility of human rights as basic human claims - as proposed by Griffin et al (e.g. protections required to actualise normative agency).[780] Instead, they are increasingly presented – by both governments and media - through a consequentialist/pragmatic lens where the limitations of their provision are to be understood as the point at which they merge/interact with other primary interests of the state (e.g. security). If we are to accept the legitimacy of this outcome, we would then be compelled to also accept the impossibility of a traditional utopian, ideological interpretation of human rights. This is because, in effect, we would be acknowledging the justifiability of both the non-universality and non-absoluteness of such protections. This would therefore appear commensurate with the 'End of Human Rights' that Douzinas once famously envisioned, and the reimagining of this concept along much narrower, more restrictive lines

[779] See Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007).
[780] See James Griffin, *On Human Rights* (Oxford University Press, 2008).

(which only serve the contextual interests of states).[781] What it does not do, however - as this thesis has established - is authoritatively undermine the justificatory purpose upon which the utopian ideal of human rights was historically constructed: to protect certain fundamental needs. Instead, it simply highlights limitations with adopting a restrictive approach to actualising human rights based upon prevailing interpretations of this concept.

It is apparent that all states recognise the validity of protecting certain interests, both individual and collective, if a satisfactory quality of life (as determined by each people and/or state) is to be ensured. The idea of human rights, of inalienable protections of certain interests, may not be universal in the sense that a specific definition can be readily applied to every state. Yet, the idea behind the need for human rights, the purpose which necessitates such protections, is seemingly universal. This determination therefore renders a purely philosophical or pragmatic approach to justifying the universality of human rights unnecessarily restrictive. Instead the focus should be on stressing the similarity of purpose shared between all states (as it relates to the aim of protecting normative agency), regardless of their specific view of a 'Western' interpretation of fundamental interests. In this way, it is apparent that a robust critique of the universal applicability of the concept of human rights can only ever invalidate the prevailing, contemporary account of how to effectively fulfil a shared objective, rather than the idea upon which the need for this objective is based.[782] Thus, it is arguably through a continual process of invalidation and reinterpretation that the concept of human rights will continue to evolve.[783]

[781] See Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000).
[782] See Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006).
[783] See Friedrich Nietzsche, *The Use and Abuse of History* (Macmillan for the Library of Liberal Arts 1957).

With regard to the modern 'subject' of human rights it is important to note that this, too, is multifaceted.[784] In reference to its deontological origins, the 'abstract man' of declarations and treaties represents the 'possessor of fundamental entitlements'. In contrast, the citizen – as the 'political construct' – exists as the beneficiary of actionable claims. The 'populism' of anti-rights discourse, facilitated by state action and media depictions, has resulted in preference generally being afforded to the latter. Here, once again, the modern era has witnessed a restricting of the scope and meaning of such protections which has been influenced by these same populist attitudes. The public perception of the purpose of human rights has noticeably changed. The utilisation of the language of rights now facilitates the gradation of human worth and the non-absoluteness of fundamental claims. In the context of security, the alleged necessity of balancing between competing interests – namely individual liberties and collective/national security – validates attempts to further restrict the scope of such protections.[785] The significance of the universal subject of rights – the abstract concept – is continually diminished through this process. It is the political construct, alone, however, that is affected (and affects) the actualisation of human rights. State interference with the enjoyment of these rights does not invalidate the legitimacy of the abstract concept – of the entitlement to claim. This 'subject' is therefore absolute in the sense that its legitimacy and existence is not predicated on positive action. Conversely, the realisability of rights – as actionable claims – is dependent upon the political construct – and as such non-application can undermine its practical feasibility. The 'abstract concept' provides a foundation for actionable claims by articulating the legitimacy of entitlements to their provision, whilst the 'political construct' creates opportunity for their implementation. The potentiality of the

[784] See Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000).
[785] See Philip Ruddock, 'A New Framework: Counter-Terrorism and the Rule of Law' (2004) 16 The Sydney Papers 112.

political construct is contingent upon the existence of a secure state (in the form of a practical space in which the protection of individual needs is both meaningful and possible).[786]

