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The Principle of Indivisibility in an Era of Global Democratic Decline

Pádraig McAuliffe 

Professor of Law, University of Liverpool, Liverpool, England
Email: p.g.mcauliffe@liverpool.ac.uk

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Abstract

The indivisibility of all human rights is a fundamental principle of contemporary human rights interpretation and advocacy. It is asserted most commonly by theorists who assert that both socio-economic rights (ESR) and civil-political rights (CPR) are intrinsic to human dignity and must be treated on the same footing as any other right without *a priori* hierarchy. One dominant strand of this argument is the contention that ESR help deepen and sustain democratic rights like free speech, free media and the vote, while democratic rights in turn reciprocate by boosting the cause of social minima like education, health, housing and food. However, the empirical reality and contemporary relevance of the mutually-supporting relationship of ESR and democratic rights are called into question by two factors. The first is the fact of democratic recession in the Global South and its seeming erosion in the West. The second is the evident success of some autocratic regimes in building extensive social housing, eradicating hunger and improving access to healthcare. These trends partially undermine arguments premised on predictable causal relationships between democracy and ESR realisation. We need a more refined understanding of how non-democratic political regimes, institutions and ideology interact to produce different levels of commitment and capacity to realize ESR. There are at least three plausible responses this reality gives rise to, namely (i) to alter nothing about the way we think about indivisibility, (ii) to abandon the concept of indivisibility, or (iii) to revise the concept for a more multivalent world.

Keywords: Human rights; indivisibility; democracy; democratic decline; authoritarianism

A. Introduction: Indivisibility and its Discontents

The indivisibility, interdependence, and interrelatedness (I-I-I) of all human rights is a “mantra”¹ “beyond dispute,”² a “bedrock” of contemporary human rights interpretation and advocacy.³ It is affirmed by the UN General Assembly and the Office of the High Commissioner for Human Rights.⁴ It is assumed that the properties of I-I-I should guide the operation of human rights practice and policy. The concept of indivisibility is “leveraged” to stress the interrelated nature of

¹MARY DOWELL-JONES, CONTEXTUALISING THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1 (2004).

²DANIEL WHELAN, INDIVISIBLE HUMAN RIGHTS: A HISTORY 1 (2010).

³Cindy Holder, *Human Rights Without Hierarchy: Why Theories of Global Justice Should Embrace the Indivisibility Principle*, in CUESTIONES DE JUSTICIA GLOBAL 125, 128 (Johnny Antonio Davilà ed., 2020).

⁴See *infra* Part B.

crises we face like climate change, underdevelopment, and mass poverty.⁵ The indivisibility, interdependence, and interrelatedness of rights is therefore a mainstream position in the sense that most scholars in human rights have coalesced around its reality and take it as a starting point for apprehending the structure and content of international law in this area.⁶

Indivisibility is generally regarded as the strongest of the three suggested supporting relationships.⁷ There is no single doctrinal definition of indivisibility, tending instead to be endorsed as a self-evident fact.⁸ In its most fundamental sense, indivisibility means that rights are “incapable of being divided in reality or thought.”⁹ While there are numerous individual human rights with distinct substances and functions, each of these rights is intrinsic to human dignity and must be treated on the same footing as any other right without *a priori* hierarchy. The content of each right is inherently related to, and may causally reinforce, any other right. Any improvement in the realization of a given human right should not be at the expense of a diminution in the realization of another. Indivisibility can be roughly distinguished from *interdependence* (the idea that any one right cannot be realized in isolation from others) and *interrelatedness* (the permeability of rights categories). In both practice and theory, the three elements of the fundamentally amorphous I-I-I formulation tend to be used interchangeably and/or “bundled” as a package.¹⁰ Indeed, all three are often simply condensed to indivisibility, a shorthand adopted throughout this Article. Some scholars have teased out the distinctions between them¹¹ and contentious debate has arisen as to whether indivisibility must be system-wide—all human rights have an indispensable supporting relationship—or partial.¹² However, most treatments of the “indivisibility-interdependence-interrelated” formulation conflate them in a spectrum of stronger to weaker supportive relations between one right and another,¹³ as does this Article. Most “I-I-I” arguments therefore take the form of somewhat generalized and impressionistic linkage arguments where certain rights are defended because they provide indispensable, moderate or helpful support to other justified or accepted rights.¹⁴ As Walker argues, relationships between rights are as likely to be tendential as they are to be necessary—as such, most rights relationships “become a more-or-less rather than an either-or affair . . . [g]raduated and selective rather than categorical and comprehensive.”¹⁵

⁵Allison Corkery, Gilad Isaacs & Carilee Osborne, *Pushing Boundaries: Building a Community of Practice at the Intersection of Human Rights and Economics*, 40 NORDIC J. HUM. RTS. 44, 48 (2022).

⁶STEVEN WHEATLEY, *THE IDEA OF HUMAN RIGHTS LAW* 10 (2019).

⁷Stephanie Soiffer & Dane Rowlands, *Examining the Indivisibility of Human Rights: A Statistical Analysis*, 17 J. HUM. RTS. 89, 89 (2019).

⁸*Id.* at 91.

⁹WHELAN, *supra* note 2, at 6.

¹⁰*Id.* at 1, 177.

¹¹Compare James W. Nickel, *Rethinking Indisibility: Towards a Theory of Supporting Relations between Human Rights*, 30 HUM. RTS. Q. 984, 984 (2008) (pointing out that indivisibility is best understood as a strong, bidirectional form of interdependence), with WHELAN, *supra* note 2 (going furthest in teasing out the distinctions of all three adjectives before accepting the inevitability of bundling).

¹²See Nickel, *supra* note 11, at 984 (presenting the strong-form version of the indivisibility argument—that a certain level of ESR protection is an indispensable, necessary condition for CPR protection and vice versa—and further arguing that “controversial” rights (for example, ESR rights) are often but not always buttressed by more established rights in this way). See also Pablo Gilabert, *The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel*, 32 HUM. RTS. Q. 425, 430 (2010) (arguing, in contradistinction to a treatment of the lineage between rights and categories as indispensable, in favor of weaker lineage arguments (highly useful, or simply useful, as opposed to indispensable) as more reflective of the literature in the area). See *infra* Part D (discussing a survey of literature that reveals that no such empirical regularity is evident. This is a more pragmatic approach to indivisibility than Nickel’s (but still “robust,” as Gilabert argues), one premised on the empirical reality that one category may be a sufficient condition for the other, without excluding that there may also be other factors that can lead to the outcome (that is, a certain level of CPR or of ESR, as the case may be)).

¹³Helen Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights: Recent Developments Concerning the Rights of Indigenous Peoples*, 25 HARV. HUM. RTS. J. 49, 50–51 (2012); Gilabert, *supra* note 12, at 429–30.

¹⁴Nickel, *supra* note 11, at 999.

¹⁵Neil Walker, *Universalism and Particularism in Human Rights*, in HUMAN RIGHTS: THE HARD QUESTIONS 39, 50–51 (Cindy Holder & David Reidy eds., 2013).

The classic, and most common, example of the linkage argument is where indivisibility is articulated when describing the close but historically contested imbrication of the civil and political rights (CPR) aspects of individual well-being with socio-economic rights (ESR). Indeed, the I-I-I formulation is “centrally concerned” about the relationship between these two types of rights.¹⁶ The successful realization of CPR is argued to be practically impossible without realizing one or more socio-economic right(s), while the full implementation of the latter means the former is indispensable.¹⁷ Typical examples include the right to healthcare contributing to the right to life¹⁸, or the civil right to legal counsel buttressing the right to housing.¹⁹

This Article concerns itself with one particular interaction of this common mutual reinforcement argument, namely that which links democratic rights that protect the right to engage in politics—assembly, association, free expression, voting, et cetera²⁰—with socio-economic rights, including health, education, welfare, et cetera. For example:

Despite the fact that these rights are categorised differently, civil, political, economic, social and cultural rights are interrelated, interdependent and indivisible For example, if an individual is to participate meaningfully in the government of his country by making an informed decision as to who to (s)elect or whether to be (s)elected or by expressing his opinions, such an individual must have had the opportunity to be educated for it In order to form associations, an individual must have at least a source of income in order to permit him to participate meaningfully in such associations.²¹

The idea that ESR and democracy are mutually constitutive is rationally established for some, while for others it is a “powerful intuition” or strong working hypothesis.²² I explore this particular linkage argument for two reasons, namely (1) doubts about the efficacy of the I-I-I formulation for describing the real world of rights realization and (2) the phenomenon of democratic decline around the world.

As regards the first reason, Soiffer and Rowlands note that while the literature on indivisibility is divided into normative studies and empirical studies, the former is often presented more as an “aspirational assertion” than as a testable proposition.²³ There is a concern, one shared by this Article, that there is a gap between practical reality and political rhetoric as regards the I-I-I formulation.²⁴ For example, some policy actors in the developing world feel the linkage of food rights with the rights to social protection and to life makes “action more difficult” by complicating policy implementation.²⁵ Scholarship in the area is replete with exaggerated or insufficiently contextualized claims about the linkage between rights.²⁶ Scholars note the “comfortable and

¹⁶WHELAN, *supra* note 2, at 2.

¹⁷See *infra* Part C (discussing a fuller articulation of this argument).

¹⁸See generally James W. Nickel, *Can a Right to Health Care be Justified by Linkage Arguments?*, 37 THEORETICAL MED. & BIOETHICS 293, 296–300 (2016).

¹⁹See generally Risa Kaufman, Martha Davis & Heidi Wegleitner, *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772 (2014).

²⁰See, e.g., International Covenant on Civil and Political Rights arts. 19–22, 25, Dec. 16, 1996, 999 U.N.T.S. 171 [hereinafter ICCPR].

²¹Avitus Agbor, *Shifting the Matrix from Legal Passivity to a New Domestic Legal Order: Towards the Justiciability of Economic, Social and Cultural Rights in Cameroon*, 25 AFR. J. INT’L COMP. L. 176, 182–83 (2017).

²²Karl Klare, *Critical Perspectives on Social and Economic Rights, Democracy and Separation of Powers*, in SOCIAL & ECONOMIC RIGHTS IN THEORY & PRACTICE 3, 4 (Helena Alviar Garcia et al. eds., 2014).

²³Soiffer & Rowlands, *supra* note 7, at 91, 93.

²⁴Christian Olaf Christiansen & Steven Jensen, *The Road from 1966: Social and Economic Rights after the International Covenant*, in SOCIAL RIGHTS AND THE POLITICS OF OBLIGATION IN HISTORY 287, 307 (Steven Jensen & Charles Walton eds., 2022).

²⁵Jody Harris, Sarah Gibbons, O’Brien Kaaba, Tabitha Hrynick & Ruth Stirton, *A ‘Right to Nutrition’ in its Social, Legal, and Political Context: How International Human Rights Translate to Zambian Realities*, 14 J. HUM. RTS. PRAC. 879, 894 (2022).

²⁶James Nickel, *Moral Grounds for Economic and Social Rights*, in THE OXFORD HANDBOOK OF ECONOMIC & SOCIAL RIGHTS (Malcolm Langford & Katherine Young eds., 2023).

often-repeated claims” about indivisibility and urge deeper thought about the spectrum of possible supporting relations and possible trade-offs between rights.²⁷ This deeper thought may not always be welcome, however. Though the empirical record shows that strong protection of some rights is not necessarily undermined by the lesser protection of other rights,²⁸ some scholars evince concern that “no dissonant voices” as regards indivisibility are allowed in official UN rhetoric.²⁹

The creeping doubt about the empirical reality of indivisibility of combinations like ESR rights and democratic rights is compounded by a further doubt about the prospects for democracy. There has been a reversal of global democracy since the 2010s.³⁰ Reductions in the quality of relatively recent democratization processes in Africa and Latin America were compounded by high-profile contractions in places like Turkey, Hungary, India, and Bangladesh, to say nothing of the democratic elections of rhetorically and/or substantively anti-liberal figures like Donald Trump in the United States or Giorgia Meloni in Italy.³¹ Opposition parties like France’s Rassemblement National or Germany’s Alternative für Deutschland make a virtue of their declining faith in the ability of liberal democracy to solve major problems. This creates a significantly “less conducive political environment for commitment to human rights” as authoritarian and post-liberal states band together and prove less susceptible to internal and external pressure.³² At the same time, many authoritarian states have seen dramatic improvements in terms of public health, education, and social security. Outside the OECD world, both democratic and autocratic states—to say nothing of the many “grey zone” states between these poles—increasingly arrive at fairly similar outcomes in terms of education, welfare, and health guarantees. This equifinality calls into question any automatic equation of socio-economic rights with democratic freedoms. Scholars are naturally comfortable theorizing about the constructive role international human rights law (IHRL) plays in states where democratic accountability is the norm. However, the success of non-democratic states in improving rates of social minima—often at much faster rates than democracies at similar developmental levels—raises the question of whether the doctrine of indivisibility is premised on institutional assumptions that do not hold in much of the developing world. Given that non-democratic politics will permeate domestic efforts to protect and enforce the rights contained in the ICESCR, complacent assumptions about the indivisibility, interdependence and interrelatedness of democratic rights and ESR may preclude a proper understanding of how rights are realized in much of the globe.

