

# **INADEQUATE MENSTRUAL HEALTH MANAGEMENT AND HUMAN RIGHTS**

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## ABSTRACT

Various human rights bodies have suggested that Inadequate Menstrual Health Management (MHM) *could* contribute to violations of human rights or, at the very least, is connected to the fulfilment of human rights. Despite recognition of this, there has not been thorough analysis of whether inadequate MHM *is* a violation of human rights, particularly in political discussions on the philosophy of human rights. Using a liberal cosmopolitan framework, this thesis attempts to bridge this gap and, ultimately, to argue that inadequate MHM constitutes a violation of human rights. This assertion brings with it various complications due to the heavily contested nature of human rights, their correlative duties, and the requirements for a lack of fulfilment to be considered a violation. I address each complication in turn. I argue that the traditional approach to human rights violations fails to consider the various ways that human rights are violated in our contemporary, globalised world. I suggest that structural violations of human rights should not be ruled out, particularly when we consider severe poverty and its by-products. Ultimately, the question of inadequate MHM is concerned with the content of human rights. If inadequate MHM were a violation, it would be a violation of women's socio-economic rights. However, both group rights and socio-economic rights are contested. This thesis therefore justifies these rights. Group-differentiated rights are argued to be necessary for substantive equality. This is particularly the case when we consider the various risks women face simply because they are women. Women therefore need special protections and provisions for their human rights to be fulfilled. Socio-economic rights are necessary for the well-being and dignity of individuals everywhere. We can justify them even if they are costly, vague, and demanding on states, as critics argue they are. Therefore, if we can accept socio-economic rights and women's rights, we can argue that inadequate MHM is a structural violation of human rights. Thinking about inadequate MHM in this way means we can respond to it with a level of urgency. This has the potential to improve the well-being, development, and dignity of women.

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# CHAPTER ONE:

## INTRODUCTION

Every day, the world over, there are thousands of women and girls who miss school or work because they are menstruating. There are some who are risking their health and well-being because they have no option but to use ‘alternative’ make-shift materials to manage their monthly menstruation. Women and girls require the appropriate facilities, information, and products to manage their monthly menstruation. When these women cannot obtain suitable feminine hygiene products, the fulfilment of their rights to health, education, work, and dignity are at stake. Adequate Menstrual Health Management (MHM) is therefore important for their personal development, health, and well-being.

This constitutes a fairly new area of study which has only recently gained momentum.<sup>1</sup> In particular, within the global human rights system there has been an increasing push to recognise MHM as a ‘rights’ issue, including assertions by the World Health Organisation (WHO) and the United Nations (UN) (Tellier and Hyttel, 2018). The UN Human Rights Office has emphasised that adequate MHM is central to fulfilling economic, social, and cultural rights (Sanghera, 2014). The WHO/UNICEF Joint Monitoring Programme (2016) has also outlined that MHM is closely linked to the achievement of the Social Development Goals (SDGs) (Tellier and Hyttel, 2018). MHM is closely linked to “Goal 3 (health), it comes under 3.7 – access to sexual and reproductive health services, in Goal 4 (education) it comes under 4.1 and 4.3 – dealing with equal access to primary, secondary and tertiary education, in Goal 5 (gender equality) [...] and Goal 8 – economic growth and employment.” (Tellier and Hyttel, 2018: 3).

At a national level too, pushes to end “period poverty” – the term used for inadequate MHM in the popular discourse – and distribute free menstrual products has been on the rise. In 2020, Scotland’s Parliament unanimously passed a bill that would provide free period products to anyone who needs them (Diamond, 2020). Additionally, around the world many schools provide government-sponsored period products to girls in need, including New Zealand (Berger, 2021), Kenya (“Kenya’s schoolgirls to...”, 2017), South Africa (Ntshingila, 2020), France, and some US States (Pietsch, 2021). However, in some countries, such as Uganda, there has been outcry over the lack of follow through with such initiatives (Tellier and Hyttel,

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<sup>1</sup> Notably, see: Bobel, C., Winkler, I., Fahs, B., Hasson, K., Kissling, E., and Roberts, T. 2020. *The Palgrave Handbook of Critical Menstruation Studies*. Palgrave Macmillan: Singapore.

2018). In 2021, Brazilian President Jair Bolsonaro vetoed a bill to combat period poverty, sparking outrage and mobilisation against him (Griffin, 2021).

### **1.1 The Impact of Inadequate MHM**

‘Menstrual Hygiene Management’ was first defined by the WHO/UNICEF Joint Monitoring Programme (2012) as “women and adolescent girls using clean material to absorb or collect menstrual blood, and this material can be changed in privacy as often as necessary for the duration of the menstrual period. MHM includes soap and water for washing the body as required, and access to facilities to dispose of used menstrual management materials” (Tellier and Hyttel, 2018: 6). Accordingly, inadequate Menstrual Hygiene Management has been defined as “any situation that does not live up to this definition” (Tellier and Hyttel, 2018: 6). As it stands, however, there is a lack of consensus regarding what constitutes ‘adequate’ and ‘inadequate’ levels of menstruation management (Balls, Dreibelbis, and Torondel, 2017; Mills and Cummings, 2016). This thesis adopts a broader understanding of MHM, in which the above definition and its emphasis on hygiene constitutes only one dimension of MHM.

There has been considerable concern that the definition of MHM as advocated for by the WHO/UNICEF Joint Monitoring Programme over-emphasises the importance of ‘hygiene’. By doing so, it implicitly perpetuates negative connotations of menstruation as ‘dirty’ and ‘unhygienic’ (Sommer et al, 2015). Narrowly focusing on the hygiene risks overlooks the important social and economic consequences of inadequate MHM, such as school and work absenteeism. Therefore, the term ‘Menstrual Health Management’ has been proposed as an “all-encompassing term that includes both menstrual hygiene management as well as broader systemic factors that link menstruation with health, well-being, gender, education, empowerment, and rights” (Geertz et al., 2016: 2). By adopting this broader definition, this analysis of MHM focuses not only on health and hygiene, but also on the combination of socio-economic matrix and human rights factors that MHM invariably entails (Geertz et al., 2016).

What follows is a summative account of current empirical research on inadequate MHM and women’s health, education, and work. Due to the economic nature of the limitations to adequate MHM, most research focuses on lower-income countries, particularly in East and Southern Africa and South Asia. However, inadequate MHM is also recorded in higher-income countries, like the United Kingdom and the United States.

### *1.1.1 MHM and Health*

MHM has broad effects on the health of women and girls. Understanding the menstrual cycle, the norms of bleeding, and best practices for managing menses is vital for women and girls to determine the need to seek out medical attention (Sommer et al., 2021). Having access to hygienic menstrual products and safe, clean facilities to manage bleeding are also vital for the prevention of various health risks associated with inadequate MHM (Tellier and Hyttel, 2017).

One common issue that results from inadequate MHM practices is that of non-sexually transmitted urogenital infections. Women who use reusable pads have been found to be more likely to develop infections than those who using disposable pads (Das et al., 2015). Studies from India (Das et al., 2015), Kenya (Juma et al., 2017), and Uganda (Hennegan et al., 2016) have all found that the risk of infection is considerably higher in instances where materials are washed and dried outside in unhygienic conditions. Urogenital infections can cause sepsis which, if left untreated, may result in disability and even death.

Women and girls without access to hygienic MHM may also experience sexually transmitted urogenital infections. To pay for menstrual products, studies in Kenya have shown that many schoolgirls engage in transactional sex (Tellier and Hyttel, 2018). During the COVID-19 lockdown in Kenya, many girls turned to transactional sex to pay for sanitary products (Muiruri, 2020). One girl, Jackie, fell pregnant after such a transaction and is now unable to return to school; she explains: “He [the boyfriend] seemed to care and would give me 50 shillings to buy [sanitary] pads. He did not use any protection before we had sex. Nobody thought what we did would result in pregnancy” (Muiruri, 2020). For girls who are uneducated and economically dependent on transactional sex, the risks of unintended pregnancy and school dropout, as well as HIV, are higher. Therefore, being mindful of the entire economic situation and the ways in which these girls access resources to meet their basic needs is important.

Another important health aspect of inadequate MHM are its effects on the psychosocial well-being of women and girls. Shame, fear, and limitations on mobility prevent many women and girls from participating in social and work events (Tellier and Hyttel, 2018). Girls and women are often excluded from basic acts like cooking, cleaning, and sleeping in their own beds. This highlights how the various health effects of inadequate MHM may permeate into the social and cultural lives of women and girls.

### *1.1.2 MHM and Education*

Staggering statistics on the negative effects that inadequate MHM may have on girls' education are widely quoted. For example, "1 in 10 school-aged African girls do not attend school during menstruation" has been quoted by the WHO/UNICEF, The World Bank, and World Economic Forum (Tellier and Hyttel, 2018). There have been various attempts to quantify the connection between MHM and school attendance and engagement. A systematic review of twenty-nine studies found that a lack of products, inadequate sanitation, shame or embarrassment, and pain limited school engagement and attendance (Tellier and Hyttel, 2018). In Uganda, a study of 1124 girls found that the provision of products and education on proper MHM significantly decreased dropout rates by 17.1% between intervention and control groups (Montgomery et al., 2016: 14).

A study in Uganda reported that 90.5 percent of girls who participated in the study cited inadequate MHM as resulting in shame, avoiding participation in school activities, class, and school absenteeism (Montgomery et al., 2016: 14). The physical and social environments of schools, however, have the potential to improve MHM. Hygienic and private sanitation areas, increased quality of teaching about MHM, and the presence of properly trained teachers may all assist this effort (Sommer et al., 2021).

### *1.1.3 MHM and Work*

There is limited research on the effects of MHM on paid work outside the home. In the United States, one study found that absenteeism due to menstruation resulted in an estimated loss of US\$1692 per woman each year (Tellier and Hyttel, 2018: 13). Studies in Bangladesh found that 73 percent of factory workers missed an average of six days per month due to menstruation, and that many factory workers will take contraception to skip their periods (Tellier and Hyttel, 2018: 14).

Not only does a lack of knowledge and resources hinder engagement at work, but Sommer et al. (2016) establish that gender discriminatory work environments may also contribute to inadequate MHM. Therefore, increased education for both men and women as well as access to safe sanitation facilities may improve the economic productivity of those who menstruate.

### *1.1.4 MHM and Human Rights*

The abovementioned studies show evidence that improper MHM affects the full realisation of women's rights to dignity, health, education, and work – all of which have

harmful effects on their physical, mental, social, and economic well-being (Balls, Dreibelbis, and Torondel, 2017; Mills and Cummings, 2016; Oruko et al., 2015). For example, poverty results in a lack of access to suitable and sanitary menstrual products, prompting the use of alternative materials such as paper bags, old socks, and leaves, often resulting in school or work absenteeism (Montgomery et al., 2016). Therefore, marginalised groups such as those living in poverty, those who are homeless, non-binary, or are refugees, are seriously at risk due to a lack of support and resources for MHM (Sommer et al., 2021).

Prior to 2012, there was little to no discussion of MHM by the UN (Tellier and Hyttel, 2018). Attention to MHM has historically come from WASH (Water, Sanitation and Health) agencies and organisations regarding school and work absenteeism (Sommer et al. 2016). In 2012, the UN Special Rapporteur on the right to safe water and sanitation introduced MHM as a human rights issue that required proper sanitation services (Tellier and Hyttel, 2018). The Special Rapporteur introduced inadequate MHM as a possible violation of human rights in relation to a lack of “separate sanitation facilities” for women and girls in both schools and work institutions. In 2014, the Chief of the Human Rights and Economic and Social Issues Section of the Office of the UN High Commissioner of Human Rights pointed out the dire effects of MHM on women’s rights to dignity, non-discrimination, health, privacy, and education (Sanghera, 2014). Likewise, in 2016, the UN Committee on the Elimination of Discrimination against Women referenced the impact of inadequate MHM on the lives of rural women: “Schools in rural areas [should] have adequate water facilities and separate, safe, sheltered latrines for girls, and offer hygiene education and resources for menstrual hygiene, with special focus on girls with disabilities” (CEDAW/C/GC/34). The UN Committee on the Rights of the Child made further reference to MHM as a precondition to achieving gender equality and the fulfilment of the human right to health (CRC/C/GC/20).

In 2012, the Special Rapporteur identified the inability for women and girls “to manage menstruation hygienically and with dignity (e.g., privacy for changing materials and for washing body, access to water and soap, disposal facilities)” as an outcome indicator that revealed a possible violation (A/HRC/27/55, 2012: 26). Additionally, in July 2021, the UN Human Rights Council passed Resolution A/HRC/47/L.2 that calls on states to “ensure that women and girls have access to adequate facilities, information and products for optimal and effective menstrual hygiene management”. The Resolution also acknowledges the role inadequate MHM plays in human rights violations by “stressing the importance of an effective

remedy to violations of economic, social and cultural rights, including those relating to menstrual hygiene management.”

Therefore, although it has been suggested that inadequate MHM *could* constitute a violation of human rights or, at least, contribute to the violations of other human rights, whether it *is* a violation is yet to be rigorously considered. This research focuses on the relationship between MHM and human rights by asking the question: is the widespread failure to provide the necessary means and facilities for adequate MHM a violation of human rights? By addressing the primary research question, this thesis aims to shed light on the nature and content of human rights, their correlative duties, and violations. This investigation has the potential to place MHM on a firmer normative, human rights foundation and to contribute to the well-being and empowerment of women and girls globally.

## **1.2 Research Focus and Outline of Chapters**

From the evidence cited above, the links between inadequate MHM and the fulfilment of human rights are evident. However, to determine if inadequate MHM constitutes a human rights violation, it is necessary to first address several underlying questions: what is the nature of human rights and what justifies their immense normative force? Who is responsible for fulfilling these rights? At what point does the failure to fulfil become a human rights violation? The answers to these questions are related and they cannot be answered nor adequately understood in isolation. How we understand the justification for human rights will inform which human rights we can claim. The human rights we have claim to are also informed by how we understand responsibility, which leads to how we determine violation.

The philosophical framework that one adopts will greatly influence how one determines the answers to the above questions. The first step is, therefore, to outline my chosen approach which will determine how I understand the nature of human rights, why we have them, and their content. Chapter two outlines a liberal cosmopolitan framework. Rather than choosing an approach that will more easily show that inadequate MHM is indeed a violation of human rights (for example, a feminist approach: Okin, 1989; Rao, 1993; Bunch, 2006), a perspective grounded in the prevailing liberalism of today has the potential to convince more people. Addressing MHM from a liberal cosmopolitan perspective will provide an analysis that is consistent with the conception employed in the international human rights system, allowing for an analysis that can improve the practice of human rights while reducing the risk of an overly detached philosophical analysis (Tasioulas, 2007). Although feminist concerns motivate and

inform this study, addressing the issue of inadequate MHM from an orthodox perspective will retain more fidelity to the existing human rights system.

Liberal cosmopolitanism, as I understand it here, unites the individualism of liberalism with the universality of cosmopolitanism. By extending the liberal 'original position' to include all individuals, regardless of their nationality, it determines the core principles of social cooperation to include universality, equality, and freedom. These principles apply at an international level and result in a strong emphasis on moral individualism and the foregrounding of individual interests and universal moral duties. Moral individualism, universality, and some level of global distributive justice therefore guide our efforts in developing the global practice of human rights. Liberal cosmopolitans stress the importance of human rights for all human beings, while the role of global institutions and indeed of individuals everywhere in the promotion and protection of human rights is seen as vital.

Through this lens, chapter two moves to provide a more holistic conception of human rights by addressing the questions of their nature and grounds. The nature of human rights refers to how we understand them as rights. Typically, scholars see human rights as either moral or political in nature. On the one hand, naturalistic scholars see human rights as moral rights grounded in moral reason. We have claim to human rights then because they protect this unique human worth. On the other hand, some see human rights as having distinctly political grounds. Their role is political insofar as they determine what actions states are entitled to or not, and which actions require intervention.

This thesis argues for a synthesised account where human rights are pre-legal moral rights that lay the foundations for legal rights. Human rights are thus understood as: a) moral rights that b) all individuals have, c) at all times and places d) in virtue of being human. It is argued that we must understand human rights as moral rights not only because it is consistent with liberal cosmopolitanism, but because if we did not consider them to be moral rights, we would not be able to criticise serious human rights violations and atrocities that were not written in the law of the time. We would therefore risk hindering the ability for human rights to criticise conventional political practices.

Seeing human rights as pre-legal moral rights that determine legal rights leads to the issue of what justifies their normative force. Whatever understanding of the nature of rights one employs, it is necessary to determine what exactly makes human rights so powerful. After discussing various justifications for human rights, including that they protect agency or the

ability to pursue a good life, I argue that the force of human rights comes from their protection of universal basic interests. Again, this is a reasoned approach given the liberal cosmopolitan emphasis on interests. However, an appeal to interests alone is considered insufficient: we would have to make compromises regarding which interests we have rights to. Trade-offs like this are exactly what human rights are said to resist. I therefore present John Tasioulas' (2012) argument that an appeal to interests *and* dignity grounds the duty-generative capacity of human rights. Tasioulas (2012) sees this duty-generative capacity as what makes human rights so powerful. This naturally leads to the question of what this duty entails, and, more importantly in the case of this research, who bears the brunt of the responsibility to protect, promote, and fulfil human rights.

To determine responsibility and an adequate standard of violation, chapter three begins with a discussion of harm. Using the liberal cosmopolitan harm principle (our moral duties to others transcend national borders) in combination with the cosmopolitan notion of humanitarianism (the idea that we ought to alleviate the suffering of others as best we can, regardless of how the suffering was caused), it is argued that transboundary harms can constitute violations of human rights. However, violations of human rights are typically associated with the specific actions of identifiable agents. Inadequate MHM, much like poverty, is not the result of one specific agent's actions. So, when we cannot identify exactly which agent or group of agents has acted in such a way that foreseeably and avoidably leads to inadequate MHM, some would say we cannot claim this to be a violation at all.

Chapter three argues that this approach to violations and responsibility is limited and has the potential to overlook many of the ways that serious violations occur today. Therefore, drawing on thinking about duties related to global poverty, the notion of a complex causal chain is presented. Complex causal chains show that even in cases where we cannot identify one specific agent as responsible for a violating action, we can still claim that a violation has occurred. In the case of widespread harms like poverty and inadequate MHM, complex causal chains show that these harms are the result of *structural* violations of human rights. Given the limited research on MHM, particularly any sort of philosophical analysis, I rely on discussions regarding the responsibility for alleviating poverty. Inadequate MHM, as previously established, often results from poverty or insufficient economic and educational resources. Therefore, inadequate MHM can be broadly viewed as a by-product of poverty. The way that inadequate MHM comes about and the human rights it affects are also like that of poverty.

Chapters two and three establish my philosophical foundation for the thesis that inadequate MHM is a violation of human rights. From this, I am in a good position to argue that inadequate MHM can indeed be considered a violation of human rights. However, these foundations do not specify which rights count as human rights. MHM is associated with particularly controversial human rights – group rights and social and economic rights. So, a convincing argument must justify the existence of these rights. Therefore, this thesis turns to consider the substance of human rights: which human rights do we have claim to and why?

Chapter four defends women’s rights and the notion of making exceptions to the principle of universality. If MHM were to be considered a human right, it would fall under group-differentiated rights because it entails obligations towards women only. Group-differentiated rights address the specific needs of minorities and provide special protections for these needs. Regarding the central thesis, however, how can we make exceptions for women and allow for human rights that are *not* universal?

Arguments against group-differentiated rights assert that the general right to non-discrimination is enough to protect minorities. However, when one considers the notion of substantive equality, non-discrimination alone is not enough. Even so, the universal nature of human rights clashes with the claim that women have human rights that men do not. In response, women’s human rights are argued to represent *variations* in universal rights. To achieve substantive equality, these variations respond to the specific needs and risks women face. Furthermore, it is proposed that within a liberal cosmopolitan framework we can use the tension between universality and an emphasis on individual characteristics to reinterpret human rights. Without entering a vacuum of relativism, we can conceive of *universal* experiences that have *particular* experiences based on context. Given this and the grounds for human rights as protecting urgent individual interests and dignity, it can be concluded that group rights are perfectly acceptable and well within the realm of human rights as understood by this thesis.

MHM might also be viewed as a part of socio-economic rights – specifically rights to subsistence, which are supposed to secure access to a broad range of basic goods essential for maintaining a minimally decent life, such as housing, food, water, and healthcare. These rights are fundamental to a liberal cosmopolitan approach to human rights because of the emphasis on some level of distributive justice at both a national and international level. Socio-economic rights face various criticisms that mostly focus on their costly nature, the supposed inability to

claim them, who is supposed to realise these rights, and their potential to over-inflate human rights.

Chapter five addresses these concerns and defends socio-economic rights. Many argue that these ‘positive’ rights require an inordinate amount of state resources and in many cases, simply cannot be fulfilled. However, I challenge the distinction between negative and positive rights that lies at the heart of this argument: rights that are traditionally considered ‘negative’ rights, like civil and political rights, are also incredibly costly. We nonetheless still confidently claim that these are human rights. The second concern is that these rights also constitute ‘imperfect’ rights wherein the duty-bearers and duties they entail are vague and unclear, which makes them unclaimable. Again, a similar thing can be said about widely accepted civil and political rights – they are just as vague, yet we unequivocally consider them human rights. The final concern is that adding too many new rights to the list of human rights has the potential to devalue the normative currency of human rights. This concern is addressed by presenting a litmus test for the addition of ‘new’ rights – socio-economic rights pass this test.

## CHAPTER TWO: A LIBERAL COSMOPOLITAN APPROACH

### 2.1 Introduction

Whether the widespread failure to provide the means necessary for adequate MHM is a violation of human rights depends on one's understanding of human rights. Inadequate MHM concerns the substance and content of human rights, asking: which human rights do we have? For any discussion concerning the substance of human rights, however, it is essential to outline the philosophical foundations of one's approach. How one understands the concept of human rights (what is the nature of human rights?) affects one's perspective regarding their justification (where do human rights get their normative force?). The answer to these questions shapes their content. In this chapter, I will argue that human rights are moral rights that lay the foundations for legal rights. They protect fundamental human interests and dignity. To arrive at this conclusion, it is first necessary to determine my theoretical orientation.

A liberal cosmopolitan framework is presented. Human rights, conventionally understood through documents like the UDHR, prioritise the achievement of universal equality, freedom, and dignity. Philosophical discourse on international human rights practice often draws on theories of justice which attempt to develop a more fair and equal society. Today, political liberalism is a dominant approach which argues that principles of social cooperation are deemed just or unjust based on their impact on *states*. However, this inherent statism is at odds with the interconnected nature of the current global system. This focus on the state also overlooks the individual experience which lies at the core of the human rights system. In contrast to liberalism, this thesis argues in favour of liberal cosmopolitanism that focuses on the *individual*: Principles are judged based on how they impact individuals globally. This approach emphasises the unity between individualism and universality. It prioritises equality and freedom based on the innate moral worth of all individuals.

This chapter moves to ask what are human rights and why do we have them in the first place? The answers to these questions inform how we conceive of the content of human rights. For example, if one considers human rights as protecting agency then the rights that we have will focus on agency – such as the right to freedom of movement. This approach will also imply that human rights bearers are only those with agency, possibly excluding groups like children.

Guided by liberal cosmopolitanism, a focus on moral individualism and individual interests suggests that human rights are *moral* rights. Rather than constituting legal rights that rely on legal systems for their justification, human rights protect the interests of individuals who are of equal moral status and worth. This thesis argues that these moral rights *guide* the development and implementation of legal rights. This will influence the approach to MHM as a violation of human rights: if human rights are moral rights, then we can argue that inadequate MHM is a violation of human rights even if the importance of adequate MHM is not recognised in the law of the time. Furthermore, if human rights protect dignity and basic interests, as this thesis argues that they do, then the connection between inadequate MHM and violations will be concerned with how inadequate MHM impacts the dignity and interests of women. Although particular attention is not paid to MHM just yet, it is for these reasons that the theoretical orientation is so important in guiding this thesis.

## **2.2 A Liberal Cosmopolitan Approach**

The foundations of political theories influence their approaches to various practical matters, including their understanding of the content and scope of human rights. Today, approaches to human rights often consider the interconnected nature of our increasingly globalised world and human rights are often understood as linked to questions of justice (Normand and Zaidi, 2008; Petersmann, 2003; Beitz, 2009). Petersmann (2003: 410) explains that “international justice refers, above all, to human rights and democratic procedures that justify the allocation and protection of equal basic rights, and the distribution of scarce resources necessary for personal self-development of individuals as morally and rationally autonomous social human beings”.

Liberalism is a prevalent approach to international politics and “conceives of the international realm as an order of societies organised as states” (Beitz, 1999: 518). The objective of international justice is equality among states, which are seen as the primary duty-bearers for their own citizens’ rights. Liberalism has contributed to the development of many core concepts in political philosophy such as political obligation, justice, democracy, equality, and freedom (Freeden and Stears, 2013). As an ideology, liberalism’s steadfast commitment to “social inclusiveness that embraces individual recognition and participation” and “to safeguarding fundamental human well-being” has been central to the development of the modern democratic order (Freeden and Stears, 2013).

Many of these notions were advanced by John Rawls (1971). Rawls (1971) moves from abstract notions of fairness and justice to a contractarian account of social cooperation.<sup>2</sup> He introduces “the original position” which attempts to determine the principles of social justice in a situation where citizens are free and equal. The original position represents the core principles of liberalism: freedom, equality, and fairness. It postulates that citizens are placed behind the veil of ignorance which hides the defining features of one’s identity, such as gender and social class. From this position, citizens are required to determine what principles should determine the structures of society. All citizens are behind the veil of ignorance, and they do not know how these structures will inevitably affect their lives when they live in this society. From the original position, it is therefore possible that based on your personal characteristics you may end up in the position of the least well-off in society. Rawls (1971) believed under these conditions citizens would act impartially and rationally to choose policies and structures that are fair.

From the original position, Rawls argued that rational citizens would choose two core principles. First, “each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all” (Rawls, 1971: 302-3). Second, “social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit to the least advantaged, consistent with the just savings principle [the difference principle], and (b) attaches to offices and positions open to all under conditions of fair and equal opportunity” (Rawls, 1971: 302-3). These principles make up a cooperative scheme that identifies the institutions which will fairly distribute the “benefits and burdens” of social life (Ingram, 2003).

With regards to the international realm, Rawls (1971) extends the original position beyond the domestic but only goes so far as to consider issues of war. Once extended, Rawls’ hypothetical position was only intended to apply to fair and equal states who choose the principles of justice for the international community. However, others have extended the original position in relation to international justice, human rights, and migration (Beitz, 1999;

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<sup>2</sup> Proponents of Social Contract Theory recognise that for equality of rights to be secured there cannot be unlimited freedom. Although proponents disagree on the characteristics of human nature, it is agreed that unlimited and unchecked freedom reduces one’s security and, therefore, one’s freedom. As such, we give up our right to absolute freedom by *consenting* to minimal constraints by a political authority to ensure equality and security. Herein lies the contract. John Locke advocated for a limited political authority. If this government fails to protect and fulfil the natural rights of its citizens, it ought to be overthrown. Importantly, Locke’s argument marked the beginning of the move away from the primacy of a divine entity or a political sovereign towards the individual – the start of Liberalism.

Carens, 1987; Ingram, 2003). These accounts extend the original position to fair and equal individuals, regardless of their nationality or community ties.

Joseph Carens (1987) famously uses the original position to justify semi-open national borders. He argues that in a world that is characterised by international trade and migration, whether the conditions of these interactions are fair ought to be considered, just as one would question the fairness of interactions within the nation state (as Rawls originally proposes). Rawls' veil of ignorance is intended to "nullify effects of specific contingencies which put men at odds" because social and biological differences are seen as "arbitrary from a moral point of view" (Carens, 1987: 256). Consequently, such factors should not influence decisions of justice and fairness (Rawls, 1971). Just as Rawls considers factors like class, race, and gender as morally arbitrary, we can consider factors like nationality to be equally as arbitrary. If we were to determine the principles of *international justice* then, these factors should also be veiled. Carens' (1987) approach is distinctly cosmopolitan in its emphasis on the individual irrespective of national boundaries. However, a global view of the original position is not without objections.

One objection argues that the original position depends on a unified understanding of "moral personality" which is only attainable in relatively homogenous or modern democratic societies. Moral personality here is the view that all persons are "free and equal moral persons" (Carens, 1987: 257). Varying moral and ethical standards would make such a standard impossible at a global level. However, even within modern liberal democracies – as Rawls originally intended his original position to be used in – varying moral personalities exist. Racism is rife within the U.S. even though it goes against the notion that all people are free and morally equal (Carens, 1987). Racism is condemned but the freedom and moral equality of racists is not detracted because of their beliefs. Fundamentally, the importance of the veil of ignorance is that it allows for agreement on principles of justice even when deep moral disagreements exist (Carens, 1987). Applied globally, the veil thus allows for the development of principles of international justice and cooperation.

A liberal cosmopolitan approach is the greatest contender against the political liberalism as described by Rawls. Judging the fairness of institutions and practices is extended beyond the nation-state and "applies to the whole world the maxim that choices about what we prefer, or what institutions we should establish, should be based on an impartial consideration of the claims of each person who would be affected" (Beitz, 1999: 519). At the foundation of

liberal cosmopolitanism is the extension of Rawls' theory of justice to an international context. State-level societies are not afforded the same ethical and moral privileges as argued for by political liberalism (Carens, 1987). Rather, the principles chosen are based on the prospects of individuals at a global scale, regardless of where they live.

The liberal cosmopolitanism unpacked and adopted here can be considered a moral form of liberal cosmopolitanism, distinguishable from political and cultural variants.<sup>3</sup> Although liberal cosmopolitans value the liberal principle of toleration, individual equality and liberty take priority (Beitz, 2009). They foreground the moral relations between human beings. In other words, we ought to respect each of our status as the "ultimate units of moral concern" (Pogge, 1992: 49). Liberal cosmopolitans therefore adopt a form of *moral individualism* that affirms the equal moral worth of individual as human being, rather than on the basis of their membership to a group.<sup>4</sup> The equality and freedom fundamental to liberal cosmopolitanism is central to the ideology's approach to human rights.

According to liberal cosmopolitans, equality refers to the universal moral worth of individuals. Equality asserts that the treatment of all people and the recognition of and respect for their rights should be uniform and unbiased (Hayden, 2001: 6). Again, in contrast to liberal conceptions of equality based on one's belonging to a state and/or community, liberal cosmopolitanism takes these boundaries to be arbitrary.<sup>5</sup> Although not without flaws, the assertion of equal moral status of all human beings has been vital to the elimination of arbitrary prejudice and inequality as prioritised by the contemporary human rights practice.

Freedom constitutes the ability to act in accordance with the life that we deem worth living, free from external constraints. Examples include freedom of association and expression. Freedom can refer both to private and public autonomy: "subjective freedom to pursue one's personal conception of the good" and "intersubjective freedom to participate in democratic

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<sup>3</sup> Charles Jones (2010) distinguishes between cultural and political cosmopolitanism. Political cosmopolitanism focuses on the international state system, pushing for political power to be vested in supranational political institutions to avoid a state-centric world order. Cultural cosmopolitanism understands individuals' identities as transcending beyond the confines of their particular cultural traditions. To varying degrees, both political and cultural cosmopolitanism understand individuals as "citizens of the world" (Jones, 2010).

<sup>4</sup> Prominent contemporary proponents include Brian Barry (1998), Charles Beitz (1999), and Thomas Pogge (1992; 2002). Others, such as Amartya Sen, Henry Shue, and Martha Nussbaum, include many liberal cosmopolitan premises within their work.

<sup>5</sup> Early assertions of the equality of human beings and their natural rights are found in the American *Declaration of Independence* (1776) and the French *Declaration of the Rights of Man and of the Citizen* (1789).

deliberation”, respectively (Ingram, 2003: 372). This freedom is universal and independent of one’s nationality.

Given assertion that there exists a universal moral realm and that all human beings are equal in moral worth, some liberal cosmopolitans argue that we are endowed with certain inalienable rights. The moral duties correlative to these rights also extend to all human beings everywhere (Nussbaum, 2006). Although the world may not be structured in accordance with this belief, cosmopolitan ethics has “prescriptive value for ethical action” (Shapcott, 2010). A liberal cosmopolitan approach to the original position, premised on the features of a universal moral realm and moral individualism, would therefore argue that institutions, states, and societal structures ought to be arranged for the benefit of *individuals* (Beitz, 1999).

The doctrine of human rights and, indeed, elements of the UDHR, have cosmopolitan elements at their core (Shapcott, 2010). Applied to human rights, emphasising the development of structures and institutions that benefit the individual guides our efforts in developing global human rights practices. Individuals, rather than states, are the subject and bearers of human rights. Liberal cosmopolitans understand human rights as flowing directly from liberal domestic rights which are given universal status (Beitz, 2009). Typically, cosmopolitans appeal to an expansive set of human rights and, rooted in Rawls’s theories, are committed to some form of global distributive justice. Although individuals can violate one another’s human rights, human rights claims are typically directed against states and institutions. They “give persons moral claims not merely on the institutional order of their own societies, which are the claims against their fellow citizens, but also on the global institutional order which are claims against their fellow human beings” (Pogge, 2002: 168).<sup>6</sup> In other words, states and global structures are seen as instrumentally valuable. That is, they promote and protect human rights (Beitz, 2009).

This thesis adopts a liberal cosmopolitan framework. This position emphasises the protection of the interests of persons and their moral claims. It unites the universality of

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<sup>6</sup> One can differentiate between two forms of cosmopolitanism: institutional and interactional (Pogge, 1992). Although duties are executed by a broad range of agents, including individuals, NGOs, and governments, interactional cosmopolitanism focuses on the conduct of individuals and places obligations directly on individuals (Pogge, 1992). These obligations demand the protection and enactment of justice. Institutional cosmopolitanism, on the other hand, shifts the burden to large-scale institutions (Pogge, 1992). The primary difference between the two groups of cosmopolitans is that interactional cosmopolitans see morality as that which ought to govern the actions of individuals and groups, where institutional cosmopolitans see morality as that which ought to be embodied by institutions, the rules of society, and the rules of the world order. In this way, our duties towards others are either direct or mediated through institutions.

cosmopolitanism with the individualism of liberalism. Institutions, states, and societal structures play an instrumental role in the promotion of equality and freedom. These structures and institutions ought to benefit *individuals*. As the interests of persons and their moral claims and obligations to one another are central to this thesis, liberal cosmopolitanism is therefore an appropriate perspective to adopt (Jones, 2010). Furthermore, the pervasiveness and widespread support for liberal cosmopolitanism allows for an analysis that is not only convincing but its ease of application to the current practice of human rights has the potential to improve the contemporary practice (Ingram, 2003; Beitz, 1999; Pogge, 2002). From the outset, this universality and comprehensiveness of liberal cosmopolitanism to analyse individuals, states, and global multilateral organisations, is precisely the appeal.

Liberal cosmopolitanism approaches human rights in a deontological sense, as generating moral duties and individuals are seen as the measure of all approaches to rights. Therefore, a liberal cosmopolitan account of human rights will embody the characteristics of universalism, impartiality, and individualism (Shapcott, 2010). In what follows, this thesis draws on liberal cosmopolitanism to determine what human rights are and why we have them in the first place.

### **2.3 A Liberal Cosmopolitan Understanding of Human Rights**

Human rights, as we understand them today, are believed to have only arisen in the late twentieth century (Moyn, 2010). After the atrocities of World War II, the modern use of the term human rights was popularised through the adoption of the UDHR in 1948. As the leading international human rights document, the UDHR has near universal acceptance and is widely promoted. However, within political philosophy, the concept of human rights (are they moral or legal rights?) and the justification for their normative force remain contested.

What follows is a discussion of the philosophical foundations of human rights. Consistent with a liberal cosmopolitan approach that foregrounds the universal moral worth of individuals, this thesis argues that human rights constitute *moral* rights. These moral rights lay the foundations for legal rights. This is a broadly synthesised account of the nature of human rights, tied to a long history of philosophical approaches to rights (Cruft, Liao, and Renzo, 2015). Some approaches connect human rights to theories of natural rights which were expanded by philosophers like Grotius, Locke, and Kant. Emphasising the moral worth of individuals, this section moves to question why we have them in the first place. What justifies

their existence? Drawing on the work of John Tasioulas, it is argued that human rights are justified because of their protection of universal individual interests and dignity.

### 2.3.1 *What are human rights?*

The orthodox tradition understands human rights as moral rights that all human beings have simply in virtue of their humanity (Cruft, Liao, and Renzo, 2015). Contemporary scholars like James Griffin (2008), Alan Gewirth (1996), and Maurice Cranston (1973) promote this orthodox view of human rights; that is, they hold that human rights constitute moral rights that can be identified using ordinary moral reasoning. Understanding human rights as moral rights that are necessarily inalienable and universal parallels orthodox understandings of human rights as they are practiced today (Griffin, 2008).

Drawing from natural rights, at their core, human rights are pre-legal ethical standards that do not require institutional or systematic recognition for their validity. Like natural rights, moral rights are rooted in the notion that rights are connected to some sort of innate and universal human feature. Supporters of this view argue that human rights should be capable of criticising societal standards and not just mirror these standards (Cruft, Liao, Renzo, 2015). It is therefore necessary to understand them as pre-legal moral rights. If, for example, human rights were not understood as moral rights – at least in part – then we would not be able to claim that the holocaust was a human rights violation because the rights that were violated were not reflected in the law of the time.

The orthodox conception of human rights argues that human rights can be traced back to the sixteenth and seventeenth century doctrine of Natural Law. Built on Roman and Greek normative philosophy and underpinned by Judeo-Christian beliefs, this doctrine emphasised innate human reason, the existence of a universal moral order, and the command of an omnipotent God (Hayden, 2001: 3).<sup>7</sup> From Natural Law developed natural rights. In the seventeenth century, Hugo Grotius proposed a secular version of natural law. Famously, Grotius developed the thesis that natural law can be derived from ‘right reason’ rather than God. Based on an understanding of humans as rational and social, right reason is the innate power of human beings to determine what conduct is right and what is wrong (Cruft, Liao, and Renzo, 2015). According to Grotius, these powers constitute *rights*. This led early modern

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<sup>7</sup> The moral doctrine of Natural Law posits that there exist entrenched laws of nature which exist in accordance with God’s will. These laws of nature comprise of moral codes of conduct that order all beings on earth. By use of reason, human beings can distinguish and act in accordance with the laws of nature (Hayden, 2001).

philosophers like Hobbes and Locke to develop the theory of natural rights. Constituting *moral rights*, natural rights are independent of any formal recognition (such as legal systems) and are grounded in shared *essential human features*, like rationality (Hayden, 2001). Given that these essential features are not dependent on social or institutional contexts, the rights are universal and can be derived through reason (Cruft, Liao, and Renzo, 2015).

Immanuel Kant recognised the integral relationship between moral duty and moral rights (Hayden, 2001). Kant proposed a deontological approach to rights. As we are rational, equal, and free, Kant argued that freedom should be understood as something valuable in and of itself. Therefore, our rights should protect our freedom (Hayden, 2001). His categorical imperative (“Act only on that maxim which you can at the same time will that it should be universal law”) introduces the fulfilment of duties and obligations as that which defines whether an action is right or wrong and pushes the universal nature of rights to include duties and obligations.

Today, the UDHR marks the pinnacle of this orthodox understanding of human rights as: a) moral rights that b) all human beings possess c) at all times and in all places d) simply in virtue of being human and e) the corresponding duty-bearers are all people in appropriate circumstances (Griffin, 2008). There are consistencies between each of these premises and the history of moral rights as presented above. As advocated for by proponents of the Natural Law doctrine, the UDHR integrates the innate moral worth of all individuals. Given their universal scope, human rights are, like natural rights, independent of formal recognition. The power of human rights lies in their being claimable regardless of one’s citizenship or location. They extend natural rights to the *universal* which allows for the promotion and protection of equality, freedom, and dignity, regardless of the policies of one’s state. As Kant suggests, rights must be claimable, and they impose *moral* obligations on others. These obligations are limited, however, to only those in appropriate circumstances – typically states and the international community.<sup>8</sup>

Rather than reflecting essential human features and inherent human worth, proponents of a political conception of human rights argue that human rights are political rights defined by their *function* in modern, international political practice (Rawls, 1999). In other words, they are backed in a specific time and place by political actors. This is based on John Rawls’

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<sup>8</sup> Chapter three delves deeper into issues of moral responsibility and the roles of states – contextualised in the twenty-first century.

landmark understanding of human rights as essentially political in nature: they are distinguishable because of the political role they play in international political practice. The political view has been defended by contemporary scholars like Charles Beitz (2009) and Joseph Raz (2010).

Affirming the political conception of human rights, some historians trace a different history of human rights to the orthodox camp. Samuel Moyn (2010) argues that human rights, as we understand them today, only emerged as an historical force in the late 1970s. At this time, human rights became an eminent force in international relations. Some examples of events that led to the prominence of human rights include the Carter Administration developing the first human rights policy in the U.S., the rise in anti-apartheid protests, and the televised atrocities of the Vietnam War (Moyn, 2010). Moyn (2010) explains that understanding human rights *only* as a continuation of the natural rights tradition limits the ability to use human rights to critique modern human rights culture. However, the continuity approach, from natural rights to human rights, is not new and is seen in the analysis of other moral-political concepts too. Many political theorists find it important to trace the history of democracy back to Ancient Athens (Heywood, 2007). In this case, the concept of democracy, broadly defined, remains constant. The historical circumstances, rather than the core of the concept, undergo drastic changes, such as the political participation of women in the case of democracy

The political conception challenges premises (a) and (d) of the naturalist/orthodox understanding of human rights.<sup>9</sup> Raz (2010) and Beitz (2009) maintain that central to human rights are the limits they set to the internal autonomy of states. In other words, the failure to fulfil or protect human rights is not just a matter of moral failure but is characteristically a reason for international political concern and intervention. Therefore, according to the political camp, human rights are not pre-legal moral rights nor are they legally justified moral rights. We have human rights because their protection is a matter of international concern, not because they protect essential human features. Those in the political camp also take up issue with premises (c) and (e).

Consider (c), that human rights are held at all times and places. For the orthodox conception, this is important to ensure protection of the equal moral status of all human beings despite any physical, political, social, or cultural differences (Cruft, Liao, and Renzo, 2015).

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<sup>9</sup> Human rights are a) moral rights that b) all human beings possess c) at all times and in all places d) simply in virtue of being human and e) the corresponding duty-bearers are all people in appropriate circumstances.

The political conception challenges this though; human rights simply cannot apply at all times and places. The human right to education, for example, would mean very little to those living in in the Palaeolithic period. Asserting that all cavemen had the right to education would not make sense. We should therefore understand human rights as ‘synchronically’ universal: they are held by all in a *specified*, modern time (Cruft, Liao, and Renzo, 2015). The political conception also takes issue with premise (e), that the corresponding duty-bearers are all able people in appropriate circumstances. For the orthodox camp, this premise is essential because, as Kant outlined, to speak of a universal right is to speak of a universal duty. For the political camp, however, duties are not universal but rather statist as they apply in the first instance to states who are their principal guarantors (Cruft, Liao, and Renzo, 2015). As it can be seen, the differences between the political and orthodox conceptions of human rights are stark in contrast.

However, some believe that these differences may be exaggerated (Cruft, Liao, and Renzo, 2015). Tasioulas (2015) argues that limiting our understanding of human rights to either moral or legal rights is insufficient for understanding both the moral and political force human rights possess today. Tasioulas (2015) explains that the relationship between morality and the law is complex. So, for example, there may be an independent *moral* right not to be tortured, but what exactly this right and its correlative duty involve may not be deducible from pure moral reasoning. The law, then, completes the job that morality begins by outlining the specific content of this moral right so as to provide a reflective guideline for actions in society. All areas of law gain their integrity from a certain ethical framework and so human rights law gets its integrity from a prior moral notion of human rights (Tasioulas, 2015). For these reasons, a synthesised account is and should be possible.

This thesis thus understands human rights as moral rights that guide the development of legal rights. These rights protect the moral worth of all individuals. As previously mentioned, the liberal cosmopolitanism adopted here is characterised by moral individualism and universality. Human rights exist as a representation of the inherent moral worth of individuals, rather than as uniquely twenty-first century political tools. That being said, it is important that one’s conception of human rights is consistent with the interconnected nature of an increasingly globalised modern world order (Jones, 2013; Pogge, 2002; Beitz, 2009).<sup>10</sup> Limiting our

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<sup>10</sup> This will be discussed further in chapter three.

understanding of human rights to either moral or legal rights is insufficient for understanding both the moral and systemic force human rights possess today (Tasioulas, 2015).

The orthodox conception is beneficial precisely because of the promotion of human rights as inalienable and independent of the law or other societal institutions and structures. This allows for human rights to function as an important foundation for the constructive criticism of conventional societal standards (Griffin, 2008). Furthermore, in line with Kant, universal human rights necessitate universal duties, without which such rights hold little value (Cranston, 1973; Gewirth, 1996). However, not all moral rights constitute human rights. As such, one concern with this account is that it becomes difficult to determine exactly which moral rights can be considered human rights. This will essentially depend on how one grounds the normative power of human rights – their justification.

### 2.3.2 *Justifying human rights*

Whatever understanding of the nature of human rights one aligns with, it is also important to understand what grounds them; or, in other words, where they get their normative force. The answer to this question will go far in defining the content of human rights. As such, we must also justify the core features of human rights as of great priority and entailing correlative obligations (Cruft, Liao, and Renzo, 2015). These justifications provide a basis from which we can develop a credible list of human rights. If we know why we have human rights, we can deduce which human rights we should have to preserve what it is that grounds them.

It will be argued that a broadly instrumental account suits the theoretical orientation of this thesis best. Human rights protect certain basic human interests, grounded in the universal achievement of well-being and dignity. Instrumental justifications for human rights typically understand human rights as moral rights that protect essential human features. Instrumental justifications identify a valuable human end/feature worth protecting and then prescribe human rights as a means to secure or develop this end/feature (Cruft, Liao, and Renzo, 2015). Such an end may be, for example, human agency. In general, there are four core features instrumental justifications consider: agency, our conception of ‘the good life’, basic human needs, and basic interests. Each of these justifications has the potential to act as a justificatory argument for this thesis. However, as it will be shown, only an interest-based account that takes into consideration human dignity and well-being is convincing.

Agency-based justifications for human rights draw on the early modern writings of Locke and Kant. For both, agency is seen as that which distinguishes human beings from other

animals as we possess the unique ability to develop and act on what we consider to be a life worth living (Cruft, Liao, and Renzo, 2015). Human rights are therefore assigned to protect and promote the agency of human beings. James Griffin (2008), for example, argues that ‘normative agency’ underpins our understanding of human dignity which creates the foundation for human rights. Griffin (2008: 47) explains that dignity “centres on our being able to form a conception of a worthwhile life and then pursue it.”

Alan Gewirth (1996) argues that agency is necessary for human beings to be free and secure their well-being. A rational agent will recognise their intrinsic need for agency and thus claim respect for their agency as a right. This agent will recognise that for her to reasonably demand that her freedom and well-being be respected, she must respect the freedom and well-being of others (Gewirth, 1996). As such, this rational agent acknowledges the agency necessary for others and that all humans have equal right to freedom and well-being. Indeed, the link between human rights and human dignity was made in the UDHR and later explicitly affirmed in the 1966 Conventions.<sup>11</sup>

However, according to this account, many human beings, like children and the mentally disabled, may not have human rights because they are largely incapable of acting as autonomous agents (Cruft, Liao, and Renzo, 2015). Those who promote the agency-based justification, like Griffin (2008), have had to concede to this argument and acknowledge that although it can still be argued that these beings have *moral* rights and that there exist moral duties that ought to be fulfilled, it cannot be argued that they have *human* rights. The liberal cosmopolitanism outlined in section one emphasises the universal moral worth of *all* human beings. Consequently, human rights so understood are rights all human beings have qua human being. Agency-based approaches thus fail to sufficiently justify human rights and rather justify the rights autonomous rational agents have qua autonomous rational agent.

A second instrumental approach, drawing on Aristotle’s philosophy, is based on the ‘good life’. This approach avoids the problem of failing to justify the human rights of non-autonomous rational agents that the agency-based account confronts (Cruft, Liao, and Renzo, 2015). According to this approach, human rights secure the goods that are needed for one to have a good life. Elements of the good life are disputed but can include agency, freedom from pain, and knowledge. Aristotle investigated *Eudaimonia* - which essentially entails human

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<sup>11</sup> See: *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

flourishing - and connected this with ‘the good of man’ (Cruft, Liao, and Renzo, 2015). Aristotle believed that virtuous activity lay at the core of the good life but the ability for one to practice virtuous activity required the fulfilment of fundamental ‘goods.’ Similarly, John Finnis (1980) has argued that ‘basic forms of human good’ include life, knowledge, play, sociability, religion, and so on. These basic forms of human good differ from the good life described by agency-based accounts insofar as the value of these ends does not depend on whether we want them. Rather, the good life is seen as a basic aspect of human well-being.

Some have argued against the good life approach by pointing out that its broad conception of ‘interests’ would create a list of human rights that is far too long (Shue, 1996). Usually, human rights set a minimum standard for human interaction, or “the lower limits on tolerable human conduct”, not “great aspirations and exalted ideals” like deep human connection which cannot be fulfilled by typical human rights duty bearers, like states (Shue, 1996: xi). Given that human rights necessarily entail correlative duties that must be fulfillable and that these duties are endowed primarily onto states, asserting a long list of human rights that meet neither of these standards is unfeasible and potentially risky. Therefore, the good life, as it is understood here, is insufficient to ground human rights as we understand them.

Others have argued that there are certain basic needs that all human beings have simply in virtue of being human. The human needs approach differs from the good life approach in that the identified human needs are not derived from how one understands a life worth living. Rather, it is argued that there exist certain basic needs, fulfilment of which is necessary for all human beings to live a minimally decent life (Miller, 2007; Renzo, 2015). Such needs can be physical, such as food and shelter, as well as social or psychological, like a minimum degree of social interaction. Human rights, therefore, “protect the conditions for a minimally decent life by protecting the opportunity to have these needs met” (Cruft, Liao, and Renzo, 2015). In contrast to the good life approach, the basic needs approach may produce a list of human rights too narrow to secure certain broadly agreed on rights, such as civil and political rights.<sup>12</sup>

This thesis aligns with an interest-based account. Like the basic needs approach, this approach asserts that there exists a plurality of human interests that are important enough that they place universal duties on others (Tasioulas, 2007). The idea is that all human beings have certain basic interests, fulfilment of which improves our quality of life. Such interests would

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<sup>12</sup> Using linkage arguments, some argue that if the fulfilment of basic needs is dependent on the exercise of civil and political rights, they can indeed be deemed human rights (Nickel, 2007; Miller, 2007).

include physical security or values of personhood like autonomy and dignity (Tasioulas, 2007). However, these interests are *basic* insofar as the value of their fulfilment does not contribute to the fulfilment of other interests. Additionally, they are universal and must be independent of any social or other context and the corresponding duties imposed must be feasible.

However, Onora O’Neill (2015) argues that appeals to interests *alone* would lead to compromises in determining which interests we have rights to – such trade-offs are exactly what human rights are believed to be resistant to. In many cases, interests oppose rights. For example, being the object of another’s romantic love may be of significant *interest* to us, but we do not have a right to it<sup>13</sup>. Similarly, rights often surpass *interests*. The right to freedom of association, for example, may be of little *interest* to those who lack the capacity or will to associate. The inevitability of trade-offs with regards to interests alone is exemplified by the sheer diversity of these *interests*. No two people share the exact same *interests*, and few have *interests* that do not contradict one another, let alone that are consistent throughout life (O’Neill, 2015). Therefore, an appeal to interests alone cannot ground human rights which are innately resistant to trade-offs.

Tasioulas (2015) develops his justification of human rights as moral rights by combining the importance of interests with the acknowledgement of the equal moral worth or dignity of all human beings. Schematically, he formulates it as such (Tasioulas, 2015: 50-51):

- 1) “For all human beings within a given historical context, and simply in virtue of their humanity, having X (the object of the right) serves one or more of their basic interests, for example, interests in health, physical security, or autonomy.
- 2) The interest in having X is, in the case of each human being, simply in virtue of their humanity, pro tanto of sufficient importance to justify the imposition of duties on others, for example, to variously protect, respect or advance their interest in X.
- 3) The duties generated at (2) are feasible claims on others given the constraints created by general and relatively entrenched facts of human nature and social life in the specified historical context. Therefore,
- 4) All human beings within the specified historical context have a right to X.”

Accordingly, the basic interests that human rights protect must be “objective, standardised, pluralistic, open-ended and holistic in character” (Tasioulas, 2015: 51). Tasioulas

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<sup>13</sup> In this case, interests refer to something that is worth knowing or having, rather than a basic interest such as subsistence or autonomy.

(2015) therefore outlines a threshold for those universal human interests which generate human rights: it must be feasible to secure them through the imposition of correlative duties and therefore they cannot be excessively burdensome. Here, feasibility refers to available resources and institutional capabilities.

Tasioulas (2012) embraces a ‘moral element’ of basic human dignity as well as ‘prudential elements’ of universal human interests as the grounds for human rights. This view is also in line with the conception of human rights as grounded in dignity and interests as employed by the UN. Tasioulas (2015: 50) explains: “a right exists if an individual’s interests in the object of the putative right (for example, freedom from torture, access to health care, opportunities for political participation) has the requisite sort of importance to justify the imposition of duties on others variously to respect, protect or advance that interest by securing to that individual the object of his right.” Human rights, therefore, are grounded in universal interests that generate duties on the part of others. These duties are justified in so far as they recognise the universal moral worth of all individuals.

## **2.4 Conclusion**

The liberal cosmopolitanism presented in this chapter foregrounds the following principles: moral individualism, equality, the interests of persons, and our obligations to one another. The role of states and societal structures are seen as instrumentally valuable to the protection of the individual moral worth of all human beings. Not only is a liberal cosmopolitan approach suitable because of its extension of the original position and the principles of justice beyond state boundaries – in line with the doctrine of human rights – but it also presents a useful focus for the analysis of inadequate MHM. Paying particular attention to the individual experience (women) informs the question as to whether inadequate MHM is a violation of human rights. Analysis of the problem while being conscious of the interconnected nature of the twenty-first century international community will also guide our approach to how we conceive of violators in the first place.

Furthermore, this chapter has argued for a synthesised account of human rights: human rights are *moral* rights that ground *legal* rights. As I have argued, human rights protect certain fundamental interests; it is necessary to therefore determine which interests inadequate MHM affects. This thesis does not permit an entire analysis of the various kinds of interests that may be considered fundamental. Rather, it focuses on those interests which are fundamental to adequate MHM. This consists of a substantive analysis of human rights (which rights do we

have claim to?) and is discussed in chapters four and five. Briefly, these interests include interests of health and education, as well interests of dignity, inclusion, and equality.

Before we engage with these questions though, as well as the overarching research question of whether inadequate MHM constitutes a violation of human rights, it is necessary to first determine who is responsible for fulfilling and violating human rights. Chapter three turns to this discussion. Of course, the liberal cosmopolitan framework described above goes far in determining the responsibility for human rights. If human rights generate international duties, as it is argued here, then at what point do we draw the line? Are all individuals everywhere responsible for the fulfilment of human rights?

## CHAPTER THREE: HARM, RESPONSIBILITY, AND VIOLATIONS

### 3.1 Introduction

If inadequate MHM is a violation of human rights, it would not fall within the realm of traditional notions of violations; inadequate MHM is not simply the result of the actions or inactions of one individual or group of individuals. Therefore, we cannot identify a perpetrator for violating human rights. Premised on statist approaches to responsibility, traditional deontological scholars may argue that without an identifiable perpetrator, no violation has occurred. However, if we were to concede to this, then widespread moral catastrophes, like poverty, would not be considered violations at all. This chapter argues that we ought not to rule these issues out *ex ante* by placing ourselves in a theoretical straitjacket. Rather, we can and should extend our conceptions of violation and responsibility to include these widespread transboundary harms. To do this effectively, a working understanding of a violation must be presented. Drawing from this notion, I argue that we can extend violations to include *structural* violations of human rights.

Theories of harm often underlie approaches to human rights violations. To argue in favour of extending violations, we must first consider how we understand harm. Guided by my liberal cosmopolitan framework, national or community membership are seen as morally irrelevant when deciding the principles of justice and responsibility. These principles extend to include individuals everywhere, regardless of their belonging to a different state. This chapter considers transboundary harms and unites the liberal principle of ‘do no harm’ with the cosmopolitan principle of humanitarianism (Shapcott, 2008). This combination is what guides responsibility or our moral duties to humankind. It is argued that transboundary harms (harms that occur beyond the boundary of the nation-state) extend this responsibility to include the “nature our obligations to outsiders and the harms associated with everyday activities of states” (Shapcott, 2008: 193).

Indeed, it is theoretically dense at first, but this chapter establishes the necessary scaffolding for considering inadequate MHM as not only a harm, but a violation of human rights. If we can concede to structural violations, then we can say that global poverty and, consequentially, inadequate MHM are *structural* violations of human rights. With this in mind, I engage with a liberal cosmopolitan approach to harm and responsibility to consider the

extension of responsibility beyond the state and, consequently, the extension of violations beyond identifiable perpetrators.

### 3.2 The Complex of Harm, Liberal Cosmopolitanism, and Responsibility

Prominent responses to questions about our moral responsibilities to humankind take a traditionally liberal approach and invoke “the harm principle”, first devised by John Stuart Mill (1859). Fienberg (1984) explains that the harm principle involves restricting one’s freedom and actions to avoid and minimise harming others. Given that we all have interests in avoiding harm, limiting freedom in this way is argued to be something that we can all agree to, even if we cannot agree on exactly what constitutes harm.<sup>14</sup> Similar to how chapter two extended Rawls’s original position to a global scale, the liberal harm principle is also extended here.

The moral individualism and universality of cosmopolitanism informs the extension of the liberal harm principle *beyond* those within our community. If we agree that there exists a universal moral realm, which liberal cosmopolitans do, then we ought to extend the liberal harm principle to a universal scale (Shapcott, 2008). The cosmopolitan harm principle requires that states consider how their policies and actions affect ‘outsiders’ (those who are not part of our state or community). Even without a global government, we can use the notion of transboundary harms to extend our concern beyond fellow ‘insiders’ (those who are within our community) (Shapcott, 2008). We have an obligation to limit *exporting* harm – exporting harm refers to the various ways in which our actions and domestic state policies inflict harm on ‘outsiders’.

A liberal cosmopolitan approach to responsibility also includes the principle of humanitarianism. Humanitarianism refers to “an obligation to help those who are in dire need or who are suffering unnecessarily, wherever they may be and regardless of the cause of the suffering” (Shapcott, 2008: 194). Liberal theories understand this obligation as primarily one of charity or altruism, but liberal cosmopolitans argue that because of the universal moral realm in which we exist, helping those who are suffering is a moral *duty*. The universal experience of suffering is what drives this assertion. Regardless of whether a universally agreed on morality exists, we can recognise the suffering of individuals as an essential feature

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<sup>14</sup> Harm is a contested concept, but a working definition of harm is provided later in this chapter. Cosmopolitans generally consider harm as treating someone “without moral respect” or “[excluding] them from the realm of obligation” (Shapcott, 2008: 193).

experienced by all of humanity – one that we all have interest in avoiding. It follows that we have a duty to alleviate the suffering of others, even if we are not responsible for that suffering.

Humanitarianism and the liberal cosmopolitan harm principle illustrate the cosmopolitan commitment to moral equality.<sup>15</sup> Treating ‘outsiders’ equally requires an acknowledgement of their moral worth and avoiding imposing cost on them, just as we would our fellow community members. Shapcott (2008: 193) explains: “In accepting the obligation not to export harms, states recognise the rights of outsiders, both as individuals and communities, to be treated equally.” The moral obligations we have to our community members are “balanced” with the obligations to all of humanity (Shapcott, 2008). Obligations to all of humanity must, at times, take precedence over our obligations to insiders. This approach is helpful when considering current issues like global poverty, which will be discussed later.

A liberal cosmopolitan harm principle is primarily a negative duty: we must limit and avoid harming others, both inside and outside our national boundaries (Shapcott, 2008). Negative duties require that we avoid actions of a certain sort. For example, I have the negative duty not to murder. To fulfil this duty, I must refrain from murdering. Positive duties require action: their fulfilment rests on the duty-bearer doing something. For example, I have the positive duty to ensure my child is healthy. To fulfil this duty, I must feed my child a balanced diet and so on.<sup>16</sup> The duty not to harm constitutes a negative duty to avoid acts that may cause harm to others. This, however, necessitates a deeper understanding of what constitutes harm.

Prominent liberal cosmopolitan scholar, Thomas Pogge (2002:4), defines harm as follows: “someone is harmed when she is rendered worse off than she was at some earlier time, or than she would have been had some earlier arrangements continued undisturbed.” So understood, this definition of harm is both relative – one is worse off in *relation* to their previous circumstances – and constitutes a baseline for assessing harms – the undisturbed earlier arrangements. Moreover, harm can be measured in relation to substantive qualities (Shapcott, 2008). Substantively, harm can be considered a violation of the interests in physical and mental well-being of an individual.<sup>17</sup>

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<sup>15</sup> As discussed in chapter two, the liberal cosmopolitan principle of moral individualism is characterised by acknowledging that all human beings, irrespective of location or community, are equal in moral worth.

<sup>16</sup> This distinction is controversial. Many of our negative duties may involve positive duties. This will be discussed in more detail in chapter four.

<sup>17</sup> There are strong parallels here between human rights and harms. Chapter two justified human rights on the basis that they protect certain basic and universal human interests. These interests were considered basic

The economic impact of increased taxes on the profits of a business may be considered a cost, but it does not follow that it is morally wrong (harmful) – harms are something more serious. Harms have a universal quality: starvation, for example, is harmful because it can be experienced by all human beings and is identifiable across community boundaries. So understood, there exists a universal common interest to avoid these harms. We can consider an injustice like poverty to constitute harm because the effects of poverty (a lack of basic necessities like food, shelter, and sanitation) are things we all have an interest in avoiding. However, when these harms are imposed on us, how do we determine responsibility and the possibility of retribution or redress?

Responsibility refers to the degree to which you are accountable for imposing harm on others. To impose, according to David Miller, is to “forcefully – without reasonable consent and with reasonable knowledge of the effects of the action – commit a harm against another” (Quoted in Shapcott, 2008:197). Miller distinguishes between causal and moral responsibility for the imposition of harm. Causal responsibility refers to harms we have caused for which we are directly responsible; moral harm refers to things we have caused for which we are morally blameworthy. Causal responsibility, however, does not imply that something is morally wrong. Although liberal democratic societies tend to advocate that all harm is wrong, some harms are permissible if they are justified. For example, if you harmed another in an act of self-defence, we would say that you *caused* harm, but you are not morally wrong or responsible for correcting this harm. Hence, causing harm is not something that we can place a blanket ban on.

We can thus distinguish between harmful intentional actions and harmful unintentional actions. Shapcott (2008: 197) explains that “unintended harmful actions can be penalised but not proscribed”. For harm to be proscribed, it follows that it must have *foreseeable* or *anticipated* outcomes. Henry Shue (1996) concurs that prohibited harms are wrong because “chosen in ignorance maintained by others, it is inflicted by those who obscure its nature and its likelihood as they introduce it” (Shapcott, 2008: 197). He uses the example of asbestosis victims who work for a company that does not disclose to employees the associated costs of working with asbestos when they accept employment (Shue, 1996). This is a prohibited harm because the employers were aware of the costs associated with the work but failed to inform workers. The harm is “knowingly or foreseeably [...] imposed rather than chosen” (Shapcott, 2008). Again, the causation of harm here is not wrong – it is entirely possible that it would not

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insofar as they related to universally important factors of well-being. Harm, understood as this thesis proposes, consists of a deprivation or damaging of these interests.

be morally wrong if the employers were unaware of the associated risks, or if they disclosed the risks and allowed potential employees to choose for themselves whether the risk is worth the economic benefit. Therefore, it is not simply *causing* harm that is the problem, it is also the avoidable imposition of harm.

Consequently, if poverty and inadequate MHM are harms insofar as they are imposed on millions of people around the world, who is responsible for these harms? Widespread poverty is clearly not the result of harmful intentional actions. Nonetheless, we can still determine responsibility and retribution or redress. Again, causation does not necessarily imply moral responsibility. How then, do we deal with the distant suffering of others?

Indeed, as was discussed in chapter two, there are important parallels between a liberal cosmopolitan approach to human rights and the liberal cosmopolitan harm principle. Many cosmopolitan thinkers thus see human rights as one central way in which we can approach the distant suffering of others (Pogge, 2002; Ashford, 2006; Beitz, 2009). In this context, we can consider human rights violations to represent the recognition of a certain *type* of harm (Shapcott, 2008). The following section outlines this type of harm and establishes a reasonable standard of violation. Using a liberal cosmopolitan approach, however, extends this standard again into a realm that is necessarily global and not only concerned with the actions or omissions of states.

### **3.3 Establishing Violations of Human Rights**

Human rights denote a minimum standard of well-being and mark out a threshold that must not be crossed. Violations occur when this boundary is crossed and are considered morally intolerable (it is morally unacceptable and cannot be tolerated) (Ashford, 2006). Eva Brems (2009: 350) states that human rights violations must be legally protected against and that the duty not to violate human rights has an absolute moral force: “[I]n ethical and political human rights discourse, the need is felt to determine a borderline. Whoever crosses that line will be labelled a human rights violator. It seems that the legal concept of a human rights violation reflects the essence of our mental image of human rights: they express what is most valuable, most sacred and should not be touched upon.”

When an agent’s actions prohibit the fulfilment or protection of an individual’s human rights, violation has occurred. Violations can also occur because of inaction or when an agent fails their duty. What differentiates human rights violations from the abovementioned moral harms is that human rights violations are typically understood as resulting from the action or

inaction of a state. Of course, individuals can violate the human rights of other individuals. If person A were to murder person B, person A has violated person B's human right to life. However, as Pogge (2002) explains, human rights typically denote some sort of institutional action or action by an "authority".

The former Rapporteur for the UN Seminar on Appropriate Indicators to Measure Achievements in the Progressive Realisation of Economic, Social, and Cultural Rights, Audrey Chapman (1996), argues that states are responsible for violations when they have failed their duties to respect, protect, and fulfil human rights as outlined in the UDHR. Respect refers to the obligation to refrain from direct violations of human rights. Protection requires the duty-holders prevent infringements by third parties. Finally, fulfilment requires the provision of resources "when individuals have no alternative way to satisfy their basic needs" (Ho, 2007: 13). In this way, violations can be the result of state action or inaction: the state's failure to fulfil the minimum core obligations of enumerated rights. Violations are typically thought of as directly resulting from state actions and policies. However, what follows considers that they can also be related to patterns of discrimination.

Two characteristics are required for something to be deemed a human rights violation: first, the action causes *foreseeable* harm; second, the action is *avoidable* without significant cost to the agent themselves (Ashford, 2006; Pogge, 2002). These characteristics are similar to the characteristics of the more general harms discussed in the previous section. To differentiate, Pogge (2002) outlines five further conditions required to determine if a violation has occurred:

1. There must be an unfulfilled human right.
2. This must be causally traceable to human agents [persons].
3. There must be active agency on the part of those agents.
4. They must be acting in some official capacity – at least that is what most people add.
5. The agents must intend/foresee/be in a position to foresee that their action will lead to a deficit.

To qualify Pogge's (2002) conditions, condition two requires that the agent must not be acting out of coercion. For example, if person A has a gun to their head and is forced to murder person B, we cannot reasonably argue that they have violated the human rights of person B because their agency (understood here as the ability to act or not to act) was thwarted. Condition five speaks to a 'deficit' which, simply put, involves an unfulfilled human right. To

speak of a human rights deficit, then, refers to human rights that are not or are only partially fulfilled. Furthermore, the agents that Pogge (2002) discusses are considered individuals or groups of individuals.

These characteristics are straightforward when we consider widely agreed upon violations like torture; however, this definition alone is too vague when we consider transboundary harms. Severe poverty and inadequate MHM are not simply the result of state action or inaction, they are by-products of how the global economy is structured. Often, harms like poverty are believed to be purely the result of domestic policies and bad governance (Pogge, 2002). However, within a global economy, domestic policy not only affects the internal situation of states, but also has some effects on the global context too. Ashford (2018: 39) argues that we ought to avoid the “conceptual straight-jacket” of ruling out “the possibility that [human rights violations] could be applicable to contemporary social contexts involving hugely complicated large-scale social interactions.”

### **3.4 Liberal Cosmopolitanism, Violations, and Responsibility**

Focusing on the effects of our actions and our state’s policies on the fulfilment of the human rights of ‘outsiders’ forces us to consider the global context in which violations occur (Linklater, 2007). Such an account considers the various, large-scale violations that occur daily – including severe poverty. The increased interdependence of the international community and the structures that bind it are responsible for perpetuating and failing to eliminate severe poverty and poverty related harms. A similar approach is taken by Kathleen Ho (2007: 2) who elaborates that “individuals are embedded in relational structures that shape their identities, interests, and interactions”. These structures apply constraints on individual action and human agency insofar as fundamental human needs are left unattainable. The violation is that these structures *foreseeably* and *avoidably* cause harm to individuals trying to survive within their constraints. However, some may argue that the issue of responsibility becomes blurred given the global nature of these structures.

#### *3.4.1 Responsibility, Human Rights, and Poverty*

Singer argues that “we all have the duty to alleviate the misery of others until [this] action bring[s] comparable cost to [ourselves]” (quoted in Linklater, 2007). Arguments against a cosmopolitan account of this notion refutes the duties of state to assist those outside their respective social contract. In other words, states are primarily responsible for their own citizens. Attempts to alleviate poverty are considered acts of benevolence rather than acts of

duty and any failure to alleviate is considered a withholding of benefit, not a violation of fundamental duties (Linklater, 2007). This argument relies on Kant's idea of perfect and imperfect duties.

Perfect duties refer to duties of action or inaction in which the content of what exactly the duty entails are explicitly outlined (Igneski, 2006). The duty-bearer knows exactly what is required of them. For example, the duty not to torture clearly entails that we refrain from torturing others. Imperfect duties, however, are not as explicit. There is still an obligation to fulfil this duty, but how one chooses to fulfil it is up to them (Igneski, 2006). Kant famously used the duty to develop one's natural talents as an example of imperfect duties (Igneski, 2006). I may, for example, have a natural talent for playing the piano. The related imperfect duty requires that I take time to practice. It is up to me, however, to decide how often I practice, when I practice, and what genre of music I prefer to practice.

The duty to aid those who are suffering is often deemed an imperfect duty. We have a moral duty to assist without a considerable cost to ourselves, but how we help is not predetermined.<sup>18</sup> However, the duty not to harm is seen as a perfect duty: "Individuals are not obliged to do everything in their power to help strangers, but they are required to do all that they can not to harm them." (Linklater, 2007: 32). Similarly, John Stuart Mill (quoted in Linklater, 2007: 44) posits that "a person may possibly not need the benefits of another; but he always needs that they should not do him hurt". We therefore cannot be held responsible for failing to alleviate the suffering of another, but we can be held responsible for causing that suffering.

However, Fienberg argues that the conception of responsibility as stated above relies on an overly restricted account of causality (Linklater, 2007). Singer's drowning child thought experiment is often used to argue in favour of it: say that you are walking in your local park and notice a small child (approximately the age of a toddler) splashing around in the pond. There is no one else around and the child appears to be drowning. Getting into the pond and saving the child would be at no considerable cost to you – the water is not very deep, and you are a capable swimmer. However, you are wearing a new pair of expensive leather shoes. You will not have time to remove your shoes before jumping into the pond. Deciding not to save the child on the basis of preserving your new shoes would be perceived by many as an immoral

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<sup>18</sup> Liberals stress that we ought to balance personal freedom and duties of assistance – we should not overburden ourselves in attempts to alleviate suffering.

act. However, some argue that deciding not to rescue the child is “a legitimate decision to *withhold a benefit* rather than as a potential criminal offence” (Linklater, 2007. Emphasis added.).

In relation to human rights, O’Neill (2002) argues that a prerequisite for a right to be a ‘genuine’ right, is that the contents of its correlative duties and the agents responsible for their fulfilment must be specific and precise. In other words, human rights entail perfect duties. Negative rights, like the right to fair trial, typically require omission of state action and clearly specify duty-bearers. Furthermore, identifying the perpetrator responsible for violating their perfect duties is relatively straightforward. Positive rights entail imperfect duties. Like the right to education, these rights require both action on the part of the duty-bearer and institutional structures to specify their content and to allocate responsibility for their fulfilment. Without these institutional structures in place, the violators of these rights cannot be identified. In this way, O’Neill (2002) argues that these rights are then not ‘genuine’ rights at all. However, this narrow conception of violations is disadvantaged insofar as “it affords less protection to the poor and oppressed” (Pogge, 2005: 1).

Fienberg argues that an adequate account of the death of the drowning child must include the decision of potential rescuers not to intervene. If a rescuer had intervened, the child would not have died. Acts of omission, therefore, can be just as harmful and punishment on this basis may be appropriate (Linklater, 2007). Some liberal cosmopolitans thus argue that the failure to assist constitutes harm because “the negative obligation not to harm gives rise to positive duties of assistance” (Linklater, 2007: 30). This argument is used by Pogge in relation to global duties of assistance and poverty.

Pogge argues that “the harm that the affluent inflict on weaker societies – and the harm that results from inaction in the face of the permanent emergencies of starvation and poverty [...] – have a permanent claim on the global conscience” (quoted in Linklater, 2007: 32). As of 2020, 22% of people and one third of all children live below the poverty line of US\$1.90 per day (GMPI, 2020: 14-15). After decades of minor wins at hacking away at global inequality, 2020 set the stage for many years of increasing inequality in ways that we have never experienced before (UNDESA, 2020). Almost a third of the world’s population is thus vulnerable to exploitation, abuse, and death, with one third of annual deaths resulting from poverty-related causes (Pogge, 2005). This calamitous poverty exists while, at the same time, there is rising affluence elsewhere. Pogge (2005: 1) explains that a shift of only 1% of the

global income from rich to poor would eradicate severe poverty. However, we are witnessing the opposite whereby many of the world's population remain below the subsistence minimum while the rich continue to grow their capital (UNDESA, 2020).

### 3.4.2 *Complex Causal Chains*

The severe harms that characterise the contemporary world are typically the result of complex causal chains perpetrated by numerous actors across the globe. As Campbell (2007) suggests, the causes of and remedial action required by poverty are so elusive and controversial that outlining them as human rights violations is significantly more difficult than identifying violations of, say, civil and political human rights. Ashford (2006), Pogge (2002), and Campbell (2007) discuss these complex causal chains in relation to severe poverty. These discussions of severe poverty can be extended and used to understand poverty-related harms such as inadequate MHM.

The causal chains that contribute to the lack of necessities required to live a minimally decent life (or, to have one's human right to subsistence fulfilled) are so complex that it is almost impossible to trace responsibility for their violation to any specific person or groups of persons. These harms are typically the result of unjust global institutions and the content of the responsibilities these institutions place on their participants are not obvious nor specific (Ho, 2007). The deontological notions of responsibility and violation do not account for these causal chains. Critics thus argue that these harms, such as severe poverty, cannot and do not constitute violations (O'Neill, 2002). Again, the criticism does not concern the validity of positive rights generally; rather, it is the argument that one cannot deem an action/inaction a violation of human rights when it is impossible to "match up specific victims to specific violators and to single out the perpetrator" (Ashford, 2006: 219). Ashford approaches this by presenting an example of how negative rights may be violated in such a way that it is impossible to single out the perpetrator/(s). In this instance, it is unlikely that anyone would deny a violation of human rights has taken place, despite the lack of a clearly identifiable perpetrators.

Ashford (2006) examines a common causal chain, which she terms an 'additive harm', in which the many agents contribute to it cannot be singled out as individually responsible. Additive harms are cases whereby each agent's behaviour is so thinly spread over multiple victims that you cannot single out any agent as individually responsible for a particular victim's suffering. An example of this is Derek Parfit's 'Harmless Torturers' thought experiment in which group of torturers act in a way that the electric shock administered by each of them is

spread over a huge number of prisoners (Ashford, 2006). According to the deontological view, these torturers cannot be held responsible for a violation of human rights because both the perpetrator and specific victim cannot be clearly identified. Importantly, in Parfit's thought experiment, if one torturer pulled out, the victims would still feel the same amount of pain had they not pulled out. Therefore, even in principle, we cannot identify a single agent as responsible for any victim's suffering a human rights violation. It is still, however, a clear act of torture and thus a human rights violation. We can therefore still consider severe harms, like the act of torture in the above example, to be violations of human rights even when we cannot identify a single perpetrator for these harms.

If we can accept that violations can still occur even when we cannot identify the perpetrator then we can consider poverty and inadequate MHM to be violations of human rights. Ashford (2006: 357) explains that "certain features of the global basic structure [...] make a hugely significant contribution to the complex causal chains that culminate in persons' coming to be actively deprived of the means to subsistence." Nagel (1997) and Pogge (2005) agree that the persistence of poverty calls for an interrogation of the political and economic institutions that provide vehicles for their operation. It is simply morally objectionable that severe poverty continues while we make tremendous economic and technological progress elsewhere. There is a *duty* to respond to poverty - relying on charity would be a tacit acceptance of the various means through which those donating acquire and maintain their economic standing. Therefore, relying on charity for securing subsistence for those at the very bottom obfuscates the need for critical examination of these *structures* (Nagel, 1997).

### 3.4.3 *Structural Violations of Human Rights*

Kathleen Ho (2007) argues that the systematic denial of basic needs is a structural violation of human rights. Understanding human rights structurally draws on theories of structural violence which is understood as "harm caused by the accumulation of institutional, legal, political, and social forms of exclusion, which results in the denial of their basic needs" (Galtung in Mohammed, 2016: 494). We can see the structures of the global society as an example of complex causal chains that harm disadvantaged individuals across the world.

According to Galtung (quoted in Mohammed, 2016: 494), "the violence is built into the structure and shows as unequal power and consequently unequal life chances". From this view, poverty constitutes "a structural denial of basic freedoms" which leads to individuals being unable to fulfil their basic needs (Ho, 2007: 9). This inability further contributes to the denial

of other freedoms and rights, “rendering the poor disproportionately vulnerable to a whole array of human rights violations” like a lack of access to healthcare, shelter, and water (Ho, 2007: 9). Similarly, Pogge and Sen argue that structural violence becomes a structural violation when the fundamental human needs of individuals cannot be achieved (Ho, 2007). There is a considerable disparity between the according of human rights to all and the continuous violation of these rights because of global poverty.

A structuralist approach to human rights violations considers the “social, political, and economic networks that form between and among individuals” (Landman, 2006: 45). Structures function at both a national and international level. Social structures include racism, sexism, and class-based structures. Global institutions like the World Trade Organisation and the UN develop and sustain international political and economic structures. Paired with domestic institutions, these structures constrain the choices states can make which, in turn, constrain the choices individuals within states can make to fulfil their needs (Ho, 2007). How does this constraint become a violation of human rights though?

Pogge (2008) extends Ashford’s argument by further complicating issues of causal responsibility to institutions and practices as violators of human rights. Pogge (2011) presents five conditions to show that these structures can violate human rights, but extends responsibility beyond the state:

1. There must be a human rights deficit.
2. Which must be causally traceable to certain rules/institutional order.
3. There must be an active individual contribution on the part of people to designing/imposing these social rules.
4. The rules must have a certain official character.
5. Those who participate in designing or upholding these rules have to intend/foresee/be in a position to intent/foresee that these rules will occur the deficits in question.

Pogge (2011) argues that if an institutional order meets the above criteria for a foreseeable and massive human rights deficit, that is avoidable through an alternative institutional design, said order constitutes a human rights violation.

If we consider the harms that result from poverty, such as the lack of adequate health care, education, and dignity, to name but a few, one would be hard-pressed to deny that a human rights violation exists. Considering premise (2), poverty and poverty-related harms are

foreseeable and avoidable results of how the world economy is structured. With regards to points (3), (4), and (5), when one considers the immense role played by international economic institutions and multi-national corporations, poverty can be seen as a *structural* violation of human rights.

Both Ashford (2009) and Pogge (2011) argue that what is crucial is the degree to which we are all complicit in a system that causes poverty. In other words, a level of responsibility lies with governments, citizens, and corporations who uphold and contribute to the maintenance of a global socio-economic system that creates poverty in the first place. Avoiding the infliction of harm on those outside our state boundaries would be at a modest economic cost for us and feasible institutional changes can be achieved. However, the “division of moral labour” that such changes would require necessitates institutional specification and allocation (Ashford, 2009).<sup>19</sup>

#### 3.4.4 *Inadequate MHM as Structural Violation*

Campbell (2007) highlights the need to determine the exact point at which a violation occurs. With regards to MHM, a violation can occur when inadequate MHM is caused (the causation of harm). In other words, inadequate MHM is a condition that is caused by the culpable conduct of others. This conduct is the violation. A second possibility is that the violation in question constitutes the failure to act by those in a position to do something about inadequate MHM. Here, it is the failure to effectively alleviate inadequate MHM, as well as being complicit in or actively causing inadequate MHM that is considered the violation. Much like the persistence of severe poverty, inadequate MHM is not a result of the intentional conduct of others. It seems illogical to conclude that governments, international organisations, or transnational corporations conspire to sustain inadequate MHM. Rather, complex causal chains and structural patterns, economic, political, and social, cause inadequate MHM. Nonetheless, if we failed to save the drowning child, we would be discarding their life. Failing to alleviate inadequate MHM when doing so would be at a minimal cost to ourselves is therefore the problem.

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<sup>19</sup> We can use the example of the nineteenth-century slave trade in America to show the importance of structural reform and institutional action for resolving collective action problems to end a widespread violation of human rights. Slavery was a structural violation of human rights, but it was also the result of the individual choices of slave-owners: slavery was at the foundation of the entire economy and social norms of the time. However, for small and independent farmers, not owning slaves prior to abolition may have been at more of an economic cost to themselves than they could afford. What was needed was coordinated reform that distributed the cost amongst all slave owners.

Furthermore, understanding inadequate MHM as a by-product of poverty means that we cannot simply argue that inadequate MHM is only the result of a government's domestic policies. We must consider the global economic context in which poverty and inadequate MHM exist (Beitz, 2009). The increasing interdependence that characterises the twenty-first century can be seen in increased capital flows between states. Beitz (2009: 515-516) states that "the extraordinary openness and fluidity of international capital markets [...] combined with the absence of any international capacity to tax or regulate international capital flows, has undermined the political and economic foundations of the welfare state". Our increasingly global market has consequences "for the autonomy and the justice of state institutions" (Beitz, 2009: 516). A result of this economic interdependence is an increase in control by international regimes and institutions, such as The World Bank that provides economic assistance with the condition of political and economic regime changes within the domestic realm (Beitz, 2009).

In relation to how we respond to harms like poverty and its by-products, these characteristics make it unhelpful to think predominantly in terms of the nation-state (Beitz, 2009). A liberal cosmopolitan emphasis on our duties to others focuses the analysis to our failure to alleviate the suffering of others. As Pogge (2002) states, because the structures that exist perpetuate poverty *now*, we can reasonably assume that if they remain unchanged, poverty will continue in future. Therefore, the analysis of inadequate MHM as violation of human rights focuses on the latter of Campbell's (2007) approaches: the failure to alleviate. The failure to respond to this continued suffering, and that we are complicit in the continuation of the system that produces it, is the violation. An alternative structure is not impossible, and it would take relatively small changes to adequately respond to inadequate MHM. Therefore, we can conclude that the persistence of inadequate MHM is a structural violation of human rights because it is an avoidable and foreseeable harm.

Grounded in liberal cosmopolitan notions of responsibility, we can extend responsibility for human rights beyond one's state. For the alleviation of harms like poverty, we have a moral responsibility to assist (humanitarianism) regardless of the cause of the suffering. This responsibility is different from duties of charity or benevolence. We can thus argue that we as individuals have a responsibility to help those who are struggling with inadequate MHM. However, to argue that we as individuals have violated their human rights seems inaccurate. Indeed, we can say that we have contributed to the harm, but the official capacity of violation is thus retained – we can argue that violation extends to those (like states and institutions) who are responsible for fulfilling and protecting human rights.

### **3.5 Conclusion**

This chapter has argued that we can consider numerous actors, actions, or inactions to cause structural violations of human rights. Violations are characterised by two principles: they must be the result of avoidable (in)action and the harms caused must be foreseeable. We can conclude that because the current international system results in violations of human rights, if left unchanged, it will continue to violate human rights in the future. Although time does not permit such a discussion, it can also be concluded the current system is, at least in part, avoidable: there are alternatives. We can therefore argue that the structures that result in poverty are both foreseeable and avoidable; they violate human rights.

From this discussion, and the understanding of human rights as presented in chapter two, we may be in a position to argue that inadequate MHM is a violation of women's human rights. However, the human rights that inadequate MHM impact are themselves contested and must be defended to convincingly make this argument. The discussion of liberal cosmopolitanism, human rights, responsibility, and violation thus forms the philosophical foundation of the core argument that inadequate MHM is a violation of human rights. We have a working conception of what human rights are and why we have them. Now, we turn to consider their substance.

## CHAPTER FOUR:

### WOMEN'S RIGHTS AND THE ISSUE OF EQUALITY

#### 4.1 Introduction

If inadequate MHM was considered a human rights violation, it would be a violation of the obligations towards women only. Hence, to convincingly argue that inadequate MHM is a violation of human rights, it is necessary that we accept the notion of making exceptions for women. Women's rights are considered group-differentiated yet individually held human rights. These rights address the specific needs of women and protect against the risks that they face *because* they are women. However, the issue of how human rights ought to respond to the risks specific to certain groups is a contested issue.

From the outset, a tension arises in my argument. The liberal cosmopolitan emphasis of this thesis asserts that individual characteristics are arbitrary and irrelevant when determining the principles of cooperation, justice, and human rights. However, the essence of the argument presented in this chapter seems to advocate the opposite. This tension, however, is more beneficial than it is fatal. I argue that we can use this tension to *reinterpret* human rights based on universal experiences that have particular expressions based on context. This does not mean falling into a relativist vacuum; rather, it is an acknowledgment of the ever-changing nature of the human rights practice.

Making exceptions for women is necessary. To argue this, the notion of substantive equality is presented: I argue that formal equality *alone* is insufficient to fulfil the human rights of women. Formal equality focuses on the law and legal assertions of equality. While important, formal equality alone fails to achieve the equal fulfilment of rights. Substantive equality recognises the need to differentiate between groups; the provision of additional resources to specific groups is core to the equal fulfilment of rights. It is therefore argued that to achieve equality, we need to focus on the substantive fulfilment of rights as well as formal assertions.

Critics may argue that the general right to non-discrimination is enough to achieve equality and that we simply cannot risk compromising the universality of human rights. I discuss each concern in turn. First, the short fallings of non-discrimination are presented. While non-discrimination protects against invidious discrimination, differentiation is sometimes necessary to achieve substantive equality. As human rights protect fundamental interests, it is

perfectly justifiable to differentiate between groups based on need. Some may simply need more than others to have their human rights fulfilled. An approach to human rights that foregrounds the protections of individual interests cannot overlook this. Second, on the issue of universality, this chapter presents the reason for universality in the first place – to avoid exclusion. Unequivocally asserting equality may, at times, be exclusionary if we do not make exceptions for people based on differences. Again, the assertion here is that we cannot overlook the need some groups have for extra provisions and protections.

## 4.2 Women's Rights and Liberal Cosmopolitanism

There are two types of group rights. The first, and perhaps most controversial, relates to human rights that are held *by a group*. Examples include a people's right to self-determination. These rights, however, threaten the liberal foundations of human rights as individually held rights that do not depend on one's belonging to a particular group, state, or time (Cruft, Liao, and Renzo, 2015). The second type, which I am concerned with for the purposes of this thesis, are the human rights held *by an individual* on the basis of their *membership* to a particular group. These rights include, for example, women's rights, children's rights, or the rights held by minorities.

Will Kymlicka coined the term 'group-differentiated rights' to describe these rights. Kymlicka (1995) explains that, after World War II, liberal thinkers began advocating for the resolution of conflicts between and against minorities using a new scheme of human rights. These minority conflicts, it was believed, did not warrant protection via special rights. Rather, minorities would be indirectly protected by the universal guarantee of civil and political rights. However, Kymlicka (1995) explains that traditional liberal human rights standards have failed to address minority issues and therefore suggests that traditional human rights ought to be supplemented with special minority rights.<sup>20</sup>

However, the liberal cosmopolitan assertion that individual characteristics are arbitrary when determining just structures of social cooperation is at odds with the assertion presented here, that we should, at times, pay close attention to these characteristics. I argue that this tension has the potential to be useful rather than destructive (Bunch, 1990). Paying attention to gender differences while maintaining a universalist perspective is possible if we advance a

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<sup>20</sup> Kymlicka (1995) broke down group-differentiated rights into three groups: 1) Self-governing rights, 2) Poly-ethnic rights and 3) Special representation rights. Group three would include women's rights.

global consciousness that focuses on women's experiences. Within a globalised world, this is ever-more pertinent.

As discussed in chapter three, globalisation has not only resulted in increased interdependence which brings with it its own socio-economic harms, but these harms disproportionately affect women (Bunch, 1990). Poverty, involuntary migration, violence against women, and exploitation are amplified in the context of globalisation. The global civil society that has developed from globalisation, however, is essential in the quest for international justice and equality (Bunch, 1990; Beitz, 2009). Liberal cosmopolitans see this global civil society and the international institutions that order it as a meaningful way to achieve equality and justice through the development of human rights. This is a similar approach to that taken by transnational feminists who see these universal values as qualified by a commitment to reinterpretation (Bunch, 1990). Reinterpretations ensure that we include a focus on gender justice and equality. But how far do we transform human rights according to these theorists? Do we not risk the potential of developing a relativist account of human rights that are not held at all times and in all places?

Reinterpretation is distinct from saying "the content of rights is decided in a relativist vacuum because the struggle to contest the meaning of human rights is always with reference to established human rights standards" (Bunch, 1990). Although this thesis does not focus on relativism, this still poses a significant risk to the argument. Relativism argues that a heterogeneous global society of ethical and moral values means that human rights cannot be considered an overarching value system. However, the argument presented here is that the meaning and justification for human rights stays the same while the content based on particular experiences and transformations in society is what is up for reinterpretation. These experiences are universal, but the particularities of them differ case by case. For example, feminist movements of the 1980s contributed to the redefinition and reinterpretation of existing human rights through increased pressure to recognise violence against women as a human rights violation (Bunch, 1990). Like inadequate MHM, even though violence against women differed by situation and place, it was acknowledged as a universal phenomenon for women. Through a reinterpretation of the context of human rights, we can modify them to be more appropriate to the twenty-first century situation.

This tension (between cosmopolitan universality and feminist particularity) has resulted in growing recognition within and across women's movements that violence against women is

a universal phenomenon that affects women in every region, even though the form it takes differs from situation to situation. When approached in this way, a feminist reinterpretation of human rights and the lens with which we approach human rights practice is vital for the achievement of gender justice and equality. The focus on domestic violence and other issues affecting women highlights how approaches to human rights with the neutral (male-defined) individual in mind misses the mark in situations where violations are not carried out by the state.

The following section argues that without paying attention to the specific experience of women, human rights practice fails to achieve substantive equality for women. In this way, although human rights may secure formal equality and non-discrimination, it is inadequate to rely on these as the only means to eradicate inequality and marginalisation. Group-differentiated rights are therefore necessary as an additional protective measure for minority and vulnerable groups. Such an approach, it has been argued, is perfectly acceptable within a liberal cosmopolitan framework.

### **4.3 Making Exceptions for Women**

Prior to the mid-twentieth century, women were subjected to invidious discrimination (Donnelly, 2013). Now, however, the progression of various political ideals and practices across much of the world has led to the recognition and assertion of the full and equal humanity of women. This is secured through formal “equal membership in society through explicitly guaranteed protections against discrimination” (Donnelly, 2013: 276). This assertion of non-discrimination is found in both the UDHR<sup>21</sup> as well as in the International Covenant on Economic, Social, and Cultural Rights<sup>22</sup>. However, this section argues that relying on the notion of non-discrimination alone can lead to significant drawbacks in the substantive fulfilment of human rights. It is argued that it is sometimes necessary to differentiate between groups and that this differentiation is still within the universalist realm of human rights as we understand them.

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<sup>21</sup> Article 2 of the UDHR asserts that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

<sup>22</sup> Article 2.2. of the ICESCR states that “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kinds as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

#### 4.3.1 Substantive Equality

Today, various treaties and conventions pay particular attention to issues that disproportionately risk violating the human rights of women. These documents highlight the plights and risks faced by women such as human trafficking and domestic violence, and by particular groups of women, such as women living in rural areas.<sup>23</sup> The introduction of various treaties and conventions in international human rights practice denotes the understanding that reproductive and sexual rights are deeply connected to civil and political rights (Nussbaum, 2016). In other words, the denial of choices regarding, for example, abortion or child rearing, has the potential to affect the fulfilment of women's civil, political, and economic human rights.

At this point, it is important to distinguish between two different kinds of equality: substantive and formal equality. Substantive equality requires “taking both historical inequalities and the present conditions of women in a certain context into account” (UN Human Rights Council, 2014: 34). According to the Committee on the Elimination of Discrimination against Women, (1979) to achieve substantive equality, it is not enough to focus on formal equality (Bunch, 1990).

The notion of formal equality is rooted in Aristotle's dictum “things that are alike should be treated alike” (Bunch, 1990). This traditionally liberal conception of equality implies a degree of neutrality. As Rawls's (1971) original position proposed, differences of identity should not be considered when determining the principles of society and a just distribution of resources. However, society *does* group people into categories based on characteristics like race and gender. Based on these categories, certain groups are excluded from the social, economic, and political activities of society, while others are included (Minow, 1990). Often, the activities and structures of society rely on a ‘neutral’ conception of the individual – but neutrality is often based on those who are included (Minow, 1990).

Formal equality promotes justice based on fairness. Indeed, legally it plays an important role in equal treatment and protection. Neutrality in decision-making is seen to imply an unbiased approach but the neutral individual which decision-making is based on depends on who is ‘included’. As Sandra Fredman (2017:163) states: “formal equality, with its focus on the abstract individual, has failed to address deeply entrenched patterns of social disadvantage”.

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<sup>23</sup> For example, Article 6 of CEDAW states that “State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women”. Article 14.1 of CEDAW (date) states that “State Parties shall take into account the particular problems faced by rural women [...]” and Article 14.2 states that “State Parties shall take all appropriate measures to eliminate discrimination against women in rural areas [...]”.

Feminist scholars have argued that conventional expressions of human rights are ‘masculine’ (Saksena, 2007; Bunch, 1990). The abstract and neutral individual these documents rely on is ‘male’. Therefore, using these rights “as a standard that may provide benefit for women [is] more symbolic than actual” (Saksena, 2007: 484).

Substantive equality moves from negative duties of restraint to a call for the state to take positive measures to achieve equality (Fredman, 2017).<sup>24</sup> When we focus on formal equality and legal expressions of equality alone, we overlook the various ways that past discrimination continue to negatively affect the opportunities that some have. With regards to substantive equality, states must create “an enabling environment for the empowerment of women in order to achieve *equality of results*” (UN Human Rights Council, 2014: 34. Emphasis added). To achieve justice and equality, positive action is required on the part of the state that “deviate[s] from equal treatment in order to achieve de facto equality” (Saksena, 2007: 484). By adopting special measures and giving women *temporary* advantages and access to opportunities, it is asserted that *substantive equality* can be achieved (UN Human Rights Council, 2014).

This approach to equality also recognises that discrimination need not only be direct, but can also occur when laws, policies, or programmes have inadvertent discriminatory effects when implemented. Reliance on the neutral individual may mean that these laws exclude marginalised groups or even perpetuate discrimination (Saksena, 2007). For example, an approach to the provision of social grants to ‘heads of households’ may achieve formal equality between men and women because of its gender-neutral nature. However, it may inadvertently reinforce the dependency of women on their husbands for economic security because, in many cases, men are still considered the head of household. This policy, therefore, would not secure equality in practice. Furthermore, there are many situations where women who are abused by their husbands remain in relationships because they lack economic independence. Providing social grants to ‘heads of households’ may therefore further entrench this abusive situation.

Hence, the UN Human Rights Council (2014: 36) emphasises that “to achieve equality of results may mean that women and men are not always treated in exactly the same manner, in order to redress historical discrimination and/or take account of women’s biological

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<sup>24</sup> As discussed in chapter three, negative duties require that we abstain from certain actions to fulfil our duty whereas positive duties require some sort of action on the part of the duty-bearer to fulfil their duty. Positive duties are described by the CEDAW in relation to the achievement of substantive equality between men and women.

differences”. To use Donnelly’s (2013) terminology, the temporary use of special measures and protections for women to attain equality of results can be considered a form of legitimate differentiation. Donnelly’s (2013) legitimate differentiation is akin to the need to deviate from formal equality to achieve substantive equality.

The idea is that if women’s human rights issues are marginalised in human rights practice, women will not be able to fully realise the whole spectrum of their human rights; this illustrates the structural indivisibility of human rights (Parisi, 2010). For example, the fulfilment of women’s socio-economic rights is dependent on the fulfilment of their reproductive and sexual rights. The human right to health care is (formally) equally held by both men and women. Women, however, require additional measures such as the provision of prenatal health care, for their human rights to health to be fulfilled (Runyan, 2018). Access to prenatal care also impacts the fulfilment of other human rights, such as the right to work. Pregnant women who are malnourished or experiencing complications in their pregnancy may be unable to attend work. This puts women at an economic disadvantage. Therefore, pregnant women require additional provisions to have the same outcome and opportunities from their human rights (Runyan, 2018). Furthermore, women who are economically disadvantaged, who are economically dependent on male members of their families, or who are forced to fulfil traditional gender roles in the home, may have their civil and political rights affected. Women who are economically disempowered simply do not have the time, money, or freedom to exercise their political and civil rights (Parisi, 2010).

Considering the indivisibility of human rights and the inadequacies of only taking a formal approach to equality, the need to provide temporary special measures for women to achieve substantive equality is evident. To determine appropriate equitable solutions, differentiation is required. However, some may disagree with the need for differentiation given the already widely accepted right to non-discrimination.

#### 4.3.2 *Non-Discrimination and Differentiation*

Differentiation is sometimes necessary to fully protect the interests of certain individuals. The right to non-discrimination only protects us from discrimination or differentiation that causes *unjustifiable harm*: “the internationally recognised human right to non-discrimination prohibits invidious public (or publicly supported or tolerated) discrimination that deprives target group of the legitimate enjoyment of other rights” (Donnelly, 2013: 275). However, it does not protect us from all forms of discrimination. The

level of non-discrimination inferred in the UDHR is exaggerated as all human beings cannot be entitled to all human rights without *any* distinction at all: states are permitted to consider some status differences (Donnelly, 2013) States and members of society typically act on legitimate differences between groups of people in relatively uncontroversial ways (Donnelly, 2013). This usually happens when there is considerable need, when differentiation is required to protect and fulfil the interests of individuals whose needs may not be considered without such an approach.

Amartya Sen (1999) uses the example of food distribution to show the need for differential treatment as a means to achieve equality of outcome and equality of opportunity through the provision of additional means. Five people are each given one kilogram of rice. The group consists of one pregnant woman, one elderly person, one young adult, one person who is a day-labourer, and one person with a very high metabolism (Sen, 1999). Although there is formal equality insofar as each member is given the same amount of rice, the difference in nutritional needs based on the distinct physiology of each member is not accounted for. Therefore, some members, like the pregnant woman and day-labourer, will not have their nutritional needs met, while the others may in fact have more rice than they required in the first place (Sen, 1999). To meet the nutritional requirements of all members, differentiation between group members is necessary to either reduce or supplement the amount of rice provided to achieve the same nutritional status.

In the human rights context, Sen's (1999) example illustrates that some people may need additional provisions (such as state-funded housing or medical care) to have the same outcome as others, who may not need these additional provisions. This allows for the fulfilment of their other individual human rights and the protection of their individual interests. We can extend Sen's example to account for the additional provisions women may need to fulfil their human rights.

Although equality between men and women has been a fundamental guarantee of the human rights practice since the founding of the UN, the development of the CEDAW came from the recognition that, generally, the international doctrine of human rights inadequately recognised the interests of women (Bunch, 1990).<sup>25</sup> The preamble of the CEDAW expressed concern that "in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs" (Hellum and Aasen, 2013: 2).

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<sup>25</sup> The CEDAW is the second-most widely ratified UN Convention (Hellum and Aasen, 2013).

Following from Sen's (1999) example, we can then say that responses to poverty should consider the unique experience of women. Women, just like day-labourer in Sen's example, need additional measures to have their needs met. For example, if we were to provide equal basic education training for both women and men living in poverty, we would need to also consider the domestic responsibilities women traditionally have in the home (Parisi, 2010). Child rearing and other responsibilities may mean that women would need training to coincide with the time that they have free, while men may be able to attend all day. Non-discrimination, in this case, would imply that women would not be excluded from the training because they are women. It would not, however, mean that the very structure of the training would be based on the experience of women to best accommodate them – rather, it would be approached with the 'neutral' (male-centric) individual in mind.

The universal human right to non-discrimination *alone* therefore fails to protect and promote equality of results (rather than formal equality) between groups (like men and women). The CEDAW highlighted other areas where non-discrimination alone fails. Particular criticism is made against a lack of recognition of violence against women, the inequality of opportunities for women as contributors to the economic activities of society, and the importance of maternity leave (Bunch, 1990). The CEDAW highlights the need to differentiate treatment between men and women to ensure that women are given the same opportunities as men.

From this, we can argue that because women have particular needs and interests that cannot be fulfilled by the general human right to non-discrimination. The achievement of substantive equality requires differential treatment for women. Women thus require group-differentiated human rights to appropriately fulfil their other vital human rights and to protect their equal moral status. Even so, there is a considerable tension here between the innate and necessary universality of human rights, as defined in chapter two, and the non-universal nature of women's rights.<sup>26</sup>

### 4.3.3 *Universality and Variations*

Human rights are, by nature, held by all individuals everywhere in virtue of their humanity. How, then, can certain individuals hold specific human rights that others do not? Those who criticise group-differentiated rights do not challenge the moral justifications for

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<sup>26</sup> A reminder that this thesis argues that human rights constitute universal moral rights that protect the vital human interests of all individuals who have equal moral status.

such rights: In cases where members of particular groups are more likely to have their human rights violated *because* they belong to vulnerable groups, opponents recognise the need for differential treatment. Rather, given the definition of human rights as universal, it is problematic to have certain rights be claimable by some and not others. Such rights may exist as moral rights or constitutional rights, but not *human* rights. As was addressed in the previous section, arguments against these rights may also claim that the human rights of minorities and vulnerable groups are adequately protected by the human right to non-discrimination and, therefore, special human rights are simply unnecessary.

Charles Beitz (2009) maintains that the human rights that are considered women's rights are perfectly general in that they mainly protect personal agency and physical security. These rights that are special and non-universal protect the specific urgent interests of women and, typically, concern reproduction. Beitz (2009) argues that to defend this special class of women's rights, one ought to merely broaden their conception of "universal" beyond "being claimable by everyone". If one adopts a stringent view of the universality of human rights, based on the traditional conception of human rights as moral rights, it would be incoherent to assert that there exist certain rights that are only claimable by "a certain subset of humanity" (Beitz, 2009: 189).

Similarly, Eva Brems (2001: 16) explains that when something is perceived as a threat to the universality of human rights, it is necessary to determine which conception of universality we abide by: "the problem of the universality of human rights is rarely equated with their concern about their worldwide observance. It is situated on a more abstract level. In essence, the fear about the undermining of universality is a fear about the exclusion of some people from the international human rights protection system". The concern regarding the exclusion of certain individuals from the crucial protections provided by human rights is an important one. In the case of women's rights and special protections, however, the situation is vastly different.

Martha Minow (1990) introduced the "dilemma of difference": in some instances, treating certain people differently emphasises their differences and is an exclusionary act. In other instances, treating people equally is insensitive to their differences, and can be exclusionary on that basis. Minow (1990: 20-21) states: "The dilemma of difference may be posed as a choice between integration and separation, as a choice between similar treatment and special treatment, or as a choice between neutrality and accommodation." Minow (1990)

illustrates the dilemma using the example of school responses to children with learning disabilities and children whose mother-tongue is Chinese but are taught in English. In the case of the Chinese speaking children, it was argued that a monolingual education system obstructed the chance for equal education. The Supreme Court of the United States determined that the monolingual system privileged English speaking students and that, to achieve equal education, special provisions must be made for non-English students. Students were divided accordingly. In the case of children with learning disabilities, however, the argument made against the division of students based on ability. This division was said to discriminate against those with learning disabilities. In this case, it was decided that equality rested on integration rather than differential treatment.

The concern still remains: if we too readily promote special and differential treatment, we risk attaching too much importance on differences and therefore rendering universality an empty term (Brems, 2001). Rather than our common humanity, our differences would form the basis for attributing human rights. The repercussions of this would be detrimental to the very foundations of human rights as we understand them.

Nickel (2007) explores how we can determine that special treatments be made for certain groups while still retaining this universality. He offers derivability as a test to determine whether group-differentiated, individually held rights can be considered human rights: if said right can be derived from a universal human right then it can be considered a human right. Nickel (2007) uses the example of women's prenatal healthcare to illustrate this. Prenatal care is necessary for the health and survival of mothers and babies and a part of the general human right to healthcare. Therefore, we can and should take such medical care to be a human right even though it is a right that can only be claimed by pregnant women. The fulfilment of the universal right to health is dependent on prenatal healthcare. Insofar as there exists a universal right to healthcare, there exist variations within this right. Prenatal healthcare is understood by Nickel (2007) as a *variation* of the universal right to healthcare.

Variations, in Nickel's (2007) terms, are based on acknowledging the difference in need for individuals of certain groups to have their human rights adequately met. To use the terminology adopted by the UN (2014), these variations thus allow for substantive equality rather than just formal equality in rights. To illustrate, for men to have their right to healthcare fulfilled, certain health issues that are specific to men would need to be addressed, such as regular prostate cancer examinations. This qualification of who can receive what variations of

human rights entails acknowledging that although human rights are formally the rights of everyone, how they are claimed requires some sort of need (the right to healthcare), vulnerability (the right to fair trial), or even ability (the right to work) (Nickel, 2007).

If conceived in this way, one could also consider the provision of sanitary products, which is necessary for adequate MHM, as part of the fulfilment of women's universal human right to health based on the potentially severe health risks that result from a lack of such products. The means, then, required for adequate MHM can be considered a variation in the right to health care. Qualification based on need results in this variation of the human right to health as only claimable by women.

Therefore, in line with Nickel's (2007) argument regarding pre-natal healthcare as a human right, we can also consider access to the means and facilities necessary for adequate MHM as within the realm of human rights obligations because the fulfilment of women's universal human right to health is dependent on it. Furthermore, using the derivability method means that we avoid the risk of over-differentiating human rights. The allocation of special human rights based on the differentiation of women from the rest of humanity does not stray far from the human rights that already exist universally. The rights of women merely account for the special needs of women as a means to achieve substantive equality and fulfilment of human rights.

#### **4.4 Conclusion**

Group-differentiated rights are necessary to protect against the specific risks faced by certain groups; this security cannot be achieved by relying only on the right to non-discrimination. Women's rights specifically require that certain variations of universal human rights are made that more adequately address the needs of women. One such example is the added need for the means and facilities necessary for adequate MHM. Although a tension arises between the universalism of the liberal cosmopolitan framework of this thesis and making exceptions for women, this tension is beneficial if we use it to reinterpret human rights to better respond to the current context. Furthermore, if the universality of human rights is to ensure that no group is excluded from having claim to human rights, which I believe it is, then group-differentiated rights do not threaten this principle. The same conclusion can be reached by looking at qualifications of rights. All rights, when implemented and claimed, require some degree of qualification. Having certain rights qualified to only apply to women, like that of the right to prenatal healthcare, does not threaten the universality of human rights.

Achieving substantive equality between men and women, as I have interpreted it here, requires extra provisions based on need. We can understand the means and facilities for MHM as constituting this need, just as we understand pre-natal healthcare as an extra need. However, the provisions necessary fall under the goods and services provided by socio-economic human rights. These rights are themselves heavily contested in human rights discourse. To argue that inadequate MHM is a violation of human rights thus requires a defence of socio-economic rights.

## CHAPTER FIVE: IN DEFENCE OF SOCIO-ECONOMIC RIGHTS

### 5.1 Introduction

If inadequate MHM were to be considered a violation of women's human rights, it would be a violation of their socio-economic rights – specifically their rights to a decent standard of living. Some socio-economic rights secure access to various basic goods, like housing, food, water, healthcare, and education. The fulfilment of these rights is considered necessary for individuals to live a minimally decent life. Not only would the provision of the means and facilities required for adequate MHM fall within this group of rights but, as it was shown in chapter one, the rights that inadequate MHM adversely affect are women's socio-economic rights.

This chapter argues that socio-economic rights are vital for well-being and, consequently, living a life of dignity. These are the universal human interests that human rights protect, as per the definition of human rights presented in chapter two. I focus on socio-economic rights to subsistence and the indivisibility of human rights more generally. Fulfilment of human rights to subsistence, such as the right to healthcare and education, impacts the fulfilment of other rights, like civil and political rights. Nonetheless, there are numerous arguments against socio-economic rights.

Critiques against socio-economic rights include their costly nature (simply, fulfilment requires economic and human resources), the lack of precision regarding who is responsible for their fulfilment, that they are overly demanding, and, finally, that they have the potential to devalue the normative force of human rights.<sup>27</sup> Successfully responding to each of these criticisms will allow for the conclusion that socio-economic rights are justifiable human rights. Many of these criticisms are deflected by highlighting the demands and nature of traditionally accepted civil and political rights, such as the right to fair trial and the right not to be tortured. In any case, the division of rights into these groups creates a hierarchy of human rights which is not only impractical but also dangerous. Furthermore, the human rights to subsistence that MHM are connected to will be shown to pass two litmus tests for new human rights. From this,

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<sup>27</sup> Socio-economic rights more broadly, and rights to subsistence more specifically, require some degree of redistribution. As was discussed in chapters two and three, a liberal cosmopolitan approach to human rights and justice favours some level of redistribution. Therefore, to argue in favour of socio-economic rights is in line with the liberal cosmopolitan approach to human rights.

this chapter concludes that socio-economic rights, specifically rights to subsistence, are perfectly justifiable.<sup>28</sup>

## 5.2 Socio-economic rights to subsistence

As designated by the UN, socio-economic rights can be categorised into six sets of rights: rights to universal public services, rights that support decent living conditions, rights of workers, rights of particular social groups, rights to natural resources, and property rights. This thesis focuses on the first two sets of rights which I refer to as rights to subsistence.<sup>29</sup> Rights to universal public services include things like preventative healthcare which is state-funded and supplied. Rights that support decent living conditions may take the form of, for example, the right to food or the provision of pensions to the elderly. These two sets of socio-economic rights protect fundamental human interests by guaranteeing the provision of the basic goods and services necessary to live a minimally decent life. Article 25 of the UDHR (1948) states that “Everyone has the right 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.”

Some authors argue in favour of rights to subsistence using linkage arguments (Shue, 1996). Linkage arguments emphasise the indivisibility of human rights by showing that the full realisation of civil and political rights is dependent on the realisation of certain socio-economic rights. In other words, the protection and fulfilment of the rights that ensure a decent standard of living are necessary to secure civil and political rights. Rhoda Howard (1983) terms this the ‘full-belly thesis.’ For example, one may argue that without access to food, shelter, and education, interests in life and liberty are at risk because serious illness and death are likely. Equally, access to education is essential for the effective participation of individuals within the political and economic spheres of states (Shue, 1996). Therefore, some argue it is necessary to first provide subsistence before it is even possible to effectively secure civil and political rights.

However, the prioritisation of social and economic rights inherent within the full-belly thesis is controversial (Howard, 1983). It is far more acceptable to argue that rights are *mutually reinforcing*; adequate nutrition, health, and education may lead to a freer society that respects

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<sup>28</sup> As it will be discussed, there are various kinds of socio-economic rights, some more controversial than others. Socio-economic rights to subsistence are the least controversial because they protect basic human needs like shelter, healthcare, and personal development.

<sup>29</sup> As I refer to them here, rights to subsistence include the provision of services and means necessary for a decent standard of living. Although similar to ‘subsistence rights’, as termed by Henry Shue (1996), the rights I discuss in this thesis are a subset of social, cultural, and economic rights as defined by the UN. I draw on Shue’s methods but do not understand rights to subsistence as a set of human rights on their own, as defined by Shue.

rule of law; freedom of expression and association may be important for ensuring that officials make the best decisions required to provide food, health care, and education. Therefore, the inclusion of socio-economic rights more broadly, and rights to subsistence more specifically, recognises “an active role of the state in the achievement of common goods, in the promotion of well-being of the people, and in the redistribution of wealth” (Jones, 2013). Nevertheless, some have argued that even though the interests protected by socio-economic rights are invaluable, they need not be protected by *human* rights.

Scholars against the inclusion of socio-economic rights as human rights argue that weaker norms could secure decent living conditions and personal development. Nickel (2007), for example, discusses charity as one such option. However, as mentioned in chapter three, within the current global socio-political climate, characterised by increased interdependence and globalisation, subsistence is best and most reliably secured through national and international institutions (Beitz, 2009). If we rely on things like charity to secure subsistence, we will overlook the inequality perpetuated by the global economic system. Furthermore, relying on charity or benevolence evades the development of a just international system. The issue of responsibility for socio-economic rights is thus one that should be tackled head on through negotiation and international cooperation (Beitz, 2009).

### **5.3 Addressing Objections to Socio-Economic Rights**

The inclusion of socio-economic rights in human rights legislation has, however, been particularly controversial (Beetham, 1995). To this day, there exists a large gap between recognition and enforcement. This section discusses the four most prominent arguments made against socio-economic rights. These arguments are interlinked and dependent on a traditional deontological approach to human rights where obligations for fulfilment are seen to fall on states. However, by extending our scope of responsibility and avoiding hard dichotomies between ‘positive’ and ‘negative’ rights, we can maintain that socio-economic rights are feasible and justifiable human rights even in cases where their content is demanding, and their correlative duty-bearers are vaguely defined.

#### *5.3.1 Too Costly*

One of the most prominent arguments against the validity of socio-economic rights is that they are unaffordable. The UN treats socio-economic rights as separate from civil and political rights in the ICESCR (1966: 2), which classifies these rights as progressively realisable: states should take appropriate measures “to the maximum of their available

resources” towards their full realisation. This acknowledges that many countries lack the institutional and economic resources necessary to fully realise these rights. While civil and political rights are seen as easily implemented and secured through legislative measures, fulfilment of which is imperative, the fulfilment of socio-economic rights is seen as something that governments should work towards achieving.

Against socio-economic rights, some scholars claim that because in many cases these rights cannot be claimed, it seems deceitful to guarantee them as human rights. Human rights, they argue, ought to be immediately realised. The right to health care, for example, does not actually secure health care for citizens whose states cannot afford it, nor does it allow citizens to claim a violation of their human rights if their government fails to fulfil this right (Cruft, Liao, and Renzo, 2015). Maurice Cranston (1983) is a well-known advocate of this argument. Cranston argues that rights like the right to life and liberty are human rights *proper*: they constitute universal moral rights owed to human beings in virtue of their humanity (Jones, 2013). He proposes the test of practicality to determine whether proposed rights can be considered human rights.<sup>30</sup> Based on this test, socio-economic rights, Cranston (1983) argues, do not meet the requirements to be deemed proper human rights.

Cranston’s (1983) practicality test appeals to the Kantian principle of duty that ‘ought implies can’. According to this principle, one can only be said to have the duty to fulfil an obligation if one is capable of such fulfilment in the first place. Hence, he argues that a right can only be said to be a human right if it is practical; for a right to be practical, the correlative duty-bearers should be able to fulfil or protect it in the first place. For Cranston (1983), civil and political rights *do* constitute human rights because they are simply secured through the implementation of various legislature and the restraint of executive power. By contrast, socio-economic rights require more than the mere implementation of law – wealth and resources are needed too. Delivering socio-economic rights requires state funds and state capacity in the form of effective administrative structures (Ahmed and Bulmer, 2017). Since many of the world’s countries lack the necessary means to secure these rights, socio-economic rights fail the

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<sup>30</sup> Cranston (1983) also discusses paramount importance as a test for human rights. Through “common sense” he argues that we can distinguish between rights that entail duties of generosity and rights that entail duties of moral obligation. Only rights that entail moral obligations, like rescuing a drowning child, can constitute human rights or universal moral rights. It may be generous to give birthday presents to my neighbour’s children, but it is clearly not a moral obligation. Therefore, using common sense, rights to subsistence are obviously of paramount importance because the interests that they secure are necessary for survival and living a minimally decent life.

practicality test. Therefore, these rights constitute little more than unfulfilled promises and noble aspirations.

Further concern is that the inclusion of human rights that cannot be fulfilled may be harmful to the entire human rights system as it could create “a political culture where rights only exist on paper and are not treated as credible or binding by the public or government” (Ahmed and Bulmer, 2017). Similarly, although supportive of these rights, Nickel (2007) expresses concern that it seems farcical to guarantee a set of rights that duty-bearers cannot fulfil in the first place. There are two responses to Cranston’s (1983) argument that I will discuss: first, that civil and political rights are also costly and, second, that states are not the only duty-bearers of socio-economic rights.

First, to respond to the relative cost of affirming socio-economic rights one may point out that any right can be and, usually, is demanding on public resources (Trispiotis, 2010). Civil and political rights, which Cranston (1983) accepts as passing the practicality test, are also costly. With regards to the right to life or the right to fair trial, for example, the European Court of Human Rights recognises state obligations to investigate killings, build effective methods for monitoring the use of force by state officials, and to protect citizens (Trispiotis, 2010). These actions not only require state capacities like effective administration, but also require economic resources for their functioning. Similarly, the right to vote requires the implementation of various costly measures to ensure free and fair elections, including setting up secure voting stations and training supervision staff. In situations where states lack a foundation of rule of law, like an effective and independent court system, developing and maintaining these mechanisms is extremely costly. Hence, no right exists without its relative costs – even civil and political rights.

Additionally, one ought to be pragmatic when speaking of what exactly these various socio-economic rights entail. As the UN outlines, states are committed first and foremost to meeting certain minimum core obligations.<sup>31</sup> Therefore, we can still enforce these rights as human rights while recognising the limits imposed by competing demands on state funds. For example, the right to housing does not entitle each individual to a state-funded house nor does the right to health mean that each individual has a right to be healthy. Rather, these rights ensure that people are protected from, say, wrongful eviction, homelessness, and provided with

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<sup>31</sup> Tasioulas (2017: 2) outlines minimum core obligations as: “human rights obligations that all states must fully comply with immediately irrespective of the resource differences that exist among them”. They thus limit the notion of progressive realisation.

preventative healthcare. It can thus be argued that socio-economic rights and civil and political rights are both resource demanding.

A second problem with Cranston's argument is that he understands the correlative duty-bearers to *only* be one's state and co-nationals (Jones, 2013). Indeed, there is cause for concern when it is ambiguous who bears the duties to protect human rights, particularly when states lack the ability to secure them (O'Neill, 2005). Nevertheless, few would argue that the correct response to this ambiguity is to dismiss human rights and their powerful international normative force altogether. Rather, as was discussed in chapters two and three, we need to carefully consider other duty-bearers, both state and non-state, co-national and foreign (Jones, 2013).

### 5.3.2 *Imprecise and Vague*

A second argument against socio-economic rights, independent of their relative cost, is that they cannot be enforced because they "suffer from a painful lack of precision" (Scott and Macklem, 1992: 69). Prior to institutional allocation, it is unclear who bears the corresponding duties to provide and fulfil these rights to goods and services. Onora O'Neill (2005: 432) raises this concern, stating that "universal liberty rights [are] independent of institutions or transactions" and so the correlative duties are clear even when institutions are missing or weak. In contrast, in situations where institutions are lacking, the duties and duty-bearers associated with socio-economic rights are indeterminate. Therefore, we risk eroding the normative power of human rights as *claimable* rights (O'Neill, 2005). O'Neill (2005) therefore argues that, again, we ought to understand these rights to goods and services as mere goals or aspirations, rather than claimable universal human rights.

One response to this argument is to point out that civil and political rights are also vague and imprecise. Scott and Macklem (1992) neatly highlight this point using the right to freedom of expression. This political right is also vague and only "ascertained evolutionary by judicial jurisprudence; once interpreted and clarified, these norms are no longer considered vague" (Scott and Macklem, 1992: 69). Only through dealing with the legalities of the right to freedom of expression have we come to fully understand what exactly this right constitutes, who bears the obligation to protect it, and the various ways that it can be violated. In other words, ironing out the details of duties and duty-bearers correlative to civil and political rights has also been largely dependent on institutional allocation – a point that O'Neill neglects.

### 5.3.3 *Positive vs Negative Rights*

Although many scholars reject the view that socio-economic rights are examples of ‘positive’ rights while civil and political rights are ‘negative’ rights, this distinction is often drawn when arguing against their grounds as human rights on the basis that they are overly burdensome on states (Shue, 1996; Donnelley, 2013). Negative rights are rights that require freedom from state intervention in their enjoyment: they constitute a duty not to do something that might violate a right. They are also duties held not just by states, but also by individuals within the state. For example, I have a negative duty not to murder someone. Another example is the right to freedom of expression that requires that states refrain from limiting the free speech of their citizens. Positive rights, on the other hand, refer to rights that require state action for their fulfilment: they constitute a duty to do something to fulfil a right or to prevent a right from being violated. For example, states have the positive duty to provide accessible healthcare to citizens. Socio-economic rights are thus deemed positive rights insofar as their fulfilment rests on the state providing goods and services to its citizens (Trispiotis, 2010). Critics may argue that it’s easier to fulfil negative rights because they simply require refraining from action. The fulfilment of positive rights, on the other hand, may require vastly greater resources than are available. Given that many states are unable to fulfil the duties required for these positive rights, critics claim that they cannot be deemed human rights because they are not claimable.

In response to this objection, it must be highlighted that most rights require *some* form of positive state action (Trispiotis, 2010). Some negative rights, for example, implicitly require state action: the right to liberty not only requires that states refrain from unjustly limiting the freedom of their citizens via, say, unlawful detention, but also encompasses the duty to inform detainees of the reasons for their detention in a language that they understand (Cruft, Liao, and Renzo, 2015). The latter cannot be achieved without state action to develop effective legal and judicial structures. Similarly, some positive rights, like the right to housing, requires states to refrain from certain actions, such as illegal evictions.

What follows then is a hierarchical classification of negative rights above positive rights in order of their ability to be fulfilled. Classifying rights into these two categories, however, seems impractical. Hierarchical classifications of human rights undermine the inherent characteristics of human rights as interrelated and indivisible which is “profoundly detrimental” to the quality of human rights (An-Na’im, 2004: 7). As human interests are important for my liberal cosmopolitan approach to human rights, subsistence, health care, and education are all basic interests that are essential to individual autonomy. Securing these

interests is necessary to prevent exploitation and sacrificing other rights in return for subsistence (Shue, 1996; Ashford, 2009). Women living in poverty, for example, consistently choose between buying food for their families or buying sanitary products, sacrificing adequate MHM for feeding their families. In another example, young girls in Kenya have been found to exchange sex for menstrual products – resulting in not only exploitation but a lack of dignity too (Tellier and Hyttel, 2018). Therefore, the distinction between negative and positive rights seems overdrawn and the use of it as a criticism against socio-economic rights to subsistence is unconvincing.

#### 5.3.4 *Over-Inflation of Human Rights*

Another serious concern regarding rights to subsistence is that they will over-inflate human rights. Some argue that including too many rights will – or has already – inflate human rights uncontrollably and thus devalue the normative currency of human rights (Jones, 2013). Although this argument is typically made in relation to claims to things like a human right to the internet, or even a human right to be loved, it has also been made in opposition to socio-economic rights (Jones, 2013). The concern is that including indefensible newer rights may renounce the general power of human rights and thereby reduce their moral importance (Raz, 2009). Scholars expressing concerns over this ‘inflation’ of human rights dates as far back as the early 1970s (Cranston, 1973). Concerns have focused on the inclusion of things such as the potential for widespread rights talk to ‘debase’ human rights, the consequential weakening of the resolve of human rights enforcers, the ‘hypertrophy’ of rights, and that we may ultimately “lose sight of the reality that some rights are more basic than others” (Clément, 2017: 156).

Clément (2017) is concerned with the general tendency in recent years to frame “any and all grievances as rights issues”; he includes examples about the purported right to affordable internet access and Mexico’s recognition of the free development of one’s person to include the use of marijuana. Clément’s (2017) primary concern is that inflating human rights to include issues like these forces states and communities to develop a hierarchy of rights in determining the allocation of resources. These grievances, he argues, ought not to be framed within human rights discourse because the language of human rights is too poorly designed to adequately address the systemic causes of these social problems. Rather, these issues should be framed as issues of *social justice*.

Social justice, according to Clément (2017), refers to “those conditions that enable individuals to pursue their vision of the good life”. Therefore, issues of poverty, a lack of health

care, illiteracy and so on, are issues of social justice because they restrict individual autonomy to pursue a good life. However, chapter three argued that we can and should consider the complex causes of these social issues as human rights issues. They relate to the national and international structures that export and inflict harm on others. Just because we cannot determine an identifiable perpetrator for the causes of these harms does not mean that harms like poverty are not violations of human rights or human rights issues at all.

There are two forms of rights inflation: the redefinition of long-standing rights and the reframing of new and old grievances as rights (Clément, 2017). The push for inflation is typically due to the widespread legitimacy of human rights. As Griffin notes, the belief that having something widely accepted as a human right “is a good first step to getting it made a legal right” (quoted in Clément, 2017: 157). Importantly, this also transforms one’s case as “one is transformed from beggar (‘you ought to help me’) to chooser (‘it is mine by right’)” (Clément, 2017: 157). Particularly important for social movements, human rights lend legitimacy to the grievances presented and allows for a common language between a diverse constituency. For example, anti-poverty and humanitarian organisations, like Oxfam and Save the Children, now frame long-standing grievances such as poverty as human rights issues (Clément, 2017). The problem, according to Clément (2017), is that this shift in framing also shifts the solutions that are envisioned.

Human rights inflation will lead to the creation of a hierarchy of rights based on the available allocation of resources. Governments and other organisations will be forced to choose what human rights to spend their economic and human resources on protecting and fulfilling. Given that resources are finite, “any attempt to recognise all rights claims in an era of rights inflation would force people to prioritise some rights claims above others or recognise none at all” (Clément, 2017: 159). Clément (2017) affirms that rejecting the validity of these social ills as rights claims does not reject their importance or priority as grievances. Furthermore, the very nature of human rights is one of absolutes – they constitute non-negotiable moral principles. However, when we start taking resources from other fundamental human rights to fulfil the rights of, say, women or children, the distribution of resources becomes negotiable. In this way, Clément (2017: 160) states that “it is axiomatic that the cost of enforcing human rights is viable (albeit, imperfect) social practice compared to the impossible aspiration of guaranteeing all grievances that are today framed as human rights.”

Although I agree with Clément that we ought to avoid a hierarchy of rights, I do not agree that the need for negotiation when determining the distribution of resources to fulfil human rights means that we should avoid adding any ‘new’ human rights. Surely negotiations of various kinds take place when introducing any human right. If, again, we turn to the human right to fair trial, the negotiations necessary for the initial development of functioning courts in countries that did not have them was considerable.<sup>32</sup> This process does not tarnish the value of human rights, nor does it give countries the freedom to actively violate the human rights of their citizens when they did not have these institutions set up. Countries were given a time frame in which they were required to meet the minimum core obligations of these less controversial rights. Moreover, the political role of human rights suggests their constant negotiation. Nevertheless, I concede that there ought to be some sort of litmus test, or standard in place to ensure that ‘frivolous’ claims do not be included into the list of human rights to maintain their moral force and achievability.

Philip Alston (1984: 614) proposed something along these lines: a ‘quality control test’ for conjuring new rights. He outlined seven criteria that any given rights claim must satisfy to qualify as a human right:

1. “The claim should reflect a fundamentally important social value.
2. Be relevant to diverse value systems.
3. Be an interpretation of the UN Charter obligations, a reflection of customary law rules, or a formulation which is declaratory of general principles in law.
4. Be consistent with, but not merely repetitive of, the existing body of international human rights law.
5. Capable of achieving international consensus.
6. Be compatible with the general practice of states.
7. Be sufficiently precise as to give rise to identifiable rights and obligations.”

Alston’s criteria are echoed in the 1986 United Nations General Assembly resolution of ‘setting international standards in the field of human rights’ (A/RES/41/120, 4 Dec 1986). On consideration, socio-economic rights to subsistence pass Alston’s criteria. We have already established the fundamental importance of securing subsistence for all human beings and these goods and services are unlikely to contradict value systems across the world. As previously

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<sup>32</sup> The right not to be tortured is another appropriate example. The Convention Against Torture (1984) involved a lot of push from the likes of Amnesty International. Negotiation was therefore required.

discussed in this chapter, rights to subsistence also satisfy Alston's criteria 3 to 7. Therefore, it is reasonable to conclude that those socio-economic rights which secure a decent standard of living can be considered human rights without devaluing the moral force of human rights more broadly.

Although Alston's criteria are important with regards to the introduction of *new* rights, we do not need to consider adequate MHM as a new human right to deem inadequate MHM a violation. This is because inadequate MHM and the effects it has on women and children around the world violates their already existing human rights, like their right to health care, education, and subsistence. The rights that need defending are socio-economic rights and the above discussion achieved this. It is the failure to alleviate inadequate MHM as well as being complicit in causing inadequate MHM that should be regarded as violating MHM-related human rights.

Campbell (2007) argues that we can argue that poverty is a violation of human rights without diluting either the moral force or the radical political and legal implications. The core violation of human rights associated with extreme material poverty is the failure to respond effectively to poverty by those who are able to do so. Human rights are linked to fundamental human interests and inadequate MHM directly effects the basic interests of women as well as their dignity and personal development. Given this understanding and that MHM directly relates to the subsistence and socio-economic rights of women as defended using Alston's criteria, I conclude that we can in fact argue that inadequate MHM is a violation of human rights without cheapening the value and moral impetus of human rights. Therefore, I acknowledge that we ought to refrain from over-inflating human rights but considering MHM as a violation of human rights is unlikely to cheapen their moral currency.

#### **5.4 Conclusion**

This chapter has argued that socio-economic rights, specifically rights to subsistence, are justifiable human rights. These rights protect a wide range of fundamental human interests necessary to live a minimally decent life. Although critics claim that these rights constitute positive rights that are far too costly to claim, it has been shown that the distinction between negative and positive rights is overdrawn. All rights require some sort of positive action and state funding and resources for their implementation. Similarly, all rights require some degree of explanation as to who is responsible for their fulfilment and what exactly this entails. We therefore cannot dismiss socio-economic rights on these grounds. The concern that including

socio-economic rights onto the list of human rights would devalue their currency has also been considered and human rights to subsistence pass broadly agreed on tests regarding whether to include them on our list of human rights.

Importantly, having proven that rights to subsistence are indeed human rights, we can consider inadequate MHM as a violation of these rights and, therefore, a violation of women's human rights. This conclusion rests not only on the discussion of this chapter, but on the assertions made regarding women's rights and our understanding of structural violations of human rights. This conclusion is appropriate from a liberal cosmopolitan perspective which is, ultimately, uncontroversial with respect to the theory and practice of human rights today.

## CHAPTER SIX: CONCLUSION

Inadequate MHM is damaging to the well-being, development, and dignity of women. Human rights bodies have suggested the connection between human rights and menstrual health, some going so far as to imply that inadequate MHM *could* contribute to violations of women's rights. However, whether inadequate MHM is a violation of human rights has yet to be considered. Through an analysis of theories of human rights, this thesis has argued that the failure to alleviate inadequate Menstrual Health Management constitutes a violation of women's human rights. This conclusion rests on a tapestry of philosophical discussions on the foundation of human rights. Woven into this discussion were questions on the nature of human rights, why we have them, who is responsible for fulfilling them, what constitutes a violation of human rights, and what human rights we have claim to.

I adopted a liberal cosmopolitan approach – one that stresses the moral worth of individuals everywhere. Liberal cosmopolitanism is a relatively uncontroversial approach to human rights and is grounded in the prevailing liberalism of the contemporary human rights practice. This was precisely the appeal; liberal cosmopolitanism presented the opportunity for a philosophical analysis with the potential to make real-world changes or, at the very least, be applicable to the current practice of human rights. Furthermore, because both liberal cosmopolitanism and the practice of human rights emphasise the individual as the ultimate unit of moral concern, the implication was that the women who experience inadequate MHM are given priority in my research. Although I did not deal with a wide scope of individual experiences of menstruation, asking whether inadequate MHM is a violation of human rights was entirely guided by a recognition of the potential impact such research could have on the individual experience in the future. The normative strength of human rights in combination with the institutional capacity of human rights structures is necessary to adequately tackle inadequate MHM at a global level.

Liberal cosmopolitanism unites the individualism of liberalism with the universality of cosmopolitanism. It is premised on universality, moral individualism, and impartiality. At its core is moral individualism: the notion that individuals are of equal moral worth simply because they are human. Principles of social cooperation, justice, and human rights are therefore judged based on how they impact the individual, and how we design states and institutions ought to benefit the individual.

Using liberal cosmopolitanism as my guide, this thesis argued that human rights are *moral* rights that guide the formation of *legal* rights. The nature of human rights was presented as follows: human rights are a) moral rights that b) all human beings possess, c) at all times and in all places d) simply in virtue of being human and e) the corresponding duty-bearers are all people in appropriate circumstances (Griffin, 2008). Understanding human rights as moral rights first is important for the ability for human rights to criticise conventional political practice. Human rights are claimable regardless of one's citizenship or location – this is precisely what makes them so powerful. Universality allows for the promotion and protection of equality, freedom, and dignity regardless of one's state.

Moreover, I argued that human rights protect a plurality of human interests as well as human dignity. These interests are universal and basic – they are interests in life and well-being. Although an extensive analysis of which interests human rights protect was not within the scope of this thesis, the interests protected by human rights would include interests in health, physical security, or autonomy. This justification for human rights is what gives them the normative power to place universal duties on others.

If human rights are pre-legal moral rights that protect the interests and dignity of human beings, how did this impact the question of inadequate Menstrual Health Management? Given the moral nature of human rights, the implication was that even though inadequate MHM is widely unrecognised as violating human rights, we can still use human rights discourse and practice to criticise the widespread failure to alleviate inadequate MHM. This is because inadequate MHM is inextricably linked to the basic and universal interests of women – their interests in health, well-being, and dignity. A further implication was that, from a liberal cosmopolitan perspective, there exists a *duty* to assist those struggling with inadequate MHM. What arose from this, however, was the question of where we draw the line. Are all individuals everywhere responsible for the alleviation of the inadequate MHM experienced by others?

Throughout this thesis, there was a recurring emphasis on the increasingly interconnected nature of the twenty-first century. Liberal cosmopolitan scholars, like Charles Beitz (2009), John Tasioulas (2012), and Thomas Pogge (2002), maintain that globalisation has played a central role in the fulfilment (or lack thereof) of human rights. Not only is this emphasis based on considerations of the political and economic consequences of globalisation, but it is also a direct continuation of liberal cosmopolitan ideas on duty and responsibility to our fellow human beings. This duty is two-fold: we have the responsibility *not* to harm, and

we have the responsibility to *alleviate* harm. At this point in the thesis, notions of transboundary harms and humanitarianism became key.

In essence, harm renders someone worse off than they were before, or worse off than they would have been if previous arrangements were left as they were. There were parallels between the presentation of harm as presented here and the justification for human rights. As human rights protect certain basic and universal human interests, harm consists of a deprivation or damaging of these interests. Harms like poverty and inadequate MHM have a somewhat universal quality. Although the experience is particular to each individual, these harms have universal qualities like health risks and so on. We also all have a universal interest in avoiding these harms.

A liberal cosmopolitan approach to harm asserts that, at a global scale, we ought to limit the harm we inflict on others. It considers transboundary harms: how our actions (individual and state) harm those outside our territories or communities. This is combined with humanitarianism which asserts that we ought to assist those who are suffering regardless of where they are or who caused the suffering in the first place. A liberal cosmopolitan approach thus asserts that we ought to both limit and alleviate the harm of others regardless of whether they are fellow community members. Although this may be the case, alleviation or limiting the harm inflicted on others should not come at a severe cost to ourselves. Debates on harm are complex and not the focus of this thesis, but the discussion on harm played an important role in understanding my liberal cosmopolitan approach to human rights duties and violations. Significantly, the implication was that there is a universal responsibility to alleviate the suffering of others. With regards to human rights, this meant that we have a universal responsibility to not only avoid violating the rights of others, but also to remedy these violations.

Traditionally, duties to fulfil, protect, and promote human rights lie first with the state. In this way, violations of human rights are typically thought of as the result of actions or omissions at some official level. Violations were characterised as *avoidable* and *foreseeable* and must be the result of an identifiable perpetrator's action. However, poverty and inadequate MHM cannot be traced directly to identifiable agents; we would be hard pressed to determine exactly who has failed their duty, particularly when we consider globalisation and the increased interdependence that comes with it. Some would therefore argue that these harms, although severe, cannot be considered violations of human rights.

I argued that we ought to avoid ruling out violations that do not have identifiable perpetrators. Using the example of torture spread between multiple perpetrators and multiple victims, I showed that we can still have clear violations of human rights even when we cannot identify who is responsible for a certain victim's suffering. Again, when we consider globalisation and the increased intricacies of international actions, we can argue that these complex causal chains result in violations of human rights – specifically, poverty and inadequate MHM. Given the nature of the international economic and political structures that result in these harms, I argued that they constitute *structural* violations of human rights: a systemic denial of basic needs based on structural inequalities. In other words, the harms are built into the structures of society. At a global level, the chains and transboundary harms that result from the ruling structures of the international system deny the basic freedoms and fundamental human needs of individuals. If the system continues unchanged, it will continue to cause this suffering. Indeed, it is not the only viable system. Structural reform is achievable at a relatively low cost to those who currently benefit from the system as it is. Therefore, violations like poverty and inadequate MHM that are caused by these structures are both *foreseeable* and *avoidable*.

From this, I may have been in a position to argue that inadequate MHM is a violation of human rights. However, if inadequate MHM is a violation of human rights, it would be a violation of women's socio-economic rights to subsistence. These rights are themselves controversial. Therefore, to argue that inadequate MHM is a violation of human rights required a defence of these rights. At this point, the thesis turned to consider the content of human rights – what rights do we have claim to? Alleviating inadequate MHM would not only require structural changes, but also the provision of basic goods and services to women *only*.

At face value, making exceptions for women seemed to go against the universalism of both liberal cosmopolitanism and the definition of human rights this thesis adopted. However, this could be used to the benefit of the human rights project. We can reinterpret human rights to consider universal experiences that have particular expressions based on context so that the practice of human rights more appropriately responds to inequalities. In this context, the need for adequate MHM is an experience that all women have, but how each woman experiences the effects of inadequate MHM is dependent on their own context. Even so, some critics argue that given the universality of human rights we simply cannot have human rights that are not claimable by everyone. This is an issue with group rights, of which women's rights would constitute group-differentiated rights. However, when we consider substantive equality and the

equal *fulfilment* of human rights, it is sometimes necessary to deviate from blanket equal treatment. Considering the different needs of certain groups to have their rights fulfilled leads to the conclusion that temporary special protections or provisions may be necessary. Of course, expressions of formal (legal) equality are important, but formal equality falls short when we neglect the specific needs and risks women have simply because they are women. The universality of human rights ensures that no one is *excluded* from claiming human rights. To argue that some may need more to have their human rights fulfilled does not put this universality at risk – it asserts it.

Finally, if inadequate MHM were a violation of human rights it would be a violation of women's socio-economic rights. Specifically, their rights to subsistence, education, and work. Socio-economic rights are controversial for several reasons, with some critics arguing that they should not be considered human rights at all. Concerns relate to the costly nature of these rights: The provision of goods and services like sanitary pads and private restrooms requires resources. Many states simply do not have these resources. At a more philosophical level, this is also a challenge to the notion that human rights are necessarily claimable. I responded to these criticisms by arguing that we ought to avoid hard distinctions between positive and negative rights. Socio-economic rights protect vital human interests necessary to live a minimally decent life. Even when socio-economic rights are resource demanding and somewhat vague, we can still justify them as human rights. We certainly justify conventional civil and political rights even when they are costly, vague, or require action for their fulfilment.

Justifying women's rights and socio-economic rights as human rights put me in a position to convincingly argue that inadequate MHM is a violation of human rights. More specifically, it is the failure to alleviate inadequate MHM as well as being complicit in a system that causes it in the first place that is considered the violation of human rights. Although this research is an important first step in affording MHM the analysis I believe it deserves, there is a serious need for further research on the topic.

Given the scope of this thesis, there are issues in the philosophical analysis that simply could not be addressed. By arguing that inadequate MHM is a violation of human rights, what follows from this thesis is the need for further research on how we ought to alleviate it. This has already been done in relation to global harms like poverty. In the context of these debates, inadequate MHM needs further engagement.

Furthermore, if we accept this thesis, we can convincingly argue for practical approaches to the issue of inadequate MHM. Consequently, a potential next step is the development of policy recommendations at national and international levels. One central issue is exactly *who* is responsible for providing the means and facilities necessary for adequate MHM. Although I argue that we ought to extend our scope of responsibilities and violations, the question of how we do this needs further attention. The extent of how we distribute duties between states, transnational corporations, and international institutions is key. International human rights organisations like the UN could lead this attempt.

This research has attempted to place inadequate MHM on a firmer human rights footing. It lays the philosophical groundwork for further discussions on how we can respond to this human rights violation. The connection between inadequate MHM and human rights have been made clear using with a relatively conventional theoretical approach to human rights. In conclusion, this thesis has argued that inadequate MHM is a violation of human rights. If we understand it as such, there is room to respond to accordingly and with a degree of urgency, potentially improving the well-being, development, and dignity of women and girls the world over.

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