This is represented by the political focus of the human rights discourse in contemporary times (and the aforementioned prioritisation of a pragmatic approach to their enforcement). As seen, interference with human rights can be legitimate in the event that it is consistent with the purpose of human rights – specifically by contributing to the continuation of circumstances necessary for the implementation of such claims (e.g. a secure physical space necessary for the enablement of normative agency). This fact does not legitimise or justify unjustifiable interferences – understood as those which are unnecessary. Unnecessary, in this context, relates to interference or violation which does not serve the fundamental purpose of such protections, but is instead premised exclusively on furthering interests of the state/governing powers. The politicisation of the rights discourse results in the eradication of considerations of necessity (and the increased potentiality of illegitimate interference).[787] The language of rights, once utilised as means of articulating rightful emancipation,[788] is now used to restrict the desirability of absolute protections (as well as the possibility of universal claims). Consequently, the human rights discourse has become an insufficient vehicle for achieving the implementation of the justificatory purpose which legitimates such protections – to guarantee basic human needs. To briefly return to the Douzinas, contemporary developments *may* represent the 'End of Human Rights' in the sense that they highlight limitations with current/prevailing interpretations of the concept of human rights, or apparent public acceptance of the legitimacy of the superiority of security

[786] Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham Vol. II* (Edinburgh: William Tait 1843).
[787] See Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007).
[788] See Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishers 2000).

over fundamental liberties. If so, however, this would simply mark an 'end' of the sufficiency of existing approaches to achieving the universal implementation of fundamental human claims – and not the 'end' of the legitimacy or justifiability of such claims themselves.

In establishing this point, and due to the fact that its fulfilment is dependent upon various inter-connected needs/interests, it has been suggested that it is appropriate to reconceptualise the right to health as a right to human healthiness. In effect, this right was proposed as being a foundational claim in that its implementation (either directly or indirectly) is necessary for other claims to become actionable (in the sense that individuals could practically claim them). Ultimately, this claim seeks to ensure the fulfilment of human subsistence. The idea of subsistence has been seen to be integral to the validity of this protection as a universal claim/right.[789] Human subsistence can be argued to extend beyond physiological, biological interests and rest, ultimately, with state security (a necessary component for the existence of a governing power capable of fulfilling this claim). The right to health, as the facilitator of human healthiness, human subsistence, is therefore inextricably linked to the idea of security. As Douzinas notes, security (specifically national security) is the name given to various initiatives which look to diminish the effectiveness/reliability of human rights.[790] Subsistence, rather contradictorily, therefore appears to provide justification for both the expansion and restriction of fundamental human claims. In addition to other limitations which are argued to highlight the impossibility of universal rights (e.g. economic, social, and cultural issues), the right to health (or healthiness) appears to represent the impossibility of absolute protections (as its foundational purpose can be used to

[789] See Lisa Foreman, 'What Future for the Minimum Core?' in John Harrington (ed) and Maria Stuttaford (ed), *Global Health & Human Rights: Legal and Philosophical Perspectives* (Routledge Press, 2012).
[790] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge Cavendish 2007).

legitimise interference with its own implementation). Alternatively, it can be argued to evidence the compatibility (and inter-dependency) of the idea of human rights and national security. Subsistence validates the promotion of basic fundamental interests/claims, but also legitimates interference with such protections in exceptional circumstances (when the continuation of such promotion is itself under threat).

It is in accordance with this approach that recommendations for reform of existing human rights derogation machinery have been made. In essence, these reforms have endorsed the adoption of a stricter approach to determining the existence of an emergency which justifies the need to derogate from the application of human rights norms, alongside acknowledgement of the non-absoluteness (e.g. derogability) of all human rights in practical terms. It has been argued that these changes have the potential to enhance the realisability of universal human rights by both providing the concept with a greater level of credibility (through demonstrating that human rights and national security are not competing aims), whilst also strengthening the prospect of securing the continual fulfilment of the justificatory purpose of such protections (by allowing for interference with the application of human rights when their purpose is more optimally fulfilled through such conduct).

This thesis has ultimately sought to determine that human rights are universal. In accordance with this aim, it has suggested that the foundation of rights is the desire to protect various basic needs. This desire is universal in that it is evidenced in all peoples and cultures in some form or another. Irrespective of present and future developments (as it pertains to the balancing of interests) this 'need' cannot be completely dismissed. It exists, in potentiality, even if its continuation or significance seems hard to appreciate in contemporary times. Human rights are foundational claims because they provide means of actualising this desire. Moreover, they are foundational in the sense that their substance is subject to variation and change (in reflection of societal and historical progress). Such protections

cannot be implemented absolutely for this reason - as it is neither practical nor desirable to do so. Instead, the absoluteness of rights relates to a permanence of purpose: to actualise human agency.

It is important to note that this conclusion does not provide justification for inaction in relation to securing such protections – even though it appears to establish that the idea/purpose of rights is separate from their content. The non-absoluteness of the practical implementation of human rights is best understood in terms of non-definitiveness of their substantive content; and is therefore not a concession that no meaningful form of protection may actually be prescribed. Instead, this non-definitiveness simply relates to the absence of fixed, absolute interpretations of human rights (as well the means by which they must be secured). Such an approach does not warrant arbitrary interpretations, or indeed unjustifiable derogations from such protections, but instead simply allows a necessary and sufficient level of flexibility in determining how such rights are to be interpreted (and their protection best achieved). This determination is itself to be based upon the aforementioned permanent purpose – which *is* argued to be absolute – and which can therefore provide a stable foundation for assessing the legitimacy of interpretations of the content and application of human rights. Consequently, it is evident that this approach still obligates states to undertake action to secure a sufficient level of protection of human rights norms (either by way of application or necessary derogation) – it is simply the case that a *specific* (e.g. definitive) form of action (in relation to successfully securing such protections) is not required. Thus, whilst the content of human rights is argued to be relative, the scope of this relativeness is significantly limited – only accepting interpretations that legitimately conform to the underlying purpose of such protections.

In conclusion, therefore, it seems reasonable to suggest that the foundation of human rights appears to be the idea that all human beings are worthy of a certain level of

'functioning'. That human life has innate moral value. Undoubtedly, this sentiment has been articulated in different ways throughout human history – in religions, philosophy, ethics and the law[791] - but all stem from a variation of the same belief. So long as this remains true, it is evident that there can be no end to human rights - or the universality of what they represent.

6.1 Proposed Areas for Further Research

This thesis looked to address the universality of human rights within contemporary contexts surrounding the prioritisation of state/national security – and the apparent resulting diminishment in popular support of the idea of universal protections. In doing so, it has argued in favour of refocusing/reconsidering the human rights discourse in accordance with the foundational purpose behind such claims. By removing the need to limit discussion to contemporary understanding in relation to what human rights are (and ought to be), we expand the possibility of providing a robust defence of the legitimacy of the concept of fundamental human claims. At the heart of this refocusing is the proposal that the purpose of human rights and national security are complimentary in nature (if not directly inter-connected) as they are both rooted in the task of securing different types of subsistence. This inter-connectedness was evidenced within the contexts of health by reimagining human healthiness (e.g. human subsistence) as the foundation of state security (and, conversely, by demonstrating that the provision of state security is a necessary component for enabling human healthiness). In advancing this position only brief consideration was afforded to the potential scope/substance of a universal right to human healthiness. Whilst this thesis attempted to sketch a rough template for this right, it was clearly noted that this would be strengthened further with additional study. A detailed examination of the normative content

[791] Costas Douzinas and Connor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014).

of a universal right to human healthiness would therefore be a worthwhile area for future research.

Similarly, the idea of human subsistence itself (and which specific interests are inherently human/fundamental) could also benefit from further analysis. For the purposes of this thesis it was important to establish the idea of human subsistence in order to support the proposition that human rights can be regarded as foundational claims. The limitations/scope of the foundational nature of these protections was not addressed in great detail. As such, another significant issue deserving of additional development is how reconceptualising rights as foundational claims may affect other fundamental protections (e.g. the right to life, freedom from torture, freedom of expression). Further research into this in relation to other human rights (either collectively or individually) would therefore be beneficial to developing the discourse. Likewise, a more detailed examination of the practical implications (and potential applicability) of the proposed reforms for existing derogation machinery (e.g. the ECHR), as well as for the use of subsidiarity techniques by the ECtHR (based on the 'perfectibility of law' framework) would also be useful. Finally, it is anticipated that the theoretical frameworks used throughout this thesis, such as Nietzsche's 'antiquarian', 'monumental' and 'critical' use of history, together with Dworkin's abovementioned 'right answer' approach (utilised here as the perfectibility of law/legal concepts) could also be applied to different fields of research (both within and beyond legal issues).

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