The concern expressed in this Article is not without precedent. Whelan and Donnelly note that the interdependence of rights has been best realized in Western liberal democratic or social democratic states where the admixture of civil rights and social minima goes to the heart of domestic order.³³ There is a risk that a focus on indivisibility of rights in states where rights are mostly or fully implemented makes theorization less relevant to “to troubled and impoverished countries where at best rights are only partially realised.”³⁴ Indeed, some speculate as to whether the I-I-I framework can apply effectively in states where democratic agency is compromised by underdevelopment, administrative incapacity, or corruption.³⁵ This anxiety taps into a broader disquiet about the salience of human rights in a more diverse global normative landscape and

²⁷Nickel, *supra* note 11, at 1000–01.

²⁸Walker, *supra* note 15, at 50.

²⁹CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 136 (2014).

³⁰See *infra* Part D(I).

³¹See generally Jacob Eisler, Jonathon Havercroft, Jo Shaw, Antje Weiner & Susan Kang, *The Pendulum Swings Back: New Authoritarian Threats to Liberal Democratic Constitutionalism*, 11 GLOB. CONSTITUTIONALISM 1 (2022).

³²Bård Andreassen, *Introductory Essay: The Politics of International Human Rights Law*, in RESEARCH HANDBOOK ON THE POLITICS OF HUMAN RIGHTS LAW 1, 21 (Bård Andreassen ed., 2023).

³³Daniel Whelan & Jack Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight*, 29 HUM. RTS. Q. 908, 922 (2007).

³⁴Nickel, *supra* note 11, at 992.

³⁵Deval Desai, *Courting Legitimacy: Democratic Agency and the Justiciability of Economic and Social Rights*, 4 INTERDISC. J. HUM. RTS. L. 25, 25 (2009).

economic/climactic/political polycrisis. Even if we are not experiencing the “endtimes” for human rights that Hopgood describes,³⁶ we are certainly in harder times than was the case during the era of exuberant human rights theorization after the Cold War in which the benevolence and applicability of human rights doctrines like indivisibility were assumed with little critical assessment. Scholars increasingly call for more complex accounts of how ideal human rights theories elaborated in favourable conditions interact with state or social practices inimical to full compliance with IHRL.³⁷

In a world where some democracies fail to provide ESR and where autocracies like China, Vietnam, and Oman manage to do so,³⁸ links between human rights and democracy and development are neither automatic nor ineluctable. Chinese public policy since the dawn of Deng Xiaoping’s reforms has been explicitly premised on the ideal that economic and political freedoms are, in fact, divisible.³⁹ What is the future for the concept of indivisibility in a world where human rights and democracy are *separable* in theory⁴⁰ and increasingly *separated* in practice? Can we still maintain the indivisibility of rights to vote, assemble, and to receive information, on the one hand, and ESR on the other, in states where social minima are provided but where robust and informed debate are absent, and where decision-makers are not accountable to their people? In non-democratic states, insofar as the I-I-I formulation is evacuated of authoritarianism, conflict, and power, it risks becoming mere argot—buzzwords that carry connotations of optimism, normativity and ambition but which do not speak to many contemporary political economies.

To date, there has been no attempt to explore whether or how the “I-I-I” principle applies in non-democratic contexts. Any full theory of human rights will have to take account of both the underlap of democratic rights and ESR provision, on the one hand, and the overlap of autocracy with robust guarantees on the other. To date, there has been no attempt to do so, even amidst a growing acceptance that “rights without illusions” are more necessary than ever in underdeveloped states.⁴¹ This Article attempts to untangle some of the strands of indivisibility in order to present its actual and potential place in an area of democratic retreat. Part B briefly surveys the history of the I-I-I formulation and recapitulates the concept of indivisibility as an intrinsic aspect of rights and as an instrumental aspect of rights realization. Part C looks at the assumed mutually reinforcing relationship between participatory rights—assembly, association, voting, free press—and ESR realization. It goes on to argue that the image of participation here is implicitly a liberal democratic model. Part D looks at the decline of this liberal-democratic model since the mid-2000s, the ability of autocratic states to realize ESR even in the absence of democratic accountability, and hence the diminishing relevance of that liberal-democratic imaginary. Part E argues that we need a more refined understanding of how political regimes, institutions, and ideology interact to produce different levels of commitment and capacity to realize ESR. There are at least three plausible responses this reality gives rise to, namely (i) to alter nothing about the way we think about indivisibility, (ii) to abandon the concept of indivisibility, or (iii) to revise the concept for a more multivalent world.

³⁶See generally, STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013).

³⁷Johan Karlsson Schaffer & Reidar Maliks, *Expanding the Debate on Moral and Political Approaches to the Philosophy of Human Rights*, in *MORAL & POLITICAL CONCEPTIONS OF HUMAN RIGHTS: IMPLICATIONS FOR THEORY AND PRACTICE* 1, 2 (Reidar Maliks & Johan Karlsson Schaffer eds., 2017).

³⁸See *infra* Part D(II) (addressing the question of whether social provision in these states amounts to rights implementation).

³⁹ARCHIE BROWN, *THE RISE AND FALL OF COMMUNISM* 447–48 (2010).

⁴⁰See generally Anthony Langlois, *Human Rights Without Democracy? A Critique of the Separationist Thesis*, 25 *HUM. RTS. Q.* 990 (2003) (describing this position).

⁴¹Ben Cousins, *Capitalism Obscured: The Limits of Law and Rights-based Approaches to Poverty Reduction and Development*, 36 *J. PEASANT STUD.* 893, 906 (2009).

B. Indivisibility as a Concept

The Universal Declaration of Human Rights does not employ the language of interrelatedness or interdependence, but is clearly a holistic model of *all* rights with no sense of hierarchy or separateness. Indivisibility therefore incorporates all rights regimes, most notably those for women, children, the disabled and refugees. It has been accepted by the Inter-American Court of Human Rights⁴² and the European Court of Human Rights,⁴³ as well as constitutional or apex courts in states like India⁴⁴ and Costa Rica.⁴⁵ It is an explicit or implicit feature of Special Rapporteur reports, Human Rights Committee Concluding Observations, and General Comments by the Committee for Economic, Social, and Cultural Rights and the Office of the High Commissioner for Human Rights. Contemporary theories of human development, human rights-based approaches to development, and sustainable development require the full suite of economic, social, cultural, civil, and political rights. In the academic literature, and as noted above in the Introduction, the I-I-I formulation is a leitmotif, often repeated as an article of faith.

Indivisibility, interrelatedness, and interdependence occur *within* certain regimes—the right to health facilitates the right to work by countering illness, while the right to due process can buttress the right to privacy—and *between* regimes—the ICESCR right to housing facilitates the ICCPR right to family life. The mutually beneficial relationship implicit in interrelatedness, interdependence, and indivisibility means no one right is logically prior to another. Some links are strong—for example, the right to life and the right to security against physical attack—and some are weak—for example, Nickel notes that the right to freedom of religion does little to facilitate due process rights—to the degree that it calls into question whether indivisibility is always literally or factually true.⁴⁶

While any right is important in and of itself irrespective of any support it lends to another right—for example, the right to social security is imperative regardless of its effect on the right to food—human rights of all sorts are best understood as a complete, holistic package as opposed to a menu from which a state can choose selectively.⁴⁷ Far from ranking rights, practice and theory emphasizes the need to balance norms holistically where they conflict by ensuring clarity about the assumptions underlying the reasoning of state actors, thereby discouraging spurious or bad faith argumentation.⁴⁸ That said, dealing with rights in atomistic fashion will seldom address their root causes. People living in poverty and deprived of social minima are aware that lack of voice and power compounds economic inequality. As Yamin notes, “real people do not experience the needs or deprivations in their lives according to categories of rights.”⁴⁹ As such, both the liberty of the person and satisfaction of basic needs are key aspects of human dignity given the multidimensional nature of human well-being.⁵⁰

Most debates about the I-I-I formulation revolve around the distinction between CPR and ESR. This dichotomy is crude. In moral terms, for many theorists the intrinsic appeal of any one right is no stronger than the intrinsic appeal of any other. In practical terms, protection of all human rights requires provision of resources and a mix of both active state intervention and restraint.

⁴²Villagran Morales v. Guatemala 1999, Inter-Am. Ct. H.R. (ser. C) No. 63, paras. 144, 191 (1999).

⁴³Airey v. Ireland, App. No. 6289/73, para. 26 (Oct. 9, 1979), <https://hudoc.echr.coe.int/eng?i=001-57420>.

⁴⁴People's Union for Civ. Liberties v. Union of India, No. 196 of 2001 (Interim Order of May 2, 2003) (Supreme Court of India).

⁴⁵Alvarez v. Caja Costarricense de Seguro Social, No. 5934-97 (Constitutional Chamber of the Supreme Court of Justice, 1997) (Costa Rica).

⁴⁶James W. Nickel, *Indivisibility and Linkage Arguments: A Reply to Gilibert*, 32 HUM. RTS. Q. 439, 444 (2010).

⁴⁷Jack Donnelly, *The Virtues of Legalization*, in THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW 61, 62 (Saladin Meckled-Garcia & Basak Cali eds., 2006).

⁴⁸Holder, *supra* note 3, at 130–31.

⁴⁹Alicia Ely Yamin, *The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda*, 27 HUM. RTS. Q. 1200, 1219 (2005).

⁵⁰Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 123 (2001).

The ICCPR and ICESCR require both here-and-now actions and deferred implementation, rendering qualitative distinctions of category or generations otiose when applied to human lives. In legal terms, the General Assembly resolution that decided that there were to be separate Covenants confirmed that that “the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent,”⁵¹ something reiterated in the common Preambles of both Covenants.⁵² While the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights necessarily draw distinctions in their respective remits, some rights are included in both—for example, freedom to join trade unions. Some rights, like equality and non-discrimination are instead transversal to both, and the duties stemming from different rights might overlap—for example, the right to life and the right to health, the right to join a trade union, and the right of free association.⁵³

1. Indivisibility as a Buttress for Socio-Economic Rights

Nevertheless, while the theoretical and legal case for indivisibility is clear, what is nevertheless striking is the degree to which divisions between ESR and CPR have “hovered like an albatross” in past and present-day debates over policy prioritization, democracy, and development.⁵⁴ The historic roots lie in the false but familiar Cold War binary between supposedly “positive” ESR endorsed by the Socialist bloc and supposedly “negative” CPR upheld by the West. The focus on nascent human rights organizations in the 1970s on political prisoners and torture crystallized a greater prominence of civil and political rights over ESR in both Western civil society and foreign policy thinking.⁵⁵ It was telling that institutional and doctrinal development was very unevenly balanced in favour of civil and political rights—the CESCR only came into effect in the mid-1980s, for example, and this foundation was itself seen as an important rectification of the imbalance in supervisory arrangements between the two Covenants. As Cold War clashes over the relative importance of ESR and CPR came to a close, the UN’s Vienna World Conference on Human Rights of 1993 saw states emphasize that “[t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”⁵⁶ By this time, the tripartite “respect-protect-fulfill” framework theorized by Henry Shue⁵⁷ and mainstreamed by Asbjørn Eide and others in human rights practice⁵⁸ had already done much to solidify the I-I-I formulation by quashing the positive/negative rights dichotomy. The Optional Protocol to the ICESCR which entered into force in 2013, by virtue of opening a state-to-state complaints procedure and individual petition akin to that extant in the CPR machinery, was seen as an “ultimate vindication of the indivisibility ideal.”⁵⁹

Even though doctrinal clarifications like these are welcome, there remains concern that this “can only to a limited extent compensate for the inherent weaknesses in the regulation of

⁵¹G.A. Res. 543 (VI), Preamble (Feb. 5, 1952).

⁵²International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3, Preamble; ICCPR, *supra* note 20, at 171, Preamble.

⁵³Christian Courtis, *Standards to Make ESC Rights Justiciable: A Summary Exploration*, 2 ERASMUS L. REV. 379, 381 (2009).

⁵⁴Craig Scott, *Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?*, 10 CONST. F. 97, 97 (1998).

⁵⁵Christiansen & Jensen, *supra* note 24, at 292.

⁵⁶World Conference on Human Rights, *Vienna Declaration and Programme of Action*, para. 5, U.N. Doc. A/CONF.157/23 (June 25, 1993).

⁵⁷HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 52–60 (1980).

⁵⁸See, e.g., Asbjørn Eide (Special Rapporteur), *The Right to Adequate Food as a Human Right: Final Report Submitted by Asbjørn Eide Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987).

⁵⁹Daniel J. Whelan, *Indivisible Human Rights and the End(s) of the State*, in HUMAN RIGHTS PROTECTION IN GLOBAL POLITICS: RESPONSIBILITIES OF STATES AND NON-STATE ACTORS 69, 76 (Kurt Mills & David Karp eds., 2015).

economic, social and cultural rights” in policy and practice.⁶⁰ Widespread rhetoric of the “I-I-I” formulation has not squelched enduring suspicions that violations of civil and political rights are considered of greater urgency than violations of others.⁶¹ If justiciability remains the “dominant metaphor for the overall validity” of any right,⁶² then the fact that ESR are less justiciable than civil and political rights in places like Bangladesh causes much anxiety,⁶³ as do grossly differential levels of constitutionalization in states like Botswana.⁶⁴ International and domestic human rights NGOs still tend to prioritize CPR over ESR.⁶⁵ The systematic overemphasis in Western theory of human rights on CPR has crowded out attention to education, health, or labor rights in the present.⁶⁶ What we see is an essentially hydraulic argument—progress towards realization of ESR is seen as impossible without a “committed rejection” of the idea that civil and political rights are more important.⁶⁷ Indivisibility therefore offers a resolution to the seemingly enduring dichotomy between ESR and CPR. It is common to see indivisibility arguments take the form of a “defended” right—one that is in some way doubted or controversial, usually a form of social right—that is argued to be highly conducive to the realization of a more established “supported” right, usually civil or political.⁶⁸ Indeed, when we look closer, it is clear that ESR scholars preservatively “stress the indivisibility of human rights . . . in an attempt to point out that socio-economic rights are as important as civil and political rights.”⁶⁹ It is for this reason that Nickel argues that linkage arguments premised on the indispensability of socio-economic rights to the realization of civil and political rights “have been the most prominent way of defending ESRs since the 1960s.”⁷⁰

II. Indivisibility as a Buttress for Civil and Political Rights

However, the fear that states might systematically focus on implementing only one set of rights⁷¹ also runs in the other direction. In many states across the world from the 1960s onwards ESR were practically and rhetorically prioritized over civil and political rights. Political leaders in the so-called Second and Third Worlds argued that rights of assembly, participation, and expression would have to wait for improvement in living conditions.⁷² Consequently, ESR were consciously “deployed to justify forms of authoritarian modernization and development from the top down,

⁶⁰Ida Elisabeth Koch, *Good Governance and the Implementation of Economic, Social and Cultural Rights*, in HUMAN RIGHTS AND GOOD GOVERNANCE: BUILDING BRIDGES 73, 78 (Hans-Otto Sano et al. eds., 2002).

⁶¹Frédéric Mégret, *International Human Rights Law Theory*, in RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 164, 174 (Alexander Orakhelashvili ed., 2020).

⁶²Ludovic Langlois-Therien, *The Justiciability of Housing Rights: From Argument to Practice*, 4 J. HUM. RTS. PRAC. 213, 228 (2012).

⁶³Jobair Alam & Ali Mashraf, *Fifty Years of Human Rights Enforcement in Legal and Political Systems in Bangladesh: Past Controversies and Future Challenges*, 24 HUM. RTS. REV. 121, 122–23 (2023).

⁶⁴Emmanuel Botlhale, *The Case for the Constitutionalisation of Economic, Social and Cultural Rights in Botswana*, 13 AFR. J. LEGAL STUD. 218, 229 (2012).

⁶⁵Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), U.N. Human Rights Council, *Second Report of the Special Rapporteur on Extreme Poverty and Human Rights*, paras. 57–58, U.N. Doc. A/HRC/32/31 (Apr. 28, 2016).

⁶⁶Beth Simmons & Anton Strezhnev, *Human Rights and Human Welfare: Looking for a ‘Dark Side’ to International Human Rights Law*, in HUMAN RIGHTS FUTURES 60, 61 (Stephen Hopgood, Jack Snyder, & Leslie Vinjamuri eds., 2017).

⁶⁷Shedrack Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights*, 5 YALE HUM. RTS. & DEV. L. J. 177, 206 (2002).

⁶⁸Nickel, *supra* note 18, at 296.

⁶⁹Inga Winkler, *Socio-Economic Rights: Consolidating Progress, Charting Future Directions*, in A RESEARCH AGENDA FOR HUMAN RIGHTS 111, 115 (Michael Stohl & Alison Brysk eds., 2020).

⁷⁰Nickel, *supra* note 26, at 6.

⁷¹See Alberto Quintavalla & Klaus Heine, *Priorities and Human Rights*, 23 INT’L J. HUM. RTS. 679, 684 (2019).

⁷²Roland Burke, *Some Rights are More Equal Than Others: The Third World and the Transformation of Economic and Social Rights*, 3 HUMAN. J. 427, 439 (2012).

impinging on individual rights” found in the ICCPR,⁷³ most notably by developing states in Africa and Asia—contributing in part to the so-called “Asian values” debate.⁷⁴ While arguments to this effect have gone into abeyance, they still subsist in some important areas of policy. Most notably, Alston observes that many contemporary development approaches to poverty elevate redistribution over governance, neglecting civil and political rights instead of showing destitution as a composite of lack of voice as well as lack of minima.

All too often, when the situation of people living in poverty is addressed in either the development or human rights frameworks the focus is confined to issues of material deprivation and a lack of resources. The fact that their civil and political rights are also gravely compromised is ignored or mentioned only in passing.⁷⁵

Issues of bodily violence, due process and electoral violations are ignored by development actors, something that “undermines the principle of indivisibility of all human rights.”⁷⁶ By one admittedly crude measurement, development actors spend 95% of their time on ESR, to the exclusion of civil and political rights.⁷⁷ While accepting that lack of voice and unchecked power of the state leads to poverty, bodies like the World Bank fail to systematically incorporate civil and political rights into their operational policies.⁷⁸ While issues of democracy and participation are becoming more prevalent in human rights-based approaches to development, development agencies still emphasize ESR significantly more.⁷⁹ However, over time the ostensible dichotomy between ESR and CPR became recognized as negatively affecting development policy, with a corresponding need to integrate the two.⁸⁰

Indivisibility’s inherent emphasis on the bidirectionality and simultaneity of ESR and CPR rights precludes fixation on individual rights categories and takes us out of these sorts of binary debates.⁸¹ Put another way, the logic for viewing political rights and human welfare “as a trade-off is weaker than a logic which views these as mutually reinforcing.”⁸² While it is not logically impossible to realize ESR without a regime of civil-political rights and vice versa, and while relationships between the two categories run the spectrum from strong to weak support,⁸³ the idea that security rights found in the ICCPR and subsistence rights found in the ICESCR cannot be fully enjoyed without the other exercises significant appeal in rights theorization.⁸⁴ The most obvious instantiation of this argument, and the core focus of this Article, is the idea that democratic rights and ESR are “mutually constitutive” in the sense that socio-economic rights are of the essence to democracy and democracy is indispensable to the realization of socio-economic rights.⁸⁵

⁷³Benjamin Authers & Hilary Charlesworth, *The Crisis and the Quotidian in International Human Rights Law*, 44 NETH. Y.B. INT’L. L. 19, 32 (2014).

⁷⁴Antony Anghie, *Whose Utopia? Human Rights, Development, and the Third World*, 22 QUI PARLE 63, 76 (2013).

⁷⁵Philip Alston, *Poverty and Civil and Political Rights*, in RESEARCH HANDBOOK ON THE POLITICS OF HUMAN RIGHTS LAW 237, 237 (2023).

⁷⁶*Id.* at 238.

⁷⁷Derek Evans, *Human Rights and State Fragility: Conceptual Foundations and Strategic Directions for State-building*, 1 J. HUM. RTS. PRAC. 181, 186 (2009) (citing a powerpoint presentation by Peter Uvin at Harvard in 2006 entitled “The Emergence of the Human Rights-based Approach to Development”).

⁷⁸See Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), U.N. Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, U.N. Doc. A/70/274 (Aug. 4, 2015).

⁷⁹Joel Oestreich, *Closing the Circle of Implementation: The Sustainable Development Goals, Universal Periodic Review, and the Rights-based Approach to Development*, 28 INT’L J. HUM. RTS. 69, 83 (2024).

⁸⁰C. Raj Kumar, *National Human Rights Institutions (NHRIs) and Economic, Social and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights*, 28 HUM. RTS. Q. 755, 772 (2006).

⁸¹Soiffer & Rowlands, *supra* note 7, at 103.

⁸²Simmons & Strezhnev, *supra* note 66, at 68.

⁸³Gilabert, *supra* note 12, at 427, 429.

⁸⁴SHUE, *supra* note 57, at 21–28.

⁸⁵Klare, *supra* note 22, at 4.

C. Indivisibility: The Relationship Between Socio-Economic Rights and Democracy

It is clear from the foregoing that scholars and policy-makers consciously try to ensure ESR-based arguments “resonate” with predominantly liberal ideas and rights discourses.⁸⁶ This is most apparent in relation to justiciability, an issue at the core of debates on the indivisibility of rights. Long-familiar distinctions drawn between ESR—supposedly positive, costly, aspirational, vague—and CPR—supposedly negative, determinative, and apolitical influenced debates that called into question whether the former could be made justiciable. To the extent that judiciaries might weigh in decisively on cases regarding education or housing or welfare, familiar “bogeymen” were invoked to challenge this—imperial judges, irrational policy prioritization amidst scarce resources, cost overruns, and an institutional incapacity to cope with the polycentricity of issues that arise from individual cases.⁸⁷ These arguments generally culminated in the equation of judicial accountability for ESR violations “with an antidemocratic rise in judicial power” that called into question the proper distribution of functions between the courts and the political branches of the state under the separation of powers.⁸⁸ Critics of ESR evinced discomfort that an unelected and minoritarian institution might decide issues with significant budgetary implications or largescale impact in a way that undermined legislative representation and popular participation in a manner that was essentially “democratically illegitimate.”⁸⁹

While the argument that ESR are not justiciable has been decisively refuted, a core aspect of this success was the ability to portray the justiciability of ESR as not merely consistent with the separation of powers, but as actively constitutive of democracy. As Bilchitz puts it in relation to these debates in India, South Africa, and Colombia, “when courts enforce such guarantees against other branches of government, they are not acting, as many would have it, in an undemocratic manner; rather, they are defending the conditions necessary for the very legitimacy of the constitutional order itself.”⁹⁰ Judicial enforcement of ESR is now argued to “deepen democracy,”⁹¹ to form a democratic site of engagement for the public and the different branches of government,⁹² and to serve as an avatar of “democratically defensible distributive justice.”⁹³ The empirical record reveals that legalization of ESR thrives most in places where democracy is strongest as courts can ally themselves with civil society.⁹⁴

I. Socio-Economic Rights Build Democracy

This narrow, self-legitimizing link between ESR and democratic judiciaries is now extrapolated to the entire democratic polity. Rapporteur and expert reports under the UN’s human rights special procedures systems consistently argue that the genesis of most of the violence and exclusion that underpin CPR violations are traceable to economic root causes like poverty, marginalization, resource discrimination, and denial of ESR.⁹⁵ Formal political rights to assemble, be informed, or

⁸⁶Jean Grugel & Nicola Piper, *Do Rights Promote Development?*, 9 GLOB. SOC. POL’Y 79, 80 (2009).

⁸⁷Daniel M. Brinks & Varun Gauri, *A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* 303, 350 (Varun Gauri & Daniel Brinks eds., 2008).

⁸⁸Katharine G. Young, *Introduction*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* 1, 8 (Katharine G. Young ed., 2019).

⁸⁹SANDRA BOTERO, *COURTS THAT MATTER: ACTIVISTS, JUDGES AND THE POLITICS OF RIGHTS ENFORCEMENT* 8 (2023).

⁹⁰David Bilchitz, *Constitutionalism, the Global South, and Economic Justice*, in *CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA* 41, 53 (Daniel Bonilla Maldonado ed., 2009).

⁹¹BOTERO, *supra* note 89, at 186.

⁹²Elizabeth Brundige & Sital Kalantry, *Socio-Economic Rights: Adjudication Under a Transformative Constitution*, 34 HUM. RTS. Q. 579, 588 (2012).

⁹³KATHARINE YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* 170 (2012).

⁹⁴Brinks & Gauri, *supra* note 87, at 306, 345.

⁹⁵Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57, 62 (2011).

vote are critically limited without at least minimal subsistence entitlements.⁹⁶ As the UN Committee on Human Rights put it, difficulties such as illiteracy and poverty can prevent persons entitled to vote from exercising their rights effectively.⁹⁷ It is common to see arguments to the effect that the right to education makes the voting process legible⁹⁸ or that one is more likely to sell their vote if they are hungry.⁹⁹ In this sense, for some a threshold degree of income, healthcare, shelter, and education *are* political rights.¹⁰⁰ For others, ESR are “positively required” by the very concept of a democratic society¹⁰¹ or conceptually prior to CPR in a democracy.¹⁰² While some, therefore, might reasonably argue that elaborate political rights are a “luxury” to those who lack subsistence,¹⁰³ indivisibility provides a rebuttal to the obverse argument—ESR “dispels the misconception that civil and political rights and freedoms are luxuries relevant only to relatively affluent societies.”¹⁰⁴ ESR both widen debate about how to allocate and renew resources in society and facilitate mobilization by the poor.¹⁰⁵ Development scholars have long concluded that the more widespread welfare is in a given state, the more robust, legitimate, and consolidated a democracy becomes.¹⁰⁶ A commitment to ESR takes the state beyond a minimalist, market-based democracy to one that assumes more ambitious responsibilities in the public sphere.¹⁰⁷

II. Democracy Builds Socio-economic Rights

The reverse argument, that democracy builds ESR, is equally prevalent in I-I-I discourse. The most famous instantiation of this position is Amartya Sen’s argument that famines do not occur in functioning democracies because the apparatus of accountability precludes policy failures that would give rise to them.¹⁰⁸ People who live below the poverty threshold “are disproportionately and differentially affected by practical and legal obstacles to the exercise of their right to political participation.”¹⁰⁹ Consequently, voting—and associated rights like those to information, assembly, association, and to hold opinions—is assumed to conduce to ESR realization for three main reasons: namely (i) the creation of incentives for politicians and parties to promote rights to housing, education, food, et cetera, (ii) as an effective institutional channel for mobilization in relation to issues of social minima, and (iii) because they open up NGO policy spaces.¹¹⁰ In short, democratization of decision-making processes does much to ensure socio-economic rights form part of the state’s political calculus, particularly in relation to budgeting and

⁹⁶SHUE, *supra* note 57, at 99.

⁹⁷U.N. Human Rights Comm., *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service* (Art. 25), para. 12, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

⁹⁸Desai, *supra* note 35, at 31.

⁹⁹Lucie White & Jeremy Perelman, *Stones of Hope: Experience and Theory in African Economic and Social Rights Activism*, in *STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY* 149, 156 (Lucie White & Jeremy Perelman eds., 2020).

¹⁰⁰HAROLD WILENSKY, *THE WELFARE STATE AND EQUALITY: STRUCTURAL AND IDEOLOGICAL ROOTS OF PUBLIC EXPENDITURES* 1 (1974).

¹⁰¹Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 3, 32 (Malcolm Langford ed., 2008).

¹⁰²PATRICK MACKLEM, *THE SOVEREIGNTY OF HUMAN RIGHTS* 61 (2015).

¹⁰³ILIAS BANTEKAS AND LUTZ OETTE, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 373 (2013) (raising but not necessarily endorsing this argument).

¹⁰⁴Office of the U.N. High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, para. 27, U.N. Doc. HR/PUB/06/12 (2006).

¹⁰⁵White & Perelman, *supra* note 99, at 166.

¹⁰⁶Adrian Leftwich, *Theorizing the State*, in *POLITICS IN THE DEVELOPING WORLD* 139, 152 (Peter Burnell et al. eds., 2005).

¹⁰⁷CHARLES BEITZ, *THE IDEA OF HUMAN RIGHTS* 57 (2011).

¹⁰⁸AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 152–53 (1999).

¹⁰⁹Alston, *supra* note 75, at 244.

¹¹⁰Andrew Rosser & Maryke van Diermen, *Law, Democracy and the Fulfilment of Socioeconomic Rights: Insights from Indonesia*, 37 *THIRD WORLD Q.* 336, 344–45 (2016).

economic decision-making.¹¹¹ In both the developed and developing worlds, low voter turnout is associated with disadvantageous public sector redistribution.¹¹² The more democratic a state is, the better its score on the Social and Economic Rights Fulfilment Index, while the surrounding liberal political apparatus is presumed to impose a “floor” below which ESR achievement will not sink.¹¹³

III. The Dominance of a Liberal Democratic Model

What is striking about the mutually reinforcing arguments that “democracy is a necessary condition for the sustained realization of economic and social rights”¹¹⁴ and that ESR help build democracy is that they are reliant on a thick, substantive, liberal account of democracy. This may be surprising given that the international human rights system is ostensibly agnostic in terms of how societies organize themselves internally. The CESCR has stated that the Covenant is neutral in terms of political system,¹¹⁵ and emphasizes “participation” without reference to a specific type of inclusive political regime.¹¹⁶ However, human rights theory has long been associated with a West-coded concept of democracy that is neither indigenous nor actively desired by many societies.¹¹⁷ As Bodig argues, “once articulated systematically and in adequate detail, demands for human rights protection add up to a more general demand for adopting a particular (modern, democratic) model of statehood and governance.”¹¹⁸ Some go as far as to posit that only within a democracy do the standards contained in human rights instruments become genuine rights.¹¹⁹

This implicit model of democracy in rights theorization is one that goes beyond a formal institutional make-up with intermittent opportunities for the citizenry to endorse or reject representatives at the polls. When these bodies come to imagine such a society, “liberal democracy tends to be upheld by the international community and its institutions as the most legitimate and normatively desirable way of organizing political life.”¹²⁰ It incorporates a wide amalgam of liberal democratic ideas, practices, and relations like participation, free association, transparency, accountability, free expression, the rule of law, mutual trust, free press, diversity, and traditions of compromise. These underpin (i) active agency and/or critical consciousness of citizens in all political processes and (ii) responsiveness to the will of the people. While the ICCPR studiously avoids use of the word democracy, full realization of its norms of political participation would produce a liberal, representative democracy.¹²¹ Here, the link between liberal democracy and human rights lies somewhere between a tautology and a complex of mutually reinforcing causal factors.¹²²

¹¹¹Paul O’Connell, *Let them Eat Cake: Socio-Economic Rights in an Age of Austerity*, in HUMAN RIGHTS AND PUBLIC FINANCE: BUDGETS AND THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS 59, 72 (Aoife Nolan, Colin Harvey & Rory O’Connell eds., 2013).

¹¹²Alston, *supra* note 75, at 244–45.

¹¹³SAKIKO FUKUDA-PARR, TERRA LAWSON-REMER & SUSAN RANDOLPH, *FULFILLING SOCIAL AND ECONOMIC RIGHTS* 129, 132–33 (2015).

¹¹⁴David Beetham, *What Future for Economic and Social Rights?*, 43 POL. STUD. 41, 49 (1995).

¹¹⁵U.N. Committee on Economic, Social & Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties’ Obligations* (art. 2, para. 1), para. 8, U.N. Doc. E/1991/23 (Dec. 14, 1990).

¹¹⁶U.N. CESCR, *An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant*, para. 11, U.N. Doc. E/C.12/2007/1 (Sept. 21, 2007).

¹¹⁷Langlois, *supra* note 40, at 1002.

¹¹⁸Mátyás Bódig, *Human Rights Protection and State Capacity: The Doctrinal Implications of the Statist Character of International Human Rights Law*, in HUMAN RIGHTS IN TIMES OF TRANSITION: LIBERAL DEMOCRACIES AND CHALLENGES OF NATIONAL SECURITY 64, 79 (Kasey McCall-Smith et al. eds., 2020).

¹¹⁹Langlois, *supra* note 40, at 1014.

¹²⁰Annika Bergman Rosamond & Daria Davitti, *Gender, Climate Breakdown and Resistance: The Future of Human Rights in the Shadow of Authoritarianism*, 40 NORDIC J. HUM. RTS. 133, 136 (2022) (emphasis added).

¹²¹Langlois, *supra* note 40, at 1013.

¹²²Stephen Hopgood, Jack Snyder & Leslie Vinjamuri, *Introduction: Human Rights Past, Present and Future*, in HUMAN RIGHTS FUTURES 1, 1 (2017).

This imbrication in modern or Western democracy is equally in evidence when it comes to ESR realization. Sen's aforementioned link between democracy and absence of famine is explicitly premised on what he calls "thickly democratic" decision-making institutions that revolve around free exchange of ideas and public discussion as a means to translate capability expansion into effective state action.¹²³ In addition, most genuine democracies are characterized by a model where citizens as principals want politicians as their agents to expend maximum effort to secure socio-economic rights under international law.¹²⁴ In advanced Western states, democratic voice is routinely advanced as the reason for expanded welfare provision.¹²⁵ In African states like Malawi, Ghana, and Zambia, states with multi-party elections and electoral turnover consistently improve levels of social minima across larger segments of the population, even amidst international pressure to reign in spending on welfare.¹²⁶ In liberal democratic Latin American countries like Costa Rica, Brazil, and Ecuador, programs of nutrition, water supply, healthcare, and education have expanded in response to electoral pressures.¹²⁷ The programmatic delivery of education, healthcare, housing, et cetera requires broad public support coalitions and active engagement, an unabashed "left version of the traditional social democratic model of politics."¹²⁸ Indeed, some argue social democracy as a concept is rooted in fair and equal access to ESR.¹²⁹ Furthermore, the justiciability of ESR and the legalization thereof is argued to be best secured in the context of "a high quality, multiparty democracy."¹³⁰ While civil-political and socio-economic rights tends to be realized coterminously in OECD democracies, simultaneous progress in both categories is the aspiration of "democratic developmental states" in the Global South, those that balance the autonomous institutional attributes of a developmental state with inclusive and accountable approaches to public policy making.¹³¹

IV. An Overly Seductive Model?

On the above presentation, the theory of indivisibility, interdependence, and interrelatedness of rights is robust, bidirectional, and coincident in terms of realization—a modern democratic process both generates, and is generated by, mutually reinforcing ESR and CPR (This is so in terms of theory even if we know the practice is different—as noted earlier, states still tend to respect civil and political rights more than ESR.).¹³² This seamlessness perhaps explains why indivisibility is seen by some as "a seductive formula," one that is perhaps "a little too broad for its

¹²³SEN, *supra* note 108, at 79.

¹²⁴Mwangi Kimenyi, *Economic Rights, Human Development Effort, and Institutions*, in ECONOMIC RIGHTS: CONCEPTUAL MEASUREMENT AND POLICY ISSUES 182, 183 (Shareen Hertel & Lanse Minkler eds., 2007).

¹²⁵PETER LINDERT, GROWING PUBLIC: SOCIAL SPENDING AND ECONOMIC GROWTH SINCE THE EIGHTEENTH CENTURY 179–82 (2004).

¹²⁶See generally Giovanni Carbone & Alessandro Pellegata, *To Elect or Not to Elect: Leaders, Alternation in Power and Social Welfare in Sub-Saharan Africa*, 53 J. DEV. STUD. 1965 (2017).

¹²⁷James McGuire, *Social Policies in Latin America: Causes, Characteristics, and Consequences*, in ROUTLEDGE HANDBOOK OF LATIN AMERICAN POLITICS 200, 212 (Peter Kingstone & Deborah Yashar eds., 2012).

¹²⁸Peter Evans, Evelyne Huber & John Stephens, *The Political Foundations of State Effectiveness*, in STATES IN THE DEVELOPING WORLD 380, 387–88, 400 (Miguel Centeno, Atul Kohli, Deborah Yashar & Dinsha Mistree eds., 2017).

¹²⁹David Kinley, *Human Rights Fundamentalisms*, 29 SYD. L. REV. 545, 551 (2007).

¹³⁰Varun Gauri & Daniel Brinks, *Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights*, in COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 1, 15 (2009).

¹³¹MARK ROBINSON & GORDON WHITE, THE DEMOCRATIC DEVELOPMENTAL STATE: POLITICAL AND INSTITUTIONAL DESIGN 1–13 (1998).

Annika Bergman Rosamond & Daria Davitti, *Gender, Climate Breakdown and Resistance: The Future of Human Rights in the Shadow of Authoritarianism*, 40 NORDIC J. HUM. RTS. 133, 136 (2022)

¹³²See, e.g., Waseem Ahmad Qureshi, *Stemming the Bias of Civil and Political Rights over Economic, Social, and Cultural Rights*, 46 DENVER J. INT'L L. & POL'Y 289 (2017).

own good.”¹³³ Doubts persist that the I-I-I credo is contestable on its own terms. Qualitative examinations of indivisibility demonstrate that *only some* couplings of human rights are genuinely indivisible, that some states still consistently elevate one set of rights over the other, and that some rights relations are not bidirectional,¹³⁴ findings supported by a broader empirical literature.¹³⁵ Where implementation of a certain right is low quality, then that right offers little support to other rights.¹³⁶ Theorists further argue that there will be situations where rights conflict and where the indivisibility concept provides little by way of principled bases on which to accept or defend certain claims.¹³⁷ On this view, the I-I-I rhetoric risks becoming what Clifford Bob calls an antipolitics claim, a set of “unreflective utterances . . . to improve the right’s mobilizing power by draping it in loftiness” regardless of its unrealistic basis.¹³⁸

These doubts are compounded where all the standards of democratization are not present. Overall, as Whelan notes, the indivisibility of CPR and ESR relies on the liberal-democratic welfare state familiar in the OECD world.¹³⁹ If, as some suggest above, rights are only fully realizable where democratic governance conditions state behavior, how does indivisibility apply where electoral competition, transfers of power, pluralities of political groups, and mobilized public opinion do not exist to make governments responsive to the expression of demands and needs? As Section D goes on to show, this is the case to a greater or lesser extent in most of the developing world. Lack of democracy not only calls a theory of indivisibility into question. It draws attention to the fact that failure to observe some rights, like the rights to choose government, free speech, and free assembly, is often symptomatic of broader deficiencies on the part of states to guarantee other aspects of well-being, like those found in the ICESCR.¹⁴⁰ Where virtuous circles cannot be presumed, vicious ones may be present. As Baxi points out, beyond the Global North the insistence on the indivisible relation between democratic rights and ESR has seldom marked “any sustained, let alone any dramatic, amelioration of the plight of the human rights-violated ‘wretched of the earth.’”¹⁴¹ This state of affairs fosters the suspicion the I-I-I formulation is merely a hortatory device that elevates selective affinities in states with which scholars are familiar over empirical reality.¹⁴² An exploration of indivisibility in the context of democratic retreat and autocratic welfarism bears this out.

D. Democratic Retreat and Autocratic Welfarism

This Section explores the impact of global democratic retreat and authoritarian welfarism on theories of indivisibility, but before doing so it is worth noting the limits of “pre-retreat” democracy. The implicit democratic model outlined above of participatory channels for decision-making, accountability at the ballot box, and long-term programmatic provision are seldom fully realized even in functioning democracies. The consensual politics of technocratic management increasingly prevalent in Western states closes the spaces for productive dissensus that animate the democracy-indivisibility thesis.¹⁴³ Many of the most important negotiations and decisions about issues of health, education, distribution, et cetera are made in non-consultative, informal

¹³³Mégret, *supra* note 61, at 174.

¹³⁴Soiffer & Rowlands, *supra* note 7.

¹³⁵*Id.* at 92–93 (offering a survey of the literature).

¹³⁶Nickel, *supra* note 11, at 994.

¹³⁷Holder, *supra* note 3, at 133 (sketching but not necessarily accepting the argument).

¹³⁸CLIFFORD BOB, *RIGHTS AS WEAPONS: INSTRUMENTS OF CONFLICT, TOOLS OF POWER* 46 (2019).

¹³⁹WHELAN, *supra* note 2, at 213.

¹⁴⁰Walker, *supra* note 15, at 50.

¹⁴¹Uppendra Baxi, *Failed Decolonisation and the Future of Social Rights: Some Preliminary Reflections*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 41, 48 (Daphne Barak-Erez & Aeyal Gross eds., 2007).

¹⁴²WHELAN, *supra* note 2, at 201, 205.

¹⁴³Jacques Rancière, *Who is the Subject of the Rights of Man?*, 103 S. ATL. Q. 297, 306 (2004).

spaces as opposed to parliament. Furthermore, most modern democracies are not wholly accountable to their own citizens—multinational governance infrastructures like the EU, international financial institutions, or footloose global capital may all exercise more influence over politics than the fairest election.¹⁴⁴

In the public sphere, representative politics tends to cluster around the center-right and centre-left, emphasizing the interests of middle-class power-bases. Elsewhere, tax systems are oriented more towards the interests of powerful economic interests than towards accountability to a citizenry. Class or horizontal inequality are seldom the most salient distinctions drawn between organized groups. As Grugel and Piper put it, “Political/legal rights, it seems, can be more effectively claimed than social and economic rights . . . [I]n democracies, governments tend to respond to the needs of certain, usually politically mobilised, constituencies rather than the very poor.”¹⁴⁵ Democracies are inherently short-termist insofar as the periodic necessity to win means that the immediate needs of narrow constituencies tend to take priority over long-term, integrated, and sustainable provision of public goods. Even relatively well-functioning democratic processes struggle to ameliorate ESR deprivation, inequality, and poverty, calling into question some of the core tenets of the democratic-indivisibility thesis. In weaker democracies, skepticism is even greater—three decades-plus of democracy in places like Malawi and South Africa have done little to address inequality and poverty.¹⁴⁶

I. Democratic Retreat

For all the qualms about the efficacy of the assumed link between democracy and ESR, most states do not attain even the level of functional democracy critiqued above. It is commonly accepted that the world has been enduring a recession in terms of both quantity and quality of democracy since around 2007 that has deepened to the present day.¹⁴⁷ In the Global North, democracies are breaking down and liberal democratic freedoms are both rhetorically contested and sometimes eroded. The first months of Donald Trump’s second presidency saw significant departures from rule-of-law norms, while “democratic erosion” in Europe continues apace.¹⁴⁸ In the Global South the number of electoral democracies is declining while the quality of participation remains low.¹⁴⁹ In Africa, for example, the “modal regime type” is one of non-competitive clientelism.¹⁵⁰ Here, ruling coalitions are fragmented; power is maintained more via the distribution of rents than adherence to ideology or program. In “patronage democracies” citizens prefer the targeted benefits their patron can channel towards them over general policies for delivery of public goods.¹⁵¹ Asia has seen an increase in the number of states who manipulate elections through force, fraud, and restrictions on who can run or vote.¹⁵² While Latin America has more democracies on paper than

¹⁴⁴James Tully, Jeffrey L. Dunoff, Anthony F. Lang, Mattias Kumm & Antje Wiener, *Introducing Global Integral Constitutionalism*, 5 GLOB. CONST. 1, 7–8 (2016).

¹⁴⁵Grugel and Piper, *supra* note 86, at 90.

¹⁴⁶See, e.g., Dan Banik, *Human Rights for Human Development: The Rhetoric and the Reality*, 30 NORDIC J. HUM. RTS. 4, 31 (2012); Cousins, *supra* note 41, at 895.

¹⁴⁷Larry Diamond, *Power, Performance, and Legitimacy*, 35 J. DEMOCRACY 5, 5, 9 (2024).

¹⁴⁸CIVIL LIBERTIES UNION FOR EUROPE, *Liberties Rule of Law Report 2025* 10 (2025), <https://www.liberties.eu/f/vdxw3e>.

¹⁴⁹See generally Marianne Kneuer, *Unravelling Democratic Erosion: Who Drives the Slow Death of Democracy, and How?*, 28 DEMOCRATIZATION 1442 (2021) (discussing global democratic retreat); Andrew Little & Anne Meng, *Measuring Democratic Backsliding* 57 POL. SCI. & POL. 1 (2023) (same).

¹⁵⁰David Booth, AFRICA POWER AND POLITICS PROGRAMME OF THE OVERSEAS DEVELOPMENT INSTITUTE (UK), *Development as a Collective Action Problem* 30 (2012), <https://thepolicypractice.com/sites/default/files/2023-02/Development%2520as%2520collective%2520action%2520problem.pdf>.

¹⁵¹See generally Kanchan Chandra, *Counting Heads: A Theory of Voter and Elite Behaviour in Patronage-Democracies*, in PATRONS, CLIENT AND POLICIES: PATTERNS OF DEMOCRATIC ACCOUNTABILITY AND POLITICAL COMPETITION 84 (Herbert Kitschelt & Steven Wilkinson eds., 2007).

¹⁵²Aurel Croissant & Jeffrey Haynes, *Democratic Regression in Asia: Introduction*, 28 DEMOCRATIZATION 1, 6–9 (2021).

ever before, there have been dramatic declines in terms of quality in Venezuela, Honduras, Brazil, Bolivia, Nicaragua, Ecuador, and El Salvador in the last decade.¹⁵³ The formal incentive and accountability systems we associate with democracy are conspicuous by their absence.

In some ways this represents a failure of the so-called “third wave” of democratization in the last quarter of the twentieth century, as most supposedly transitional states found themselves in a political “gray zone” between authoritarianism and democracy.¹⁵⁴ Many parts of the world are now governed as oxymoronic “illiberal democracies” and/or as qualified democracies with “modifiers” in places like the Philippines, El Salvador, Bangladesh, Turkey, Venezuela, and vast swaths of Africa.¹⁵⁵ What we see is a range of hybrid regimes, where elements of democratic governance are mixed with forms, often predominant, of autocratic rule. Their sheer heterogeneity precludes generalization, but common features are observable. Where elections occur, they may be between corrupt or clientelistic parties.¹⁵⁶ Elections are a “weak source of pressure for performance” absent discipline on the part of rulers.¹⁵⁷ Often, one party or group will dominate power with little alternation, resulting in caesaristic or plebiscitarian executives.

Of course, the poor quality of contemporary democracies in the post-colonial world can be explained by historical-institutionalist factors. The effectiveness of any democracy is reliant on background institutional, economic, and cultural conditions that may not exist in many developing countries. Most of the states in the Global South that democratized from the 1960s onwards were places where development levels and other socio-economic indicators like the Human Development Index would historically suggest democracy might have severe difficulty embedding.¹⁵⁸ Functional democratic processes have historically been consolidated in states that have strong bureaucracies, cohesive societies, and liberal capitalist economies. As Hydén argues:

Those who are grounded in more structuralist interpretations of politics argue that democracy is a product of underlying socio-economic processes that create the conditions for the demand for democracy and respect for human rights. Pointing to the fact that these rights are foremost respected in countries that are already economically developed, like those in Europe and North America, they show that empirical research confirms the thesis that level of economic development is a significant determinant of democracy.¹⁵⁹

In these situations where these conditions did not obtain, the rapid liberalization ethos that underpinned democratization proved destabilizing, and could not be sustained. Subsequently, most of these democracies eroded “gradually and under legal disguise.”¹⁶⁰

Some now argue that a “third wave of autocratization” is emerging—though closed hereditary, military, or one-party autocracies where the executive is not subject to any electoral competition only make up around twelve percent of regimes globally.¹⁶¹ Here the rules of the game are almost entirely personalized or managed through ideologically repressive apparatuses. More frequently, authoritarian, neopatrimonial, militarized, and sultanistic regimes “construct and utilize nominally democratic institutions, particularly legislatures and multiparty elections, in order

¹⁵³Scott Mainwaring & Aníbal Pérez-Liñán, *Why Latin America's Democracies are Stuck*, 34 J. DEMOCRACY 156, 156, 161, 162 (2023).

¹⁵⁴Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5, 9 (2002).

¹⁵⁵Leah Gilbert & Payam Mohseni, *Beyond Authoritarianism: The Conceptualization of Hybrid Regimes*, 46 STUD. COMPAR. INT'L. DEV. 270, 271 (2011).

¹⁵⁶Larry Diamond, *The Democratic Rollback—The Resurgence of the Predatory State*, 87 FOREIGN AFFS. 36, 38 (2008).

¹⁵⁷Booth, *supra* note 150, at 42.

¹⁵⁸Alina Rocha Menocal, *Democracy and Development: Moving Beyond the Conundrum*, in RESEARCH HANDBOOK ON DEMOCRACY AND DEVELOPMENT 60, 62 (Gordon Crawford & Abdul-Gafaru Abdulai eds., 2021).

¹⁵⁹Göran Hydén, *Governance and Human Rights: African Challenges*, in RESEARCH HANDBOOK ON THE POLICIES OF HUMAN RIGHTS LAW 47, 49 (Bård Andreassen ed., 2023).

¹⁶⁰Anna Lührmann & Staffan Lindberg, *A Third Wave of Autocratization is Here: What is New About It?*, 26 DEMOCRATIZATION 1095, 1095 (2019).

¹⁶¹*Id.* at 1095, 1097.

to identify and manage sources of societal discontent.”¹⁶² Competitive authoritarianism is the most common form of government outside the liberal West.¹⁶³

All of this has occurred against the aforementioned background of disillusionment in liberal democracies at how this model works for those economically left behind. This is visible in the rise of leaders like Orban, Modi, Trump, and Erdogan who are willing to (a) manipulate elections and erode executive constraints and (b) indulge populist, nationalist, and anti-immigrant sentiment.¹⁶⁴ For better or worse, embattled democracies of the West see a decline in their ability to persuade or sway as illiberal powers like China and Russia challenge them for influence.¹⁶⁵ The Western model of modernity comprised of democracy, human rights, and the rule of law “is increasingly challenged by alternative models outside and beyond ‘the West.’”¹⁶⁶ The temptation on the part of liberal scholars, as Hout and Hutchison note, is to vaguely assume or hope the growth of authoritarianism and/or non-liberal projects of modernity will somehow be overcome.¹⁶⁷ It cannot be wished away. Indeed, the democracy-autocracy binary that has historically underpinned political analysis—and that has often been an explicit or implicit feature of indivisibility theorization—has for some lapsed in importance because it tells us little about how rule is carried out in relation to issues like pandemics, trade, and—most saliently—the provision of social minima¹⁶⁸

II. Welfarist Autocracy

If we accept that development is a necessary precursor to ESR, or even that they are mutually-reinforcing, then any automatic linkage between ESR and democracy is called into question. Many authoritarian and quasi-democratic states take it as axiomatic that improved development performance requires the “insulation of policymaking and implementation from arbitrary political interference From this perspective, subjecting politicians to greater social pressures through democratization may seem, at best, to miss the point.”¹⁶⁹ The fact that democracy is short-termist, disperses power, and slows decision-making also complicates developmental projects for the broad, long-term good.¹⁷⁰ Authoritarian regimes confident in the stability of their rule can, and often do, adopt longer time horizons in terms of institution-building and social investment.¹⁷¹ Performance in areas like health, housing, and education might better be ensured through hierarchical performance mechanisms than through diffuse electoral accountability. Even at the height of global democratization, it was clear that democracies do no better than non-democracies in terms of poverty reduction, and some non-democracies are among the strongest performers in this regard.¹⁷² As Khan notes, no state developed good governance capabilities that permit the

¹⁶²Dawn Brancati, *Democratic Authoritarianism: Origins and Effects*, 17 ANN. REV. POL. SCI. 313, 315 (2014).

¹⁶³Andrea Cassani, *Varieties of Autocracy and Human Development*, in RESEARCH HANDBOOK ON DEMOCRACY AND DEVELOPMENT 135, 139 (2021).

¹⁶⁴Menocal, *supra* note 158, at 66.

¹⁶⁵Emilie Hafner-Burton, *Yesterday, Today, and Tomorrow*, in HUMAN RIGHTS AT RISK: GLOBAL GOVERNANCE, AMERICAN POWER, AND THE FUTURE OF HUMAN DIGNITY 173, 179 (Irene Hadiprayitno & Salvador Santino F. Regilme eds., 2022).

¹⁶⁶TANJA BÖRZEL AND THOMAS RISSE, *EFFECTIVE GOVERNANCE UNDER ANARCHY: INSTITUTIONS, LEGITIMACY, AND SOCIAL TRUST IN AREAS OF LIMITED STATEHOOD* 1, 4 (2021).

¹⁶⁷Wil Hout and Jane Hutchison, *Introduction to the Handbook on Governance and Development*, in HANDBOOK ON GOVERNANCE AND DEVELOPMENT 1, 6 (Wil Hout and Jane Hutchison eds., 2022).

¹⁶⁸Stephan Hanson & Jeffrey Kopstein, *Understanding the Global Patrimonial Wave*, 20 PERSPS. ON POL. 237, 239 (2022).

¹⁶⁹Rod Alence, *Political Institutions and Developmental Governance in Sub-Saharan Africa*, 42 J. MOD. AFR. STUD. 163, 165 (2004).

¹⁷⁰Alina Rocha Menocal, *Political Settlements and the Politics of Transformation: Where Do “Inclusive Institutions” Come From?*, 29 J. INT’L DEV. 559, 568 (2017).

¹⁷¹BRIAN LEVY, *WORKING WITH THE GRAIN: INTEGRATING GOVERNANCE AND GROWTH IN DEVELOPMENT STRATEGIES* 15 (2014).

¹⁷²MICK MOORE & JAMES PUTZEL, *THINKING STRATEGICALLY ABOUT POLITICS AND POVERTY* 9 (1999).

delivery of widespread public goods we see in democratic states *before* they developed.¹⁷³ As a result, development agencies have “moved away from the certainties of the good-governance agenda” and instead prefer more realist or best-fit approaches to governing elites.¹⁷⁴

Authoritarian and quasi-democratic states have been successful in pursuing pro-poor development. By this is meant three things, namely (i) the reduction in mass poverty through improvement of living standards, (ii) structural economic reforms to increase access to economic resources and so reduce inequalities that sustain impoverishment, and (iii) the direction of economic growth and other aspects of the developmental agenda to benefit the poor more than the non-poor.¹⁷⁵ It can be contrasted with “human-rights-based approaches to development” on the basis that aspects of the latter like participation, empowerment, and legal accountability are largely discounted in terms of relevance.¹⁷⁶ Though pro-poor development is largely dependent on economic growth, its proactivity is best understood in contrast to more passive “trickle-down” development which assumes a passive diffusion of the benefits of this growth to all elements in society. The focus is less on income than on direct expansion of access to other essential services.¹⁷⁷ To the extent these services expand, this is considered pro-poor growth. This is so even if one service—for example, education—expands while another does not or improves at a slower pace, though most pro-poor development accepts that that poverty is a multidimensional concept involving a complex set of deprivations. East Asian developmental states of both capitalist and socialist hues have significantly expanded health, education, and other minima.¹⁷⁸ Between the 1960s and the 1980s, undemocratic South Korea paired economic growth and a good record on ESR with a strikingly poor record on CPR.¹⁷⁹ Since the 1980s, China has achieved spectacular success in reducing poverty and improving rates of education, welfare, and health while consciously eschewing competitive democratic elections and liberal freedoms. The comparison of the lower rate of ESR realization in democratic India—the paradigmatic failure being that of the right to sanitation under Article 11 ICESCR’s right to an adequate standard of living—with more authoritarian China is something many find instructive in the last twenty years.¹⁸⁰ As Moyn notes, one of the major challenges for contemporary human rights theorizing is the fact that Chinese authoritarian capitalism has “fulfilled far more aspirations to basic social protection from the most abject misery than any legal regime or political movement expressly devoted to them has ever achieved.”¹⁸¹ The comparison now extends as far as industrialized and consolidated democracies. As Birchall argues,

[W]hile less wealthy East Asian states have built extensive social housing and high-speed rail networks, eradicating hunger and vastly improving access to healthcare, Western counterparts were reducing access to affordable housing, degrading healthcare and job

¹⁷³Mushtaq Khan, *Governance and Growth: History, Ideology and Methods of Proof*, in GOOD GROWTH AND GOVERNANCE IN AFRICA: RETHINKING DEVELOPMENT STRATEGIES 51, 79 (Akbar Norman, Kwesi Botchwey, Howard Stein & Joseph E. Stiglitz ed., 2012).

¹⁷⁴SAMUEL HICKEY & KUNAL SEN, PATHWAYS TO DEVELOPMENT: FROM POLITICS TO POWER 11–12 (2024).

¹⁷⁵George Asiamah, *Pro-poor Development Strategies*, in NO POVERTY: ENCYCLOPEDIA OF THE UN SUSTAINABLE DEVELOPMENT GOALS 716, 718 (Walter Leal Filho et al. eds., 2021).

¹⁷⁶See generally Pádraig McAuliffe, *The Ambivalent Status of Socio-Economic Rights in Human Rights-Based Approaches to Development*, 40 NORDIC J. HUM. RTS. 481, (2022) (discussing human-rights-based approaches to development).

¹⁷⁷Asiamah, *supra* note 175, at 719.

¹⁷⁸VERENA FRITZ & ALINA ROCHA MENOCAL, (RE)BUILDING DEVELOPMENTAL STATES: FROM THEORY TO PRACTICE 23 (2006).

¹⁷⁹Michael Freeman, *Is a Political Science of Human Rights Possible?*, 19 NETH. Q. HUM. RTS. 123, 130 (2001).

¹⁸⁰Randall Peerenboom, *Law and Development in China and India: The Advantage and Disadvantages of Front-Loading the Costs of Political Reform* 10–12 (La Trobe L. Sch. Legal Stud., Working Paper No. 2008/15, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283209.

¹⁸¹SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD iv (2018).

security, and failing to make social improvements, all the while extolling their human rights credentials.”¹⁸²

One must be careful not to overly praise these developments in the fastest-developing autocracies. While economic growth has facilitated improvements in rights-realization rates in areas like education and health, other rights are limited by the exigencies of global competitiveness that have generated that growth. For example, in China the ICESCR Article 7 right to just and favorable conditions of work goes largely unrealized under exploitative labor regimes regulated via increasingly capitalistic relations of production.¹⁸³ The same can be said of rising developmental autocracies like Vietnam.¹⁸⁴

Elsewhere in the world there are substantially pro-poor and socially inclusive authoritarian regimes.¹⁸⁵ None of the main African states that brought in food security measures in the seventies and eighties were liberal democracies, but were instead revolutionary or technocratic autocracies committed to ideals of social welfare.¹⁸⁶ Today, the resolutely undemocratic Rwanda has dramatically reduced maternal mortality rates.¹⁸⁷ Indeed, reservations about the relatively high performance of undemocratic states like Rwanda, Ethiopia, and Uganda in areas like primary education enrolment, access to safe water, and under-five mortality “feeds into the current debates on the limits of liberal democracy and its capacity for fostering economic development.”¹⁸⁸ Long before this, the specter of Cuba, with life-expectancy and child-mortality rates comparable to those of the United States, posed broader questions for indivisibility and the rights-democracy link insofar as it may have shown it is possible to fully implement ESR without coming close to implementing the full suite of CPR.¹⁸⁹ Both closed and competitive authoritarian states build their legitimacy via the distribution of benefits,¹⁹⁰ preferring this performance legitimacy to repression and co-optation of populations. Indeed, insofar as autocratic states maintain this legitimacy through social assistance, education, and health, they do so as a conscious trade-off of development progress *against* political freedoms.¹⁹¹

Of course, doing well on ESR indicators is not the same as having a robust rights culture. It is axiomatic that authoritarian or quasi-democratic states seldom permit independent courts to weigh in on the making of public policy or to hear thoroughgoing rights claims. Rights theorists might reasonably argue that the passive enjoyment of better shelter, education, health, and welfare is not the same as individual, claimable rights vindicated in a court of law. For others, promotion of ESR through political and/or administrative channels is enough even in the absence of claimable justiciability—“even advocates of a robust role for the courts allow that litigation alone will not suffice to ensure the realization of ESR.”¹⁹² On this view, “good democratic governance is not a

¹⁸²David Birchall, *Human Rights and Political Economy: Addressing the Legal Construction of Poverty and Rights Deprivation*, 3 J. L. & POL. ECON. 393, 400 (2022).

¹⁸³MANFRED ELSTROM, WORKERS AND CHANGE IN CHINA: RESISTANCE, REPRESSION, AND RESPONSIVENESS 159 (2021).

¹⁸⁴TU PHUONG NGUYEN, WORKPLACE JUSTICE: RIGHTS AND LABOUR RESISTANCE IN VIETNAM 5 (2018).

¹⁸⁵JONATHAN DI JOHN, CONCEPTUALISING THE CAUSES AND CONSEQUENCES OF FAILED STATES: A CRITICAL REVIEW OF THE LITERATURE 38 (2008).

¹⁸⁶Sam Hickey, *Conceptualising the Politics of Social Protection in Africa*, in SOCIAL PROTECTION FOR THE POOR AND POOREST: CONCEPTS, POLICIES AND POLITICS 247, 252 (Armando Barrientos & David Hulme eds., 2008).

¹⁸⁷See, e.g., Felix Sayinzoga & Leon Bijlmakers, *Drivers of Improved Health Sector Performance in Rwanda: A Qualitative View from Within*, 16 BMC HEALTH SERV. RES. 1, 1 (2016), <https://bmchealthservres.biomedcentral.com/articles/10.1186/s12913-016-1351-4>.

¹⁸⁸Samuel Ojo Oloruntoba & Toyin Falola, *Introduction: Contextualizing the Debates on Politics, Governance and Development*, in THE PALGRAVE HANDBOOK OF AFRICAN POLITICS, GOVERNANCE AND DEVELOPMENT 1, 5 (Samuel Ojo Oloruntoba & Toyin Falola eds., 2018).

¹⁸⁹Nickel, *supra* note 11, at 987; Quintavalla & Heine, *supra* note 71, at 684–85.

¹⁹⁰Daniel Vázquez & Horacio Ortiz, *Impunity and Economic and Social Rights*, 21 HUM. RTS. REV. 159, 177 (2020).

¹⁹¹HICKEY & SEN, *supra* note 174, at 53.

¹⁹²Randall Peerenboom, *Economic and Social Rights: The Role of Courts in China*, 12 S.D. INT’L L.J. 303, 316–17 (2011).

necessary condition for the productive application of rights perspectives.”¹⁹³ The reality, as Langlois puts it, is that human rights and democracy are separable—while you cannot have democracy without human rights, you can have human rights, though certainly not all of them, without democracy.¹⁹⁴ After all, since the dawn of the UDHR, non-democratic states have signed up to human rights instruments, while the recognition of human rights has never been dependent on a state enjoying a democratic apparatus.¹⁹⁵ As he goes on, “a state merely has to see the adoption of any given human rights instrumentality as desirable: the regime does not have to be democratic, it merely has to be open to the pursuit of human rights norms.”¹⁹⁶

To point this out is not to advance any claim about a general advantage of authoritarianism rule over democratic accountability. The success of states like China, Vietnam, or Bangladesh in improving ESR indicators is found in history and circumstance, as opposed to any intrinsic superiority of repressive governance. Authoritarian rule is often more an excuse for corruption and chauvinism than a platform for development, and even the best-intentioned autocrats fail to generate growth or improved public institutions. Even where they do, there may be a point at which authoritarian developmentalism becomes more a burden than an asset, particularly where more straightforward logistical challenges—for example, building hospitals, building schools—give way to more complex “transactional” challenges like actually reducing maternal mortality or improving learning.¹⁹⁷ If there was any automatically positive correlation between autocracy and ESR realization, then many Latin American and African states would be clustered near the top of rights-realization indices. In the same way, observations about some of the weaknesses of consolidated democracy or hybrid democracies are not intended to undermine the broader case for democracy in this era of global democratic retreat. Democracy has led to inclusive development in places as diverse as India, Costa Rica and Mauritius.¹⁹⁸ There is no reason in principle why democratic responsiveness and accountability would not enhance the effectiveness of a state in development.

One does not have to personally accept that there are trade-offs between democracy and ESR in much of the world. However, one does need to accept that in many states across the globe, this trade-off is taken as axiomatic and forms the basis for the domestic political economy in which ESR will be realized. As one scholar puts it, the success of authoritarian states may not “fracture” the I-I-I principle, but leaves ample room to debate it, disagree with it, or challenge it.¹⁹⁹ There is nothing new in this. As noted earlier, the Whiggish treatment of the “I-I-I” principle in contemporary rights theorization masks earlier debates about the link between CPR and ESR. The so-called Asian Values debate revolved around the question of whether authoritarian development models could be permitted to trump the rights associated with liberal democracy. The present-day success of resolutely authoritarian governments like China and Vietnam in achieving better health, education, and welfare for their people means this question endures.²⁰⁰ The admittedly partial success of authoritarian welfarism and the struggles of democracy in realizing ESR examined in this Section reinforce the call elsewhere for exaggerated indivisibility claims to be eschewed, particularly in the context of developing states.²⁰¹ How then might we rethink the “I-I-I” formulation?

¹⁹³CAROLINE MOSER, ANDY NORTON, TIM CONWAY, CLARE FREGUSON & POLLY VIZARD, *TO CLAIM OUR RIGHTS: LIVELIHOOD SECURITY, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT* xi (2001).

¹⁹⁴Langlois, *supra* note 40, at 1013.

¹⁹⁵*Id.* at 997.

¹⁹⁶Langlois, *supra* note 40, at 998.

¹⁹⁷HICKEY & SEN, *supra* note 174, at 68–92.

¹⁹⁸RICHARD SANDBROOK, MARY EDELMAN, PATRICK HELLER & JUDITH TEICHMAN, *SOCIAL DEMOCRACY IN THE GLOBAL PERIPHERY* 65–92, 93–122, 123–46 (2007).

¹⁹⁹Kinley, *supra* note 129, at 566.

²⁰⁰*Id.* at 565.

²⁰¹Gregory Amoah, *Living up to the Normative Ideal of the Human Right to Adequate Housing in Urban Ghana*, 18 J. HUM. RTS. 439, 444 (2019).

E. Indivisibility in an Uncertain Future

The ICESCR was designed on the premise of a mid-century modernization theory which assumed post-colonial states around the world would converge on a model of high state capacity capable of progressively realizing the rights contained within. By the 1980s, it was apparent that few states outside Asia achieved this modernization.²⁰² In the 1990s, participation replaced modernization as the route to rights realization when the concept of indivisibility became mainstreamed in an era of democratic triumphalism. From the mid-2000s to the present day, this End of History triumphalism has given way to a global polycrisis, characterized by metastasizing global and domestic inequality, the rising cost of living, a pandemic, mistrust of authorities, the rise of far-right nationalism or neo-fascism, and the retreat of the West from its assumed global moral leadership, to say nothing of the growing autocracy noted throughout this Article. As Marks notes, inherited romantic narratives of human rights are inadequate to the present moment—the “well-meaning tale of vindication and deliverance needs interruption . . . [T]he forward march of progress is unsettled by a more complex and uncertain rhythm.”²⁰³ Some now fear the human rights project is “too superficial to thrive” amidst Western hegemonic decline and the reality of multiple modernities, most notably those premised on illiberal development models.²⁰⁴ States adopting authoritarian or quasi-democratic models lack the accountability and responsiveness of fully democratic regimes, but can avail of some of the advantages of authoritarianism like concentration of decision-making power, long-term decision-making, and bureaucratic discipline. Varied experiences of structural economic change outside the OECD world provide a basis for systematic reflection on what matters and what does not beyond a rote insistence on the inter-relatedness of rights. The motivation to provide social minima extends beyond, or completely eclipses, a democracy-infused rights logic—regime survival, nationalism, patronage, and other things may all exercise more influence over state policy-making.

We need fresh thinking about the implications of these insights for the concept of indivisibility. Given the large number of cases in which ESR have been realized under conditions of qualified democracy or autocracy, and the scant attention it has received in the existing literature, I posit that future studies must deepen our theoretical understanding of the non-democratic dynamics that drive provision of health, education, and welfare. This fresh thinking may require us to think in unconventional ways about political regimes and ESR outcomes. There are at least three plausible responses this possibility gives rise to, namely (i) to alter nothing about the way we think about indivisibility, (ii) to abandon the concept of indivisibility, or (iii) to revise the concept for a more multivalent world.

I. Change Nothing

The struggles this Article has explored might be considered challenging for the concept of indivisibility, but not existential. It is not axiomatic that altered causal conceptions about the link between democratic participation and provision of social minima should qualify, much less negate, principled conceptions. The present *failures* of democracies to improve ESR realization might be understood as reinforcing the reality of progressive realization under Article 2(1) ICESCR where states must take steps, using maximal available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant. Similarly, the present success of autocratic states in realizing ESR might be understood as a chimera. For those who believe human rights can only be secured in a democracy, there is a principled argument that *soi*

²⁰²Pádraig McAuliffe, *On Second (and Third) Thoughts: Raising, Revising and Reviving the Concept of Progressive Realisation Over Time*, 6 EURO. Y.B. ON HUM. RTS. 533 (2024).

²⁰³Susan Marks, *Human Rights in Disastrous Times*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 309, 321–22 (James Crawford & Martti Koskeniemi eds., 2012).

²⁰⁴Hopgood, Snyder & Vinjamuri, *supra* note 122, at 21–22.

disant human rights provided by an authoritarian regime are less genuine rights than they are privileges, whims, or gifts.²⁰⁵ As such, this also does not call the principle of indivisibility into question.

As noted earlier, the idea of indivisibility, interdependence, and interrelatedness exerts intuitive moral appeal, so much so that imagined trade-offs like undermining political rights to improve socio-economic well-being are rigidly rejected in international human rights law.²⁰⁶ Furthermore, the unease with anything that implies an acceptance of authoritarianism is something worth preserving in maintaining the field's moral clarity. Even if it is not always factually or causally true, we can understand indivisibility as what Kaldor calls a "stylized fact," where theorists can emphasize broad tendencies over individual, and sometimes controverting, detail.²⁰⁷ Indeed, it is arguable that this *already* is how we understand indivisibility. As Quane notes, indivisibility is asserted as a self-evident principle without reference to any supporting factual or theoretical matrix.²⁰⁸ A stylized fact like indivisibility can be—and, indeed, seems to be—applied on an "as if" basis whereby the theorist or advocate constructs a hypothesis that could account for a supposition like the I-I-I formulation without automatically committing herself on the accuracy of the facts or tendencies thus summarized.²⁰⁹ As Hirschman notes:

[S]tylized facts, either implicitly or explicitly, serve as normative claims that the particular regularities identified are the ones most important to study and are preferable to other potential characterizations of the evidence . . . Stylized facts are not full-blown explanations or theories, nor are they simple reports of a set of specific facts. Rather, they are lightly theorized descriptions—theories of what is and what is not worth noticing.²¹⁰

Understanding indivisibility as a stylized fact in this way makes it less a robust causal claim than a simple association that calls to be explained.²¹¹ It allows us to concentrate on those empirical regularities where indivisibility is true, or might be true, like social democracies in the Global North or developmental democracies of the Global South, without being unduly troubled by "troublesome individual cases" like those we see in illiberal developmental states.²¹²

It will come as no surprise to readers of the Article that the option of changing nothing does not find favor. Failing democracies and efficacious autocracies are not "troublesome individual cases"—they constitute most of the states containing most of the people in the world. While it is important to have empirical and theoretical models of the link between democracy and socio-economic rights, in much of the world waiting for democracy means waiting forever. As Nickel argues, "restricting claims about indivisibility to those countries where rights are fully realized means that these claims will have little relevance to troubled and impoverished countries where at best rights are only partially realized."²¹³ As noted in Section B, the indivisibility thesis is coming under increasing pressure. Rote invocations of the "I-I-I" mantra have come to substitute for critical thinking on the matter. A pristine understanding of indivisibility as it might apply in Denmark or Canada leaves a gap in our understanding of the politics of rights realization in Cambodia or Yemen.

²⁰⁵Langlois, *supra* note 40, at 1014.

²⁰⁶Eric Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1763 (2008) (pointing out and rejecting the idea).

²⁰⁷Nicholas Kaldor, *Capital Accumulation and Economic Growth*, in THE THEORY OF CAPITAL 177, 178 (D.C. Hague ed., 1961).

²⁰⁸Quane, *supra* note 13, at 50.

²⁰⁹Kaldor, *supra* note 207, at 178.

²¹⁰Daniel Hirschman, *Stylized Facts in the Social Sciences*, 3 SOCIO. SCI. 604, 608 (2016).

²¹¹*Id.* at 607.

²¹²*Id.* at 606.

²¹³Nickel, *supra* note 11, at 992.

II. Reduce Reliance on the Principle of Indivisibility

The failure of indivisibility to have anything to say about (a) those states where democracy is unresponsive to need or (b) those states where autocracy guarantees health, education, and welfare, has left the theory open to the accusation that the I-I-I credo is more an intellectual artifact than a norm that can meaningfully inform policy. The concern that philosophies of rights, like indivisibility, “risk formulating normative principles that offer little practical guidance because they fail to take into account current social realities” is a real one.²¹⁴ Few argue that indivisibility should be abandoned as a concept overall. However, Hannum holds that the rhetorical insistence on the I-I-I principle is “not realistic in theory or practice,” positing that the relatively diffused concept on indivisibility is less immediately useful than a targeted focus on the most feasible and/or fundamental rights.²¹⁵ Such an approach would have the virtue of speaking directly to both Western states that try to buttress their democratic norms even amidst declining performance in terms of ESR and to autocratic states that advance the citizen’s socio-economic welfare while watering down or eroding political freedoms. Along similar lines, Nickel argues indivisibility should assume a diminished role in interpretations of human rights compliance on the grounds that the blanket rejection of the hierarchical ordering of human rights is insufficiently sensitive to the difficulties of implementation in the most adverse circumstances, where competing interests or competing claims—between, for example, democratic freedoms and state planning—may not be reconcilable and may have to be traded off against one another.²¹⁶ The adverse circumstances he refers to will often be those illiberal developing states where the assumed role of democracy in catalyzing support for socio-economic rights is eschewed by states that either valorize strongly centralized, technocratic, or instrumental approaches to human welfare, or largely neglect human welfare. As he puts it, “claims about the indivisibility and interdependence of human rights have much less relevance to developing countries than is generally realized” given that the quality of implementation of any right or category of rights will often be low and therefore insufficient to contribute significantly to any other.²¹⁷

It is submitted that dispensing with, or severely reducing reference to, indivisibility would throw a rather precious baby out with the bathwater. Relevance is not merely a matter of empirical reliability—there will always be a role for an aspirational theory that links political and economic rights. Civil society in the developing world speaks about the cousinhood of political and economic rights because the links between the two are plausible even if they are not automatic. That said, history shows that it is immensely challenging for polities to reconcile the growth and redistribution that underpin ESR with the competitive and open politics that characterize CPR.²¹⁸ The scope for ESR and CPR to mutually inform each other will be determined by the interactions between political processes and economic variables that will not mimic models familiar to Western rights theorists. A better approach, therefore, might be one rooted in critical approaches to international human rights law, an approach that embraces “paradoxical thinking, willing to live with the full contradictory promise of rights, and accept the ambivalence inherent in them.”²¹⁹ It is to this that attention now turns.

²¹⁴Schaffer and Malik, *supra* note 37, at 2–3.

²¹⁵Hurst Hannum, *Reinvigorating Human Rights for the Twenty-First Century*, 16 HUM. RTS. L. REV. 409, 447 (2016).

²¹⁶Nickel, *supra* note 11.

²¹⁷*Id.* at 987, 997.

²¹⁸Hickey & Sen, *supra* note 174, at 123.

²¹⁹Frédéric Mégret, *Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes*, in NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND AMERICAN EXPERIENCES 3, 35 (José María Beneyto & David Kennedy eds., 2012).

III. Half a Loaf: Qualifying the Indivisibility of Political Freedoms and Socio-Economic Progress

Based on the foregoing, it is submitted that theories of indivisibility will be richer if we admit the possibility of a more nuanced political economy of rights realization beyond the oversimplifications of the I-I-I formula or rhetorical preference for democracy. Scholars examining the politics of human rights realization argue that ICESCR principles like “by all appropriate means” or “progressive realization” should be subject to a degree of “contextual pragmatism” when applied or interpreted.²²⁰ This type of pragmatism has long been in evidence in development circles, which of necessity have eschewed prior insistence on good governance and democratization to work with alternative forms of political organization that generate incentives to provide public goods like clean water or rudimentary social insurance.²²¹ Some scholars have argued international human rights theory must follow. As Ingram puts it:

[A]lthough democracy might be the best (and only) empirically effective remedy to these threats, there does not appear to be any conceptual necessity for its being the sole institutional form that a legitimate human rights regime must assume . . . combining the moral idea of equal individual human dignity with practicalities does not justify the logical necessity of liberal democracy.²²²

Qualifying the assumed link between political and economic freedoms does not serve as an endorsement of illiberal rule, but it does reflect a more adequate conception of elite political behavior than was the case at the height of the good governance and indivisibility agendas of the 1990s and 2000s. Particularly in non-democracies, it might be preferable to qualify critiques of human rights performance with realistic or pragmatic bargaining strategies, particularly where these states are making genuine progress in terms of social and economic human development.²²³ Those who do the most to undermine elections or media freedom may prove to be the most effective agents in extending schooling or generating rural employment, even if they are motivated more by growth or regime survival than the provisions of the Covenant. A rigid insistence on the indivisibility of rights does not help us better understand human elements of ESR realization in states with minimal political freedoms—how meanings are contested, how projects are committed to, how policies are translated into local contexts.

The lack of socio-economic rights is often attributed to a lack of “political will.”²²⁴ Drèze argues that we do not have an adequate account of how political will is formed in democracies where that will often fails, as noted earlier,²²⁵ but this is doubly the case in non-democracies. Political-economy analysis in the development literature has been identified as one place where human rights scholars and policy-makers might look for a better understanding of the concept in illiberal states, but this involves a conscious qualification of the legalistic and ideational language of ESR theory.²²⁶ A world where democracy is in retreat puts a premium on what development actors call

²²⁰Andreassen, *supra* note 32, at 42.

²²¹Tim Kelsall, *The Politics of Development*, in ROUTLEDGE HANDBOOK OF AFRICAN POLITICS 346, 346 (Nic Cheeseman, David Anderson & Andrea Scheibler eds., 2015).

²²²David Ingram, *Mediating the Theory and Practice of Human Rights in Morality and Law*, in MORAL & POLITICAL CONCEPTIONS OF HUMAN RIGHTS: IMPLICATIONS FOR THEORY AND PRACTICE 97, 97 (Reidar Malik & Johan Karlsson Schaffer eds., 2017).

²²³Stephen Hopgood, Jack Snyder & Leslie Vinjamuri, *Conclusion: Human Rights Futures*, in HUMAN RIGHTS FUTURES 311, 311 (Stephen Hopgood, Jack Snyder, & Leslie Vinjamuri eds., 2017) (presenting the argument, partially).

²²⁴Jean Drèze, *Democracy and the Right to Food*, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 45, 50 (Philip Alston & Mary Robinson eds., 2005).

²²⁵*Id.*

²²⁶Pádraig McAuliffe, *Opening the Black Box: Socio-economic Rights and the Question of Political Will*, 29 AUSTRALIAN J. HUM. RTS. 314, 332 (2023).

working with the grain. As such, it might call for greater flexibility about familiar rhetorical modes like the “I-I-I” formulation—legal principles like this might be used tactically, and, perhaps, sparingly, as opposed to dogmatically.²²⁷

What all of this requires is that we think of indivisibility in terms of relative outcomes, as opposed to absolute rules, of certain causal relationships between rights as desirable as opposed to necessary. There is some evidence of movement in this direction in the literature. Erman, for example, argues that it is a misapprehension to understand human rights of any stripe and democracy as mutually implied or existentially imbricated with each other. It may be more profitable, she argues, to see them “as two separate normative ideals, which under certain circumstances are strongly related, instrumentally or intrinsically, whereas under other circumstances they are not.”²²⁸ On this basis, it is plausible to argue that the universality of rights is not necessarily eroded by lesser protection of one right or set of rights—for example, political freedoms—compared to others like the socio-economic minimum core.²²⁹ Accepting the reality of some trade-offs, and identifying them, may help us ascertain which state actions must be accepted as a matter of realpolitik and which are genuinely beyond the pale.²³⁰ Of course, the context of human rights realization in illiberal democracies or autocracies rarely manifests so overt a trade-off, but states *do* often argue that political freedom must await economic development. Cognizant of this reality, some argue that we should be open to the possibility of limited disaggregation of indivisibility claims—the achievement of human rights is a matter of incremental progress, wherein “failure to achieve everything in the domain of human rights . . . is not, as such, a failure to achieve anything.”²³¹ In democracies-with-adjectives or autocracies, any capacity for citizens to determine the content of their socio-economic rights or to hold their governments may be residual, at most. However, international human rights law almost always necessitates a balance between conflicting normative priorities and principles, a balance the rhetoric of indivisibility, interdependence, and interrelatedness cannot adequately incorporate.²³² It may be time to at least partially denaturalize the received legal and theoretical wisdom about the links between democratic freedoms and human welfare.

F. Conclusion

As Keefer notes, “Many democracies fall short of many autocracies in the provision of public services or the protection of human and economic rights Understanding this puzzle is of increasing importance.”²³³ It is questionable whether the concept of indivisibility of rights helps us to understand the puzzle. There are of course good reasons for the faith in the I-I-I principle. Much of the rhetoric around indivisibility was enunciated as a conscious response to criticisms of the perceived deficiencies of the ICESCR and the supposedly flawed nature of socio-economic rights.²³⁴ In many parts of the world, economic impoverishment and political disempowerment are two sides of the same coin.²³⁵ It is intellectually and legally defensible to argue that there is no

²²⁷Hopgood, Snyder & Vinjamuri, *supra* note 223, at 321.

²²⁸Eva Erman, “*The Right to Have Rights*” to the Rescue: From Human Rights to Global Democracy, in *HUMAN RIGHTS AT THE CROSSROADS* 72, 73 (Mark Goodale ed., 2012).

²²⁹Walker, *supra* note 15, at 50.

²³⁰James Griffin, *First Steps in an Account of Human Rights*, 9 *EURO. J. PHIL.* 306, 324 (2001) (drawing on an argument herein).

²³¹Patrick Emerton, *The Particularism of Human Rights Discourse*, in *HUMAN RIGHTS: OLD PROBLEMS, NEW POSSIBILITIES* 113, 143 (David Kinley, Wojciech Sadurski & Kevin Walton eds., 2013).

²³²Frances Kamm, *Conflicts of Rights: Typology, Methodology, and Nonconsequentialism*, 7 *LEGAL THEORY* 239, 240–41 (2001).

²³³Philip Keefer, *Clientelism, Credibility, and the Policy Choices of Young Democracies*, 51 *AM. J. POL. SCI.* 804, 804 (2007).

²³⁴WHELAN, *supra* note 2, at 178.

²³⁵KATARINA TOMASEVSKI, *DEVELOPMENT AID AND HUMAN RIGHTS REVISITED* 5 (1993).

logical priority of one category of right over another, and that there should be no hierarchy where one is elevated above the other. The language of indivisibility has commendably hardened the currency of ESR in international and domestic rights theorization.

Of particular concern in this Article is the ritualistically affirmed indivisibility of ESR and those civil and political rights associated with democracy. The theory of indivisibility is theoretically plausible to the extent it reflects the classic assumption that democratically elected governments are more responsive to demands for ESR because they foster competition and participation. So powerful is this imagery that it has led to indivisibility's interpretative and semantic drift towards the liberal and social democracy models of the modern constitutional state.²³⁶ Modern democracy is attractive, connoting—and often realizing—representation, empowerment, responsive decision-making, and redistributive economic outcomes. Human rights and democracy are conceptually inseparable insofar as they express core assumptions of liberalism.²³⁷ While that is the theory, it does not reflect the practice in much of the world. States that enjoy democratic freedoms have “largely neglected issues of economic justice—basic needs such as access to food, shelter, medical care, and housing.”²³⁸ Perhaps more troublingly for indivisibility theorists, many autocracies and illiberal democracies have rapidly expanded the provision of public services and the protection of ESR over the last thirty years while denying and undermining political freedoms respectively.

It is this reality, that different categories of rights may not sustain each other and may instead exist in splendid isolation, which has given rise to the worry that the language of indivisibility is “an intellectual stopgap and a political dead end.”²³⁹ Claims about indivisibility are imprecise and fair-weather. Little thought has been given to whether and how indivisibility applies in unfavorable conditions where states do not enjoy the facilitative institutional, economic, and social conditions for democracy. This is all the more concerning in a world where Western democracies, themselves embattled, are less likely to acknowledge or criticize democratic backsliding.²⁴⁰ As Hopgood, Snyder, and Vinjamuri note, many states outside the West represent “hard cases” lacking the scope conditions for the success of conventional mainstream approaches to rights advocacy.²⁴¹ These hard cases call for distinctly pragmatic responses—the interaction of human rights and democracy may require study outside those progressive frameworks in which they were initially developed.²⁴² This Article explored three possibilities for this. The first is to leave the concept of indivisibility untouched, treating it essentially as a “stylized fact” by insisting on its relevance in all conditions, even in states where civil and political rights have little prospect for realization but where ESR become consolidated. This option was rejected. Critics increasingly note that the concepts of indivisibility, interdependence, and interrelatedness “are rarely elaborated or translated in concrete ways.”²⁴³ Refusal to adapt these ideas to states outside the world of functional democracies can only substantiate this critique. The second option is to significantly reduce reliance on indivisibility in rights theory. However, this is to go too far, losing indivisibility's ability to both capture what it means to be “fully human” and to reconcile the state's character as the biggest threat to, and facilitator of, human rights.²⁴⁴

The final, and preferred, option is to qualify the notion of indivisibility in quasi-democracies and autocratic states, particularly where these states do in fact deliver on the rights contained in

²³⁶Andreassen, *supra* note 32, at 25 (citing VINCENT ANDREW, *THE POLITICS OF HUMAN RIGHTS* 5 (2010)).

²³⁷Langlois, *supra* note 40, at 1009, 1010.

²³⁸OMANO EDIGHEJI, *A DEMOCRATIC DEVELOPMENTAL STATE IN AFRICA* 4 (2005).

²³⁹Martti Koskeniemi, *Rights, History, Critique*, in *HUMAN RIGHTS: MORAL OR POLITICAL?* 41, 54 (Adam Etinson ed., 2018).

²⁴⁰Diamond, *supra* note 147, at 14.

²⁴¹Hopgood, Snyder & Vinjamuri, *supra* note 122, at 2.

²⁴²Tully, *supra* note 144, at 2.

²⁴³Authers & Charlesworth, *supra* note 73, at 35.

²⁴⁴WHELAN, *supra* note 2, at 209, 213.

the ICESCR. As Koskenniemi notes, rights theory will struggle to inform or catalyze better responsiveness if it assumes a pre-existing harmony where none exists.²⁴⁵ The assumption of harmony has largely informed the theory of indivisibility, but it does not tally with the experiences—or, indeed, ambitions—of many states. In states that genuinely foster socio-economic rights but eschew or postpone civil and political rights, there may be a viable argument “that in certain circumstances and at certain times, a two-speed approach to human rights implementation may not only be possible, but necessary.”²⁴⁶ This does not mean endorsing or downplaying the importance of rights to free speech, free expression, and to vote, but it may help us re-envision the interactions between CPR and ESR that have proven far more fraught and disconnected than indivisibility theory has hitherto allowed. At various points the link between the two is complementary, competitive, alternative, and sequential. The struggle for human rights is always a compromise between utopianism of the sort we see in indivisibility theorization and the realism, or *realpolitik*, of states engaged in policies for human betterment in radically imperfect ecologies. The dominant democratic paradigm is not a particularly useful guide to understanding ESR progress in much of the world. There are a broader range of options for rights-realization under illiberal forms of governance than the indivisibility paradigm assumes. We must revise our assumptions as their imperfections become clear.

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²⁴⁵Koskenniemi, *supra* note 239, at 54.

²⁴⁶Kinley, *supra* note 129, at 566.