

Indivisibility of Human Rights: A Theoretical Critique

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Abstract

In human rights discourse of the last several decades there exists generous support for the concept of the indivisibility of human rights.

Indivisibility of human rights has been interpreted in many ways. It can be taken to mean that the major categories of rights – particularly civil and political rights (CPR) and economic, social and cultural rights (ESCR) – are complementary, mutually reinforcing and best realised when implemented together. Another interpretation is that these rights are equally important and possess no hierarchical distinction. Indivisible rights may also be viewed fundamentally the same and without grounds for distinction, or as constituting inseverable parts of a complete form of rights. This thesis is structured around these prominent definitions. It identifies theoretical shortcomings which could ultimately inhibit the realisation of indivisible rights.

A common thread running through the thesis is the idea that inconsistencies in the reasoning of indivisibility provide windows of opportunity in which CPR can prevail over ESCR, thus perpetuating the tradition Western focus on CPR. For example, CPR can dominate the interplay of rights if indivisibility is unable to neutralise conflicting rights or express them equally. Also, indivisibilists' idealistic search for a fundamental element common to all rights may 'fortuitously' lead to the discovery of a fundamental element framed in the vernacular of CPR, such as democracy or human dignity. Indivisibilists who alternatively deconstruct rights, stripping them of an essence, claim that this overcomes the supposed oppressive homogeneity of rights, but their critique of oppression could be perceived as an apology for CPR. Moreover, the view that the contemporary canon of rights forms a complete and indivisible totality may overstate the relative importance of CPR given their potential decline amid changing emphasis on rights.

This thesis proposes more constructive ways of conceptualising the relationship of human rights than simply in terms of indivisibility. It is suggested that rights be understood historically and within the context of competing social phenomena, which gives rise to complex dialectical relationships of rights and provides a foundation from which to appreciate how rights may be prioritised. While rights share an essence at a general level, concrete analysis highlights their relative independence. Finally, in consideration of their state of flux, rights might ultimately be deemed divisible rather than indivisible.

Introduction

Up until recent decades, the question of human rights was approached from the point of view of choosing which rights should predominate over others. The choices represent the different values, ideologies and economic interests in society, and symbolise the various socio-political and cultural traditions. These rights provide not only a major source of social cohesion in guiding social institutions, but also social division where they set apart social groups and even nations.

Doing away with the prioritisation of rights, human rights theorists of late have proposed a simple and alluring solution to the problem of competing rights, which has captured the imagination of the United Nations and many human rights thinkers. This is to treat competition not as a basic feature of rights which is to be negotiated in the advancement of rights, but rather as an error of reasoning about rights which is to be reformulated. In its place, they promote the so-called ‘indivisibility’ of human rights. Indivisibility generally means that the major categories of human rights – particularly civil and political rights (CPR) and economic, social and cultural rights (ESCR) – are inherently complementary and equal in importance, and that any attempt to privilege one set of rights over another displaces their natural balance and compromises their effectiveness. Therefore, the goal of indivisibilists is to institute all rights simultaneously, to their full potential, in all societies. In this way, competition of rights becomes redundant and is cast as a mere social construction. Such is the potency of their conviction, that the theorists have placed indivisibility on a pedestal of legal concepts amongst the likes of democracy and the rule of law.¹ Indeed, it has been said that indivisibility ‘is a concept at the very

¹ Samantha Besson, ‘The European Union and Human Rights: Towards a Post-National Human Rights Institution?’ (2006) 6(2) *Human Rights Law Review* 323, 345.

root of international human rights law',² and that it is fundamental to the 'very establishment of the United Nations'.³

Prima facie, indivisibility provides for an objective and equitable system of human rights. There is no imposition of personal judgement because the theory does not openly favour any particular rights or groups of people who prioritise certain rights. Yet on closer analysis, inconsistencies emerge. It appears that the indivisibilists' neutral position in fact masks underlying tensions between rights. If this is really the case, then not only might there be no point at which all rights can be fully realised, but the theory could act as a beacon of false hope and encumber the development of strategies for dealing with human rights problems. Essentially, this could mean continuance, if not reinforcement, of the traditional emphasis on CPR in the catalogue of human rights.

Another consideration is that since indivisibility often forms a basis or premise of human rights study, as opposed to a subject of critical analysis in itself, if the theoretical validity of indivisibility can be challenged, so might the wealth of conclusions based on its assumption.

The central purpose of this thesis is to explore whether the theory of indivisibility is able to withstand conceptual analysis of its lofty claims, and can thus be successfully applied in human rights scholarship and implemented in practice. The thesis will seek to establish if indivisibility can be supported by basic philosophical concepts, and whether it demonstrates an appreciation of human rights within their dynamic socio-historical context. The thesis constitutes a systematic and comprehensive critique of indivisibility.

Chapter 1 begins with a historical review of the theory of indivisibility, which is also referred to as the 'indivisibility thesis'. Chapters 2 to 6 are structured according to prominent interpretations in the human rights literature of the broadly defined term.

² Victoria Hamlyn, 'The Indivisibility of Human Rights: Economic, Social and Cultural Rights and the European Convention on Human Rights' (2008) 40 *Bracton Law Journal* 13, 13.

³ Asbjørn Eide, 'Interdependence and Indivisibility of Human Rights' in Yvonne Donders and Vladimir Volodin (ed), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 11, 11.

Chapter 2 contemplates indivisibility as it is understood to mean that categories of rights are complementary, and entertains contrary evidence. Chapter 3 then critiques indivisibility as a representation of the idea that rights are equally important, and in doing so considers key issues from academic debates on the hierarchy of rights. Chapter 4 looks at indivisibility as the idea that rights have basic features in common, rendering them essentially indistinguishable. Chapter 5 takes an inverse approach and considers that indivisibility represents an absence of difference of rights, and likens this to the postmodern rejection of categories and weakening of the notion of rights. Lastly, Chapter 6 examines indivisibility as meaning that the present catalogue of rights makes up a complete and immutable form of rights, and questions philosophical rationales underpinning this position. Therefore, while Chapters 2 to 5 are concerned with the relationship of rights, Chapter 6 considers rights as they exist holistically.

Finally, it is hoped that this thesis not only offers a more in-depth understanding of the concept of indivisibility – given that it is all too often used as a matter of course in the human rights discipline as opposed to a subject of study in itself – but that it also provides a general theoretical foundation from which to appreciate the significance of rights and their interactions.

Chapter 1. Indivisibility of Human Rights: A Background

History of the Indivisibility Thesis

The meaning and significance of the term ‘indivisible’ has evolved since it was first used in a human rights context in 1950. It was at this time that the Third Committee of the General Assembly of the United Nations was debating how to rework the *Universal Declaration of Human Rights* (UDHR) into a binding treaty form.⁴ Although the General Assembly originally issued a directive to draft a single instrument, there was resistance from primarily Western countries which eventually resulted in the bifurcation of rights in the UDHR into the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁵ In the midst of the debate, Argentina implored the Committee ‘not to attempt to divide the indivisible’.⁶ Hence the term indivisible was coined.

In a study tracing the history of the indivisibility thesis, Whelan notes that the expression was first used to describe the ‘fundamental unity’ of rights in the UDHR.⁷ Soon after, it came to express ‘postcolonial aspirations’ of developing countries. By the 1960s and 1970s indivisibility conveyed a message that ESCR should be afforded priority over CPR. Thus in the *Proclamation of Tehran*, adopted by the General Assembly on the 20th anniversary of the UDHR in 1968, ESCR are represented as the key rights: ‘Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political

⁴ *Universal Declaration of Human Rights*, GA Res 217 A (III) (adopted 10 December 1948).

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200 A (XXI) (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA Res 2200 A (XXI) (entered into force 3 January 1976).

⁶ Cited in Daniel J. Whelan, *Indivisible Human Rights: A History* (2010) 76.

⁷ *Ibid.* ch 1.

rights without the enjoyment of economic, social and cultural rights is impossible'.⁸ In other words, ESCR are a necessary condition for the attainment of other rights.

However, by the 1990s indivisibility had come full circle to once again signify the fundamental unity of rights. It is this meaning of indivisibility which persists in the present day, and which forms the subject of this thesis. The following fifth paragraph of the *Vienna Declaration and Programme of Action*, drafted at the Vienna World Conference on Human Rights in 1993, and adopted unanimously by 171 nations present,⁹ elucidates indivisibility from this perspective:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁰

The historical developments of the indivisibility thesis may reflect the changing ideologies of the United Nations, from an era in which socialist and developing countries had considerable sway, to the renewed vigour of liberalism in the aftermath of the Cold War. However, many human rights theorists overlook this varied history. They posit that United Nations support for indivisibility as a fundamental unity of rights has been relatively consistent, and place the *Proclamation of Tehran* on the same plane as the *Vienna Declaration*.¹¹ Such interpretation of history may be indicative of the breadth of influence of the current formulation of indivisibility.

⁸ *Proclamation of Teheran*, Final Act of the International Conference on Human Rights, Teheran, 22 April - 13 May 1968, UN Doc A/CONF.32/41 (1968), para 13; see also United Nations Audio Visual Library of International Law, *Proclamation of Tehran* <http://untreaty.un.org/cod/avl/pdf/ha/fatchr/fatchr_ph_e.pdf> at 18 September 2010.

⁹ Office of the High Commissioner for Human Rights, 'World Conference on Human Rights' <<http://www.unhcr.ch/html/menu5/wchr.htm>> at 22 May 2009.

¹⁰ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, Vienna, 14-25 June 1993, UN Doc A/CONF.157/23 (1993); 32 ILM 1661 (1993), I.5.

¹¹ See, eg, Willy Mutunga, and Alamin Mazrui, 'Rights Integration in an Institutional Context: The Experience of the Kenya Human Rights Commission' (2002) 8 *Buffalo Human Rights Law Review* 123,

Categories of Rights Considered Indivisible

The two grand categories of rights, CPR and ESCR, are the most common subjects of the indivisibility thesis. This is because the central aim of the indivisibility thesis is to challenge the traditional assumption that these rights are geographically and ideologically polarised, and to replace this assumption with the notion that they are inherently reconcilable. Therefore, much discussion by indivisibilists centres around what is considered to be an ill-conceived division of the ICCPR and ICESCR not in keeping with the UDHR.¹²

A second aim of indivisibilists is to use indivisibility as a vehicle for expanding rights discourse so that it advances the status of marginalised people and so-called ‘suppressed narratives’.¹³ Indivisibilists raise rights such as peace and development,¹⁴ and freedom from discrimination,¹⁵ to the level of rights of mainstream international law, thus

124-125; James W. Nickel, 'Rethinking Indivisibility: Towards a Theory Supporting Relations Between Human Rights' (2008) 30 *Human Rights Quarterly* 984, 985; Dinah Shelton, 'Hierarchy of Norms and Human Rights: Of Trumps and Winners' (2002) 65 *Saskatchewan Law Review* 301, 302; Atty. Rene V. Sarmiento, 'Human Rights: Universal? Indivisible? Interdependent?' (Speech delivered at the PAHRA-Sponsored Forum on Human Rights, Quezon City, Philippines, 20 June 1995).

¹² Robert Howse, and Makau Mutua, 'Protecting Human Rights in a Global Economy - Challenges for the World Trade Organization' (1999/2000) 1999/2000 *Human Rights in Development Yearbook - The Millennium Edition* 51, 76; Eide, above n 3, 11; See, eg, Center for Economic and Social Rights, *1. Historical Background of ESCR* [1]

<<http://www.cesr.org/downloads/Historical%20background%20of%20ESCR.pdf>> at 20 August 2010.

¹³ See M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence* (8th ed, 2008) 1414.

¹⁴ Gillian Moon, 'The WTO - Minus Strategy: Development and Human Rights Under WTO Law' (2008) Working Paper 10 *University of New South Wales Faculty of Law Research Series* 26; Dianne Otto, 'Rethinking the "Universality" of Human Rights Law' (1997) 29 *Columbia Human Rights Law Review* 1, 9. Cf. Katarina Tomaševski, 'Monitoring Human Rights Aspects of Sustainable Development' (1992) 8 *American University Journal of International Law and Policy* 77, 81.

¹⁵ Ian Clyde, and Simeon Beckett, 'A Human Rights Commission for the United Kingdom: The Australian Experience' (2000)(2) *European Human Rights Law Review* 131, 141.

covering third generation rights formulated by Karel Vasak in the 1970s.¹⁶ They also entertain more recent developments including so-called fourth generation rights.¹⁷

Notably, the *Vienna Declaration* proclaims that ‘all human rights’ are indivisible.¹⁸ Yet commentators have generally limited the scope of indivisibility to the three generations of rights,¹⁹ rights recognised at an international level,²⁰ and rights contained in international human rights instruments.²¹ Accordingly, the *Vienna Declaration* refers to vulnerable groups protected under international law, such as Indigenous and disabled peoples, and explicitly elaborates on the ‘human rights of women and of the girl-child’ which ‘are an inalienable, integral and indivisible part of universal human rights’.²²

Interpretations of the Indivisibility of Rights

Although the United Nations frequently employs the term indivisibility in relation to human rights, it is yet to have defined the term in any detail, regardless of indivisibility being a stranger to everyday English.²³ It has also not explained whether indivisible is unique in meaning to interdependent and interrelated, which are used alongside indivisible in the *Vienna Declaration*. Accordingly, there is little consensus among commentators. Some use the word indivisible interchangeably with interdependent and

¹⁶ Krzysztof Drzewicki, 'The Rights of Solidarity - The Third Revolution of Human Rights' (1984) 53 *Nordisk Tidsskrift International Ret* 26, 27-28; Karel Vasak, 'For the Third Generation of Human Rights: The Rights of Solidarity' (Paper presented at the Tenth Study Session of the International Institute of Human Rights [Inaugural Lecture], Strasbourg, France, 2-27 July 1979).

¹⁷ Otto, above n 14, 22.

¹⁸ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, above n 10, I.5.

¹⁹ Joel Armstrong Schoenmeyer, 'Book Review' (1996) 3 *Michigan Journal of Gender and Law* 609, 610; Office of the High Commissioner for Human Rights, *Your Human Rights* <<http://www.ohchr.org/en/issues/Pages/WhatAreHumanRights.aspx>> at 19 August 2010.

²⁰ Octávio Luiz Motta Ferraz, *Moving Beyond Rhetoric: A Critical Analysis of the Indivisibility of Human Rights* (3 August 2008) (unpublished working paper) [2] <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1294322> at 3 September 2010.

²¹ Morton Winston, 'On the Indivisibility and Interdependence of Human Rights' (Paper presented at the Twentieth World Congress of Philosophy, Boston, Massachusetts, 10-15 August 1998) 2.

²² *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, above n 10, I.18. See also *Beijing Declaration and Platform for Action*, Fourth World Conference on Women (15 September 1995).

²³ Whelan, above n 6, 3.

interrelated, and classify the three terms as logically distinct only from the other prominent adjective in the *Vienna Declaration*, universal.²⁴ Others claim that the three terms are mutually exclusive.²⁵ Nickel, for instance, suggests that more rights are interdependent than indivisible, and that the latter has stronger meaning.²⁶

Moreover, the broader significance of indivisibility is disputed. Some theorists propose that it is merely rhetorical,²⁷ or that it is purely an indication that both of the grand categories of rights are valid,²⁸ or that its purpose is simply to protect minimum human rights standards.²⁹ According to another school of thought, indivisibility has more fundamental meaning, expressing a need for the full realisation of rights,³⁰ and thereby the full realisation of what it is to be human.³¹

Generally, it is accepted by indivisibilists that CPR and ESCR have a ‘close relationship’,³² but as to the specific nature of this relationship, a wide range of views can be found in the academic literature. Therefore, it may be useful to start with a literal interpretation of the word indivisibility as connoting something which cannot be divided, that is, a unified whole. We can derive from this four themes which generally cover the field of indivisibility research conducted since the *Vienna Declaration*. The first theme is that there exists a catalogue of rights which represents a complete and unified form of rights. Second, this catalogue of rights is unified by virtue of the fact that its parts – individual rights or clusters of rights – either possess a shared essence or no distinct essences which distinguish them. Third, the unity is threatened where there is exclusion

²⁴ See, eg, Ferraz., above n 20, 2.

²⁵ See, eg, Eide, above n 3, 13-14.

²⁶ Nickel, above n 11, 987.

²⁷ Ralph Wilde, 'NGO Proposals for an Asia-Pacific Human Rights System' (1998) 1 *Yale Human Rights and Development Law Journal* 137, 138.

²⁸ Ali Mohsin Qazilbash, 'NGOs Efforts towards the Creation of a Regional Human Rights Arrangement in the Asia-Pacific Region' (1998) 4(2) *ILSA Journal of International and Comparative Law* 603, 614.

²⁹ Mary Robinson, 'Human Rights at the Dawn of the 21st Century' (1993) 15 *Human Rights Quarterly* 629, 632.

³⁰ Nickel, above n 11, 984.

³¹ Cited in Whelan, above n 6, 209.

³² See, eg, *Additional Protocol to the American Convention On Human Rights in the Area of Economic, Social, and Cultural Rights* ["Protocol of San Salvador"], Organization of American States, 16 November 1999, A-52, Preamble.

or favouring of certain rights. Fourth, the unity is consolidated in the process of its parts being interconnected and mutually reinforced.

These themes are explored in the remaining chapters of this thesis. However, as the purpose is to conceptually ‘unpack’ indivisibility, the thesis concludes rather than begins with an analysis of the idea that rights form a unified whole. Critique instead starts in relation to the abovementioned central aim of indivisibility, which is to establish that rights are not inherently irreconcilable, but rather that they complement and reinforce one another.

Extent of Support for the Indivisibility Thesis

Since the Vienna Conference, indivisibility has become an ‘official doctrine’ of the United Nations,³³ which has declared that it is ‘beyond dispute’.³⁴ Indivisibility has been reaffirmed at subsequent world conferences on human rights,³⁵ and in resolutions of the General Assembly and Human Rights Council.³⁶ It has been promoted by the United Nations High Commissioner for Human Rights,³⁷ an office created at the Vienna Conference.

³³ Nickel, above n 11, 987.

³⁴ Whelan, above n 6, 1.

³⁵ 2005 *World Summit Outcome*, UN Doc A/60/LI (15 September 2005); *Beijing Declaration and Platform for Action*, above n 22; *Report of the World Summit for Social Development*, Copenhagen, 6-12 March 1995, UN Doc A/CONF.166/9 (1995).

³⁶ Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2009) 15; *General Assembly Resolution 60/251 establishing the Human Rights Council*, UN Doc A/RES/60/251 (3 April 2006); *Human Rights Council Resolution 8/2 adopting the Optional Protocol to the International Covenant on Economic Social and Cultural Rights*, 28th meeting (18 June 2008).

³⁷ See, eg, Navanethem Pillay, 'Human Rights in United Nations Action: Norms, Institutions and Leadership' (2009)(1) *European Human Rights Law Review* 1, 2. See also Christina M. Cerna, 'A Small Step Forward for Human Rights: The Creation of the Post of United Nations High Commissioner for Human Rights' (1995) 10(4) *American University Journal of International Law and Policy* 1265, 1268-1269; Nickel, above n 11, 987.

There is broad regional endorsement of indivisibility by the Council of Europe,³⁸ the Organization of American States,³⁹ the League of Arab States,⁴⁰ the Association of Southeast Asian Nations,⁴¹ and the independent Asian Human Rights Commission.⁴² There is also some support from the African Union,⁴³ although the African *Banjul Charter* is ambiguous in the type of indivisibility it advocates, echoing both the *Vienna Declaration* and the *Proclamation of Tehran*:

Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights⁴⁴

³⁸ Regis Brillat, 'A New Protocol to the European Social Charter Providing for Collective Complaints' (1996)(1) *European Human Rights Law Review* 52, 52. See also Sionaidh Douglas-Scott, 'The Charter of Fundamental Rights as a Constitutional Document' (2004)(1) *European Human Rights Law Review* 37, 42-43; Ida Elisabeth Koch, 'The Justiciability of Indivisible Rights' (2003) 72 *Nordic Journal of International Law* 3, 3.

³⁹ See, eg, *Additional Protocol to the American Convention On Human Rights in the Area of Economic, Social, and Cultural Rights* ["Protocol of San Salvador"], above n 32, Preamble. See also Mónica Feria Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 *Human Rights Quarterly* 431, 495.

⁴⁰ *Revised Arab Charter on Human Rights*, League of Arab States, adopted 22 May 2004 (entered into force 15 March 2008), art 1.4. See also Mervat Rishmawi, 'The Arab Charter on Human Rights and the League of Arab States: An Update' (2010) 10 *Human Rights Law Review* 169, 169; Mervat Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' (2005) 5(2) *Human Rights Law Review* 361, 368.

⁴¹ *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights [Bangkok Declaration]*, Bangkok, 29 March - 2 April 1993, UN Doc A/CONF.157/ASRM/8, A/CONF.157/PC/59 (1993), Preamble, art 10; *Kuala Lumpur Declaration on Human Rights*, adopted by the ASEAN Inter-Parliamentary Organization, 14th General Assembly, 20-25 September 1993, Preamble. See also Otto, above n 14, 10; Li-ann Thio, 'Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to Go Before I Sleep'' (1999) 2 *Yale Human Rights and Development Law Journal* 1, 30; Gillian D. Triggs, *International Law: Contemporary Principles and Practices* (2006) 890.

⁴² *Asian Human Rights Charter*, Asian Human Rights Commission, Kwangju, Korea (17 May 1998), art 2.2-2.4.

⁴³ Evadné Grant, 'Accountability for Human Rights Abuses: Taking the Universality, Indivisibility, Interdependence and Interrelatedness of Human Rights Seriously' (2007) 32 *South African Yearbook of International Law* 158, 166.

⁴⁴ *African [Banjul] Charter on Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM. 58 (1982) (entered into force 21 October 1986), Preamble.

Given the consensus reached at the Vienna Conference, it has been suggested that indivisibility could form part of customary international law.⁴⁵ Indivisibility, it is said, has general and widespread acceptance,⁴⁶ and is increasingly recognised.⁴⁷ However, as Alves notes, there was lack of consensus on the Preparatory Committee of the Vienna Conference regarding nearly every paragraph of the draft *Vienna Declaration*.⁴⁸ The *Vienna Declaration* and subsequent United Nations support for indivisibility may therefore conceal underlying disagreement, particularly over ESCR.⁴⁹

Indeed, ESCR are still afforded less emphasis in practice,⁵⁰ with limited implementation such as in national constitutions, and enforcement.⁵¹ The major world power, the United States, continues to view CPR as the only ‘real’ rights,⁵² and many countries follow suit.⁵³ International non-government human rights organisations have only gradually begun to take up the plight of ESCR.⁵⁴ Ewelukwa considers that resistance to indivisibility is widespread, particularly due to ‘the Western tradition which is based on

⁴⁵ Robert F. Drinan, 'The ABA in Vienna: At the U.N. World Conference on Human Rights' (1993) 20 *Human Rights* 22, 22-23.

⁴⁶ Lila Barrera-Hernández, 'Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water' (2005) 11 *Annual Survey of International and Comparative Law* 1, 5; Frans Viljoen, *International Human Rights Law in Africa* (2007) 7.

⁴⁷ Claire Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8 *Human Rights Law Review* 617, fn 5; Kristin Nadasdy Wuerffel, 'Discriminating Among Rights?: A Nation's Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law' (1998) 33 *Valparaiso University Law Review* 369, 409, 412.

⁴⁸ José Augusto Lindgren Alves, 'The U.N. Social Agenda Against 'Postmodern' Unreason' in Kalliopi Koufa (ed), *Might and Right in International Relations* (1999) 51, 73.

⁴⁹ Ssenyonjo, above n 36, 15.

⁵⁰ Shedrack C. Agbakwa, 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177, 178; Ssenyonjo, above n 36, 4-5.

⁵¹ E. Nii Ashie Kotey, 'Some Fallacies About Rights: Of Indivisibility, Priorities and Justiciability' in International Commission of Jurists and African Development Bank (ed), *Report of a Regional Seminar on Economic, Social and Cultural Rights* (1998) 27, 27.

⁵² Ssenyonjo, above n 36, 15. See also Mary Robinson, 'From Rhetoric to Reality: Making Human Rights Work' (2003)(1) *European Human Rights Law Review* 1, 3.

⁵³ See, eg, Dejo Olowu, 'Invigorating Economic, Social and Cultural Rights in the South Pacific: A Conceptual Approach' (2007) 7(1) *Queensland University of Technology Law and Justice Journal* 71.

⁵⁴ Rainer Braun, and Judy Gearhart, 'Who Should Code Your Conduct? Trade Union and NGO Differences in the Fight for Workers' Rights' (2004) 14(1/2) *Development in Practice* 183; Asbjørn Eide, and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in Asbjørn Eide and Catarina Krause and Allan Rosas (ed), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (1995) 15, 18.

“a strong faith in full economic liberalism and a severely constrained role for the state in matters of welfare”⁵⁵.

Nevertheless, there is substantial support for indivisibility in academia and social activism, with its popularity mushrooming since the Vienna Conference. Human rights scholars have reported ‘growing consensus’,⁵⁶ and promote the United Nations’ position that indivisibility is ‘beyond dispute’.⁵⁷ Many argue that indivisibility is an ‘axiom’,⁵⁸ a ‘well-established fact’,⁵⁹ and ‘reflected and confirmed in the academic literature’.⁶⁰

Value of the Indivisibility Thesis

Importantly, in seeking to advance the status of all rights, indivisibility lends greater legitimacy to ESCR than typically experienced in Western societies, which have commonly cast ESCR as mere ‘equities’, ‘concerns’ or ‘directive principles’ rather than actual rights,⁶¹ or have downplayed their significance in relation to CPR.⁶² This is

⁵⁵ Uché U. Ewelukwa, 'Litigating the Rights of Street Children in Regional or International Fora: Trends, Options, Barriers and Breakthroughs' (2006) 9 *Yale Human Rights and Development Law Journal* 85, 118. Cf. Olowu, above n 53, 89.

⁵⁶ Ewelukwa, above n 55, 119; Conway Henderson, 'Human Rights and Regimes: A Bibliographical Essay' (1988) 10(4) *Human Rights Quarterly* 525, 534.

⁵⁷ Howse, above n 12, 77.

⁵⁸ John King Gamble, Teresa A. Bailey, Jared S. Hawk, and Erin E. McCurdy, 'Human Rights Treaties: A Suggested Typology, an Historical Perspective' (2001) 7 *Buffalo Human Rights Law Review* 33, 36; Rolf Künemann, 'A Coherent Approach to Human Rights' (1995) 17 *Human Rights Quarterly* 323, 323.

⁵⁹ Makau Mutua, 'Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission' (2004) 10 *Buffalo Human Rights Law Review* 15, 42.

⁶⁰ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge From Deprivation* (2007) 181.

⁶¹ Ferraz., above n 20, 11; Grant, above n 43, 178; Howse, above n 12, 77; John C. Mubangizi, 'Towards a New Approach to the Classification of Human Rights with Specific Reference to the African Context' (2004) 4 *African Human Rights Law Journal* 93, 98; Olowu, above n 53, 72; Ssenyonjo, above n 36, 5-6.

⁶² See, eg, Anthony Cassimatis, 'International Trade and Human Rights - Which Human Rights?' (2001) 6 *International Trade and Business Law Annual* 19, 23; Howse, above n 12, 76; Leah Leatherbee, 'International Human Rights Symposium - Introduction' (1990) 13(3) *Hamline Law Review* 463, 464; Emilio García Méndez, 'Origin, Meaning and Future of Human Rights: Reflections for a New Agenda' (2004) 1 *Sur - International Journal on Human Rights* 7, 10; Olowu, above n 53, 72; Ssenyonjo, above n 36, 4.

reflected to some extent in the ICESCR which provides that ESCR be 'progressively' realised, or programmatic, rather than immediately implemented like CPR.⁶³

Additionally, the indivisibility movement gives impetus to the demand for the justiciability of ESCR, with its reasoning that because rights are equally important and fundamentally interconnected, ESCR should be equally as enforceable as CPR and not simply 'aspirational'.⁶⁴ This presents a significant development for ESCR, particularly for those who believe that the real test of effectiveness of human rights in international treaties is their justiciability:

Treaties perform in international society the part of anaesthetics in surgery; they get the patient into a condition which makes it possible to operate ... It is no good giving gas to a man with toothache unless you have a dentist with his nippers on the premises; and it is no good dosing international society with law in treaties unless you have a judge handy to decide the legal disputes.⁶⁵

Another benefit of the indivisibility thesis is that it encourages the various human rights treaty monitoring bodies to function in a more integrated and collective fashion.⁶⁶ It is also amenable to merging these bodies such that rights are considered holistically, and so that complaints which have both ESCR and CPR dimensions are handled more appropriately.⁶⁷

⁶³ Mubangizi, above n 61, 98-100; Gunnar G. Schram, 'Human Rights and the Environment' (1992/1993) 61/62 *Nordic Journal of International Law* 141, 144; Ssenyonjo, above n 36, 5; *International Covenant on Economic, Social and Cultural Rights*, above n 5, art 2.1.

⁶⁴ Grant, above n 43, 179; Hamlyn, above n 2, 14-16; Colin Harvey, 'The Politics of Rights and Deliberative Democracy: The Process of Drafting a Northern Irish Bill of Rights' (2001)(1) *European Human Rights Law Review* 48, 63; Howse, above n 12, 77; Ssenyonjo, above n 36, 345-346; Winston, above n 21, 2.

⁶⁵ Leonard S. Woolf, 'On International Government and International Court' in Micheline R. Ishay (ed), *The Human Rights Reader: Major Political Essays, Speeches, and Documents from Ancient Times to the Present* (2nd ed, 1916/2007) 258, 258. Philip Alston, 'Economic and Social Rights' in Louis Henkin and John Lawrence Hargrove (ed), *Human Rights: An Agenda for the Next Century* (1994) 137, 157.

⁶⁶ Ernst-Ulrich Petersmann, 'On 'Indivisibility' of Human Rights' (2003) 14 *European Journal of International Law* 381, 383; Craig Scott, 'Toward the Institutional Integration of the Core Human Rights Treaties' in Isfahan Merali and Valerie Oosterveld (ed), *Giving Meaning to Economic, Social, and Cultural Rights* (2001) 7.

⁶⁷ Rachael Lorna Johnstone, 'Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body' (2007) 7(1) *Human Rights Law Review* 173, 184-185, 194; Michael O'Flaherty, and Claire O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the

Finally, when the indivisibilist idea of equal importance of rights is extended to a notion of equality of social systems, it can encourage positive international relations between different types of societies which choose to emphasise discrete rights.⁶⁸ It may thereby serve to reinforce the principles of self-determination and non-interference, which remain vital for ensuring peaceful co-existence.⁶⁹

However, with regard to indivisibility as a theoretical concept specifically applied to conceptualising the interrelations of ESCR and CPR, the following chapters examine whether it is as watertight as its proponents claim, and, if not, whether there may be a preferable theoretical approach.

Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) 7(1) *Human Rights Law Review* 141; Michael O'Flaherty, 'Towards Integration of United Nations Human Rights Treaty Body Recommendations: The Rights-Based Approach Model' in Mashood A. Baderin and Robert McCorquodale (ed), *Economic, Social and Cultural Rights in Action* (2007) 27.

⁶⁸ See Weil and Tasioulas, cited in Cassimatis, above n 62, 23, 26.

⁶⁹ See Alexander Baryshev, *The USSR and the United Nations* (1977) 13.

Chapter 2. Indivisibility as Complementary Rights

Complementary and Mutually Reinforcing Rights

The term indivisibility is commonly intended to mean that the major categories of rights are essentially complementary. In other words, they do not typically clash or exhibit contradiction, but rather are suited to a common existence which has the effect of enhancing and reinforcing them through a process of ‘synergy’ and symbiosis.⁷⁰ Hence, rights may also be described as ‘corresponding’,⁷¹ ‘interlocking’,⁷² ‘interconnected’,⁷³ ‘overlapping’,⁷⁴ ‘mutually reinforcing’,⁷⁵ and ‘enriching’.⁷⁶

Complementarists often identify violations of both CPR and ESCR in the one human rights claim. For instance, Thio highlights the United Nations Committee Against Torture’s finding that racially incited violence towards Roma people and destruction of their homes amounts to violation of freedom from torture (CPR) and the right to housing (ESCR).⁷⁷ Novogrodsky posits that CPR and ESCR are most ‘deeply intertwined’ for vulnerable people such as HIV/AIDS sufferers.⁷⁸ Although, vulnerable people are by definition disadvantaged in relation to ESCR, such that ESCR are already in play.

⁷⁰ J. Oloka-Onyango, 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for People’s Rights in Africa' (2003) 18 *American University International Law Review* 851, 913.

⁷¹ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 3.

⁷² Paul Hunt, 'Taking Economic, Social and Cultural Rights Seriously' (2006) 31(3) *Alternative Law Journal* 120, 121.

⁷³ Alston, above n 65, 147-148.

⁷⁴ Noah Novogrodsky, 'The Duty of Treatment: Human Rights and the HIV/AIDS Pandemic' (2009) 12 *Yale Human Rights and Development Law Journal* 1, 38.

⁷⁵ Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81, 123.

⁷⁶ F. M. Volkov, et al. (ed), *International Law* (Kim Pilarski trans, 1990) 8.

⁷⁷ Li-ann Thio, 'The Universal Declaration of Human Rights at 60: Universality, Indivisibility and the Three Generations of Human Rights' (2009) 21 *Singapore Academy of Law Journal* 293, 310. See also Lisa J. Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development' (2007) 10 *Yale Human Rights and Development Law Journal* 141.

⁷⁸ Novogrodsky, above n 74, 42. See also Silvia Cartwright, 'The Harkness Henry Lecture: Some Human Rights Issues' (2001) 9 *Waikato Law Review* 1, 18.

Indivisibilists present many examples of how CPR and ESCR strengthen each other with every right that is achieved, and, in the reverse, weaken each other with every right that is denied.⁷⁹ Yet there appears to be a point of diminishing returns where one right is pursued to the exclusion of another. Thus Eide suggests there are at least three ways in which rights interact: ‘positively, negatively and through balancing.’⁸⁰ This does not, however, account for the situation in which the achievement of one right directly denies the achievement of another, such as with the democratic election of a government whose policies oppose welfare.

Mutual Reinforcement and its Uncertainties

Scott identifies two types of mutual reinforcement: 1. ‘related or indirect permeability’, in which rights are separate, and 2. ‘organic or direct permeability’, in which rights form subsets of other rights.⁸¹ According to the latter, right *x* (eg, the right to life) directly protects right *y* (eg, the right to an adequate standard of living), by virtue of right *y* supposedly being a subset of right *x*. Yet it would appear that only protection of right *y*, and not any other right, can ensure protection of this right *per se*. While right *y* might be narrower than right *x* in one sense, it could be broader in another sense, or simply different, such that subsets may not be a useful system of classification. Scott proposes that the right to an adequate standard of living can be a subset of the right to life if the right to life is understood as the right to a quality life,⁸² but this seems tautological. The first type of mutual reinforcement, related or indirect permeability, may present a more prudent method of reasoning. Certainly, few people would dispute that particular rights bear particular relationships. However, it remains unclear from the theory as to the nature and significance of the relationship between rights.

⁷⁹ Howse, above n 12, 77; See, eg, Eide, ‘Interdependence and Indivisibility of Human Rights’, above n 3, 14; Pierre Sané, ‘Introduction’ in Yvonne Donders and Vladimir Volodin (ed), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 1, 2.

⁸⁰ Eide, ‘Interdependence and Indivisibility of Human Rights’, above n 3, 14.

⁸¹ Craig Scott, ‘The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights’ (1989) 27(4) *Osgoode Hall Law Journal* 769, 779-786.

⁸² *Ibid.* 783.

Theorists all too readily point to the violation of certain rights as the cause of complex social phenomena which they associate with other rights. For instance, Eide recognises deficiency of ESCR as a ‘major’ cause of Nazism and former military regimes in Latin American.⁸³ Nobel Laureate Amartya Sen identifies deprivation of CPR as the source of third world poverty.⁸⁴ He writes, ‘It is not surprising that no famine has ever taken place in the history of the world in a functioning democracy’.⁸⁵ Cassimatis likewise blames the state of CPR in East Asia for its financial crisis of the 1990s.⁸⁶ Are we then to believe that violation of CPR is the cause of the recent financial crisis of the nation famous for championing CPR, the United States? Surely, this does not necessarily follow. It appears to be a simplified approach, absent of meaningful social analysis, that where fulfilment of one set of rights is lacking, to the point of crisis, deficiency or even purported repression of another set of rights can provide automatic explanation.

Another interpretation of mutual reinforcement is that each set of rights is a ‘necessary or desirable’ precondition for the other.⁸⁷ Yet, in establishing a chain of causation, this leads one to encounter a ‘chicken or the egg’ causality dilemma. Each set of rights requires the other to be satisfied first, such that neither can ever reach fulfilment level. Mubangizi’s submission that all rights be fulfilled in order to realise any one right, presents an even graver predicament.⁸⁸ The only solution would be to implement human rights simultaneously.⁸⁹ Accordingly, the American *Protocol of San Salvador*, which endorses indivisibility, favours ‘permanent protection and promotion’ of the different categories of rights.⁹⁰

⁸³ Eide, 'Interdependence and Indivisibility of Human Rights', above n 3, 14.

⁸⁴ Sen, cited in Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2007) 372. See also Penny Overby, 'The Right to Food' (1990) 54 *Saskatchewan Law Review* 19, 29.

⁸⁵ Sen, cited in Cartwright, above n 78, 9.

⁸⁶ Cassimatis, above n 62, 62.

⁸⁷ See also Howse, above n 12, 77; Eide, 'Interdependence and Indivisibility of Human Rights', above n 3, 14.

⁸⁸ Mubangizi, above n 61, 97.

⁸⁹ Upendra Baxi, 'Too Many, or Too Few, Human Rights?' (2001) 1 *Human Rights Law Review* 1, 3; Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 *Human Rights Law Review* 349, 366.

⁹⁰ *Additional Protocol to the American Convention On Human Rights in the Area of Economic, Social, and Cultural Rights* ["*Protocol of San Salvador*"], above n 32, Preamble.

However, a number of indivisibilists have argued that it is possible, if not necessary, to concentrate on improving particular rights, given that other rights will naturally flow from these.⁹¹ Cox contends that promoting all rights holistically ‘actually undercuts the idea that human rights are indivisible because it denies that working for some rights can lead to improvements in others’.⁹² Notably, Amnesty International, a proponent of indivisibility, relies on this logic to legitimise its strong emphasis on CPR.⁹³

If Cox is correct, then it could be unnecessary to seek that ESCR be subject to immediate implementation, contrary to their presently programmatic status, or give these rights attention at all if CPR are adequately promoted and enforced. Moreover, states may not need to ratify or implement the assortment of human rights treaties if rights in one treaty can act as a catalyst for the achievement of rights in others. They might even be liberal with reservations if rights *within* treaties are mutually reinforcing. Such possibilities raise considerable doubt regarding the United Nations’ human rights machinery.

Beetham’s solution is to not pin all hope on certain rights materialising from the fulfilment of others.⁹⁴ If a right is to be protected, it should be done so directly. However, human rights are known to have many complex relationships. Haas has documented unidimensional, multidimensional, hierarchical, inverse and curvilinear relationships, whereby one right may be affected indirectly by another right.⁹⁵ Although, Haas believes that these relationships can be empirically tested and generalised across societies.⁹⁶ It is perhaps more prudent to entertain the idea of different types of relationships in different contexts, including direct realisation of rights which necessitates the promotion of all human rights treaties.

⁹¹ See, eg, Philip Iya, 'Human and Civil Rights Education - African Perspectives with South Africa as a Case Study' (1997) 132/133 *Law and Justice - Christian Law Review* 49, 59.

⁹² Katherine E. Cox, 'Should Amnesty International Expand its Mandate to Cover Economic, Social and Cultural Rights?' (1999) 16(2) *Arizona Journal of International and Comparative Law* 261, 276.

⁹³ Ibid. See also Amnesty International, *Amnesty International – INGO Accountability Charter Global Compliance Report 2009* <<http://www.amnesty.org/en/library/asset/IOR80/001/2010/en/a69a1d75-0329-414a-9a55-b244c9336ec2/ior800012010en.pdf>> at 2 October 2010.

⁹⁴ David Beetham, 'What Future for Economic and Social Rights?' (1995) 43(Special Issue) *Political Studies* 41, 49. See also Ferraz., above n 20, 3.

⁹⁵ Michael Haas, *Improving Human Rights* (1994) 7.

⁹⁶ Ibid. 7-8.

Scepticism should similarly be shown towards the idea of some indivisibilists that because there exist ‘social elements of civil rights’ and vice versa,⁹⁷ ESCR can simply be dealt with via associated articles in the ICCPR and through CPR complaints mechanisms.⁹⁸ Such idea makes redundant the recently adopted *Optional Protocol to the ICESCR* for the adjudication of ESCR complaints.⁹⁹ It could also entrench the dominance of CPR in the human rights arena, while underlining the notion that ESCR are ‘merely instrumental’.¹⁰⁰

Conflicting Rights and ‘Neutral’ Resolution Favouring CPR

When confronted with the idea of conflicting rights, indivisibilists tend to show one of three responses. The first is to deny that the incidence of conflicting rights is fatal to the indivisibility thesis. For example, Eide proposes that it is in fact consistent with indivisibility to limit one set of rights in order that a conflicting set of rights can be protected.¹⁰¹ Nickel simply chooses not to rely on ‘strong claims of invisibility’ which require that rights are ‘mutually indispensable’.¹⁰² He says that weaker claims of indivisibility have more validity because they require that rights are merely *useful* for each other. In a more recent article, Nickel’s dissatisfaction with strong claims of indivisibility culminates in what he articulates as a ‘new worry about indivisibility’

⁹⁷ Ida Elisabeth Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective' (2006) 10(4) *The International Journal of Human Rights* 405, 407.

⁹⁸ Barrera-Hernández, above n 46, 5; John Hendy, 'The Human Rights Act, Article 11, and the Right to Strike' (1998) 5 *European Human Rights Law Review* 582, 588; Aoife Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors Through the Role of the State: A Comparison of Regional Approaches to the 'Obligation to Protect'' (2009) 9 *Human Rights Law Review* 225, 250, 253; Novogrodsky, above n 74, 38-39; Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', above n 81, 844.

⁹⁹ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 24 September 2009, GA Res 63/117 (not entered into force).

¹⁰⁰ Chisanga Puta-Chekwe, and Nora Flood, 'From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights' in Isfahan Merali and Valerie Oosterveld (ed), *Giving Meaning to Economic, Social, and Cultural Rights* (2001) 39, 39.

¹⁰¹ Eide, 'Interdependence and Indivisibility of Human Rights' above n 3, 15.

¹⁰² James W. Nickel, 'Indivisibility and Linkage Arguments: A Reply to Gilabert' (2010) 32(2) *Human Rights Quarterly* 439, 441; Nickel, 'Rethinking Indivisibility: Towards a Theory Supporting Relations Between Human Rights', above n 11, 984, 992.

concerning ‘what we might call “undermining” or “conflict” relations between rights’.¹⁰³ Yet Nickel continues to identify various strengths of indivisibility and fails to engage in decisive qualitative criticism of it.¹⁰⁴

The second response to conflicting rights is to suggest that certain rights in conflicting relationships are not valid. Parmar does this by questioning the Human Rights Council’s resolutions on defamation of religion, which she argues have ‘dangerous implications’ for freedom of expression, and threaten the normative human rights framework involving indivisibility, and thus the credibility of the international human rights system.¹⁰⁵ It may be said that, in an effort to preserve the supposed sanctity of indivisibility, Parmar effectively disregards religious rights which come into conflict with her preferred system of rights.

The third response, which is perhaps the most common, is to play down the existence of conflict, both in society as a whole and in the international human rights framework. Indivisibilists often premise their belief in indivisibility on the notion of ‘ideological neutrality’.¹⁰⁶ According to indivisibilists, the dissolution of the Eastern bloc demonstrates that nations of the world are no longer at loggerheads, and hence that all rights are inherently reconcilable along ideological lines, if not devoid of ideological content. Tomaševski contends that it is a ‘smokescreen’ that ‘human rights cannot be separated from ideology, and furthermore, that human rights are essentially a domain of intensive ideological confrontation’.¹⁰⁷ For indivisibilists, it follows that without ideologically conflicting rights, governments have the potential to respect human rights holistically.¹⁰⁸

¹⁰³ Nickel, 'Indivisibility and Linkage Arguments: A Reply to Gilabert', above n 102, 445-446.

¹⁰⁴ Ibid. 440. See also Pablo Gilabert, 'The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel' (2010) 32(2) *Human Rights Quarterly* 425.

¹⁰⁵ Sejal Parmar, 'The Challenge of "Defamation of Religions" to Freedom of Expression and the International Human Rights' (2009)(3) *European Human Rights Law Review* 353, 353, 373.

¹⁰⁶ See, eg, Cassimatis, above n 62, 23.

¹⁰⁷ Katarina Tomaševski, 'Human Rights: The Right to Food' (1984/1985) 70 *Iowa Law Review* 1321, 1326.

¹⁰⁸ Ibid.

However, there is significant evidence of conflict within and between CPR and ESCR, with freedom of speech versus freedom of privacy, women's rights versus religious and cultural freedom, religious rights versus freedom of education, etc.¹⁰⁹ Importantly, one of the most intense clashes of rights involves the civil right to private property. This is because a society's laws regarding property go a long way towards defining its socio-economic basis, such that conflict involving property rights can reflect conflict of ideology and social systems themselves.¹¹⁰

There are different schools of thought on the question of how conflicting property rights can be managed in international law. Not so controversially, one school believes that conflict can be avoided through discussion of rights in a general way (the 'generalisation approach'). Kartashkin explains that international human rights law has been acknowledged by both capitalist and socialist countries which have their own ideas about rights, precisely because it is stated in general terms, *sans* a 'class assessment'.¹¹¹ Thus the generalisation approach allows international law to maintain a reasonably relativist position.¹¹² More problematic is a school of thought, consistent with the indivisibility thesis, which sees that conflict can be overcome by finding a golden mean or neutral equilibrium of rights (the 'equilibrium approach'). Buergenthal accordingly perceives the UDHR as having 'politically balanced' content.¹¹³

Marković promotes the generalisation approach, but in doing so, overshadows it with the equilibrium approach. He considers that the generalisation of rights is made possible

¹⁰⁹ See, eg, Cassimatis, above n 62, 56; Hilary Charlesworth, 'Resolving Conflicting Human Rights Standards in International Law: Remarks' (1991) 85 *American Society of International Law Proceedings* 336, 346; Emmanuel Decaux, 'Cultural Rights: Universal, Indivisible, and Legally Enforceable Individual Rights' (1995) 38A *Yearbook of the European Convention on Human Rights, the European Commission and European Court of Human Rights* 27, 30; Carolyn Evans, 'Religious Education in Public Schools: An International Human Rights Perspective' (2008) 8 *Human Rights Law Review* 449, 455-456; Tom Farer, 'The Hierarchy of Human Rights' (1992) 8 *American University Journal of International Law and Policy* 115, 119; Tracy E. Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 *Harvard Women's Law Journal* 89; Ssenyonjo, above n 36, 5, 16.

¹¹⁰ See Christopher Saporita, 'Reconciling Human Rights and Sovereignty: A Framework for Global Property Law' (2003) 10(2) *Indiana Journal of Global Legal Studies* 255, 263.

¹¹¹ Vladimir Kartashkin, *Human Rights: What We Argue About* (Nancy R. Lasse trans, 1989) 59-60.

¹¹² Cf. Pitman B. Potter, 'Human Rights in China: The Interplay Between Political and Socioeconomic Rights' (1987) 12 *American Bar Foundation Research Journal* 617, 619.

¹¹³ Thomas Buergenthal, 'International Human Rights in an Historical Perspective' in Janusz Symonides (ed), *Human Rights: Concept and Standards* (2000) 3, 16.

because Marxists and liberals converge in their thinking about private property and government involvement in providing for people's needs.¹¹⁴ For example, neither Marxists nor liberals support the abolition of personal property and both accept some form of social security and welfare. Marković appears to err when he claims that liberals recognise broader property rights, that is, the right to own property in itself, including communal property which he likens to the corporation.¹¹⁵ His quantitative analysis obscures the key qualitative difference between private and public property, namely, the profit motive. Yet profit is ingrained in his thinking, to the point that he sees that communal property can exist in the form of private corporations with public shares. If these are sufficient, there need not be any ownership of public property as it is traditionally understood. Thus, Marković's ostensibly neutral compromise solution to the problem of conflicting rights shows bias towards private property and CPR.

The equilibrium approach is reflected in the industrial laws of many Western countries, including Australia, which recognise both a right to join and not join a union,¹¹⁶ and thereby turn the Industrial Labor Organisation's principle of freedom of association on its head.¹¹⁷ Arguably, the right not to join a union can undermine the right to join a union, as unions are weakened with every worker who exercises freedom *from* association. Yet the reverse is not necessarily the case. The strength of non-union members can far outweigh their numbers, and even more so if they actively oppose union actions. Therefore, it can be said that the individualist values of CPR which are associated with the right not to join a union predominate in a supposedly free society which permits both types of rights.

Tensions between conflicting rights are often resolved in favour of private interests in international law. Ederington, citing Grotius and Pufendorf, notes that private property

¹¹⁴ Mihailo Marković, 'Philosophical Foundations of Human Rights' (1981) 1(4) *Praxis International* 386, 9-11.

¹¹⁵ Ibid. 10.

¹¹⁶ See, eg, *Fair Work Act 2009* (Cth) s 346(a).

¹¹⁷ *Constitution of the International Labour Organization*, adopted 1919, amended 1944 by the Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia), Preamble, Annex I(b); *ILO Declaration on Fundamental Principles and Rights at Work*, adopted at the 86th Session of the International Labour Conference, Geneva, June 1998, art 2(a).

protection has been one of international law's 'most pronounced themes'.¹¹⁸ The UDHR provides for private property rights (art 17) and intellectual property rights (art 27), and proscribes discrimination on the basis of property (art 2). Various regional and national instruments have followed suit.¹¹⁹ On the other hand, neither the UDHR nor the ICESCR promote public property ownership *per se*. Thus Cerna's observation that the UDHR can 'support almost any proposition',¹²⁰ may be somewhat misleading.

The UDHR does mention property ownership 'in association with others',¹²¹ but the *Paris Charter*, drafted in 1990 following the fall of socialism, attempts to dispel any ambiguity, adding freedom of 'individual enterprise' to the UDHR's phraseology and designating this as a fundamental right.¹²² Saporita is keen to include 'wealth property' in the definition of private property,¹²³ and a slew of thinkers propose that human rights are compatible with new forms of global capitalism and business ethics, and are even 'good for business'.¹²⁴ Such optimism suggests that private property rights are more effective at excluding rather than complementing public interests.

If conflict of private and public interests remains deep-seated in contemporary society, as many theorists suggest,¹²⁵ one would expect that discussion be raised about its resolution. However, as Cassese notes, the Vienna Declaration's catchphrase on indivisibility 'serves

¹¹⁸ L. Benjamin Ederington, 'Property as a Natural Institution: The Separation of Property from Sovereignty in International Law' (1997) 13 *American University International Law Review* 263, 264.

¹¹⁹ *African [Banjul] Charter on Human and Peoples' Rights*, above n 44, art 14; *American Convention on Human Rights*, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, art 21; *European Convention on Human Rights [Convention for the Protection of Human Rights and Fundamental Freedoms]*, ETS 5/ 213 UNTS 221, Rome, 4 November 1950, art 14, protocol 1 (art 1); See, eg, *Human Rights Act 1998* (UK) art 14, protocol 1 (art 1).

¹²⁰ Cerna, above n 37, 1267.

¹²¹ *Universal Declaration of Human Rights*, above n 4, art 17(1).

¹²² Ederington, above n 118, 264; *Charter of Paris for a New Europe*, Meeting of the Heads of State or Government of the participating States of the Conference on Security and Co-operation in Europe, Paris, 19-21 November 1990, 4.

¹²³ Saporita, above n 110, 277-281.

¹²⁴ See, eg, Damian Grace, 'Business Ethics and Human Rights' (1998) 4(2) *Australian Journal of Human Rights* 59, 1, 7; Howse, above n 12, 56; Adam Lopatka, 'Comment: Two Conceptions of Human Rights' (1990) 15 *Bulletin of the Australian Society of Legal Philosophy* 30, 32; Thomas Donaldson, *The Ethics of International Business* (1989).

¹²⁵ See, eg, Baxi, above n 89, 4; Beetham, above n 94, 50; Cassimatis, above n 62, 56; Decaux, above n 109, 29; Farer, above n 109, 118-119.

to dampen the debate' on conflict, 'while leaving everything the way it was'.¹²⁶ One can go a step further and suggest that by staying silent, indivisibility could effectively consolidate existing relationships of dominant CPR and subordinate ESCR.

Complementarity and Dialectical Opposites

In the promotion of indivisibility, Kibwana writes that 'the different species of rights interact dialectically', where the achievement of one set of rights leads to the achievement of others.¹²⁷ Yet, dialectics need not be harmonious. It can also express relationships fraught with tensions. Moreover, it would seem that dialectical relationships are the subject of opposites which have contradictory features. As indicated, in relation to property, the human rights instruments do not have clear opposites. Yet in more general terms, CPR and ESCR may be viewed as opposites if they are categorised as individual and collective rights, respectively.

Interestingly, however, there has been a trend in recent times to categorise both CPR and ESCR as individual rights,¹²⁸ while reserving the collective label for third generation rights,¹²⁹ or even, according to one theorist, rights of corporations.¹³⁰ Various thinkers argue that, like CPR, ESCR focus on the individual rather than the community or group,¹³¹ are compatible with 'individual liberty and market economics',¹³² and are

¹²⁶ Cassese, cited in Ida Elisabeth Koch, 'Social Rights as Components in the Civil Right to Personal Liability: Another Step Forward in the Integrated Human Rights Approach?' (2002) 20(1) *Netherlands Quarterly of Human Rights* 29, 30.

¹²⁷ Kivutha Kibwana, 'Human Rights and/or Economic Development: Which Way Africa' (1993) 1993 *Third World Legal Studies* 43, 47.

¹²⁸ Howse, above n 12, 77.

¹²⁹ Jack Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15(3) *California Western International Law Journal* 473, 499; Li Buyun, 'On Individual and Collective Rights' in Fried van Hoof Peter R. Baehr, Liu Nanlai, Tao Zhenghua and Jacqueline Smith (ed), *Human Rights: Chinese and Dutch Perspectives* (1996) 119, 119-120; Kotey, above n 51, 27; Triggs, above n 41, 893.

¹³⁰ Baxi, above n 89, 4.

¹³¹ Sue Farran, 'Human Rights in the Pacific Region - Challenges and Solutions' (2005) *LawAsia Journal* 39, 55.

¹³² Howse, above n 12, 77.

exercised by individuals as opposed to the state.¹³³ Individual rights have been further expanded to include developmental rights,¹³⁴ thereby transferring both ESCR and third generation rights into the individualist CPR paradigm.

It appears that this tendency away from classifying ESCR as collective rights has occurred in tandem with the development of the indivisibility thesis, and is theoretically consistent with it. Classifying both CPR and ESCR as individual rights serves the aims of indivisibilists, who are generally interested in finding similarities between CPR and ESCR in order to emphasise the strength of their relationship (see Chapters 2 to 4) or to do away with the process of categorising discrete sets of rights (see Chapter 5). It is also consistent with the indivisibilists' extensive use of CPR concepts in the forging of a common language of rights (see Chapters 3 to 5).

Alston, former chair of the United Nations Committee on ESCR, questions such 'insistence that human rights are almost exclusively of an individualistic nature' given that 'our fate as individuals is bound up with the fate of the others in whose social context we find ourselves'.¹³⁵ Buyun argues in the reverse that 'any collective is constituted of individuals'.¹³⁶ Mubangizi attempts to present an equitable solution by stating that all rights have both individual and collective characteristics.¹³⁷ One may proceed a step further and demonstrate that the nature of this internal relationship of rights is highly dependent on the dialectic of individual and collective rights. For instance, in the struggle of individual and collective rights, if collective rights (eg, public education) triumph over individual rights (eg, private education), then education has both its individual and collective elements satisfied. That is, education is available for one and for all. The same outcome may not necessarily be achieved where user-pays education, based on a philosophy of individual rights, is part of the equation. Indeed, many people do not study

¹³³ Donnelly, above n 129, 499.

¹³⁴ Upendra Baxi, 'What Happens Next is Up to You: Human Rights at Risk in Dams and Development' (2001) 16 *American University International Law Review* 1507, 1516; Dinah Shelton, 'A Response to Donnelly and Alston' (1985) 15 *California Western International Law Journal* 524, 525.

¹³⁵ Philip Alston, 'The Shortcomings of a "Garfield the Cat" Approach to the Right to Development' (1985) 15(3) *California Western International Law Journal* 510, 516.

¹³⁶ Buyun, above n 129, 128.

¹³⁷ Mubangizi, above n 61, 99-100. See also Drzewicki, above n 16, 27.

at university as they simply cannot afford to. Therefore, indivisibilists such as Kibwana should be careful to invoke the philosophy of dialectics in describing the relationship of rights, lest it reveal weakness in their position. Understanding the myriad levels at which dialectical relationships operate and interact can both prove and negate the theory of indivisibility.

Chapter 3. Indivisibility as Equally Important Rights

Equally Important Rights, sans a Normative Hierarchy

Many human rights theorists define indivisibility as an absence of hierarchical distinction of the major categories of rights,¹³⁸ both with reference to their normative standing and practical obligations of states.¹³⁹ This is in keeping with the *Vienna Declaration* which proclaims: ‘The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis’.¹⁴⁰ The *Vienna Declaration* represents a deliberate break with Cold War thinking in which there was a clearer demarcation between Western forces championing CPR, or ‘blue rights’, and non-Western forces championing ESCR, or ‘red rights’.¹⁴¹

Traditionally, the two sides argued for the supremacy of their set of rights both empirically and ideologically. Empirically, they state that their rights are more important for survival and subsistence. Proponents of CPR observe that one cannot live without freedom from murder, the right to life, freedom of movement to escape life-threatening situations, or famine, believed to be caused by insufficient CPR.¹⁴² They claim that

¹³⁸ See, eg, Cartwright, above n 78, 8; Hamlyn, above n 2, 13; Otto, above n 14, 5, 46; Potter, above n 12, 619; Dianne Otto, ‘Defending Women’s Economic and Social Rights: Some Thoughts on Indivisibility and a New Standard of Equality’ in Isfahan Merali and Valerie Oosterveld (ed), *Giving Meaning to Economic, Social, and Cultural Rights* (2001) 52, 53-54, 58; Ssenyonjo, above n 36, 15; United Nations Population Fund, *Human Rights Principles* <<http://www.unfpa.org/rights/principles.htm>> at 19 August 2010; Sarmiento; Winston, above n 21; Joseph Wresinski, ‘The Very Poor, Living Proof of the Indivisibility of Human Rights’ (Originally prepared for the French Commission on Human Rights at the occasion of the bicentennial of the French revolution, 1989, translated by Kathleen Fingleton and Charles Courtney), <<http://www.joseph-wresinski.org/THE-VERY-POOR-LIVING-PROOF-OF-THE.html>> at 19 August 2010.

¹³⁹ Foster, above n 60, 181.

¹⁴⁰ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, above n 10, I.5. See also *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights [Bangkok Declaration]*, above n 41, art 10.

¹⁴¹ Cassimatis, above n 62, 23; Howse, above n 12, 76-77; Iya, above n 91, 56; Méndez, above n 62, 10; Makau wa Mutua, ‘Limitations on Religious Rights: Problematising Religious Freedom in the African Context’ (1999) 5 *Buffalo Human Rights Law Review* 75, 105; Olowu, above n 53, 72.

¹⁴² See Farer, above n 109, 116-117; Walter J. Landry, ‘The Ideals and Potential of the American Convention on Human Rights’ (1975) 4 *Human Rights* 395, 410; Haas, above n 95, 6; Human Rights

people themselves choose CPR over ESCR when they relinquish basic needs to pursue a cause.¹⁴³ On the other hand, proponents of ESCR advocate the ‘full-belly thesis’, based on evidence that satisfying basic needs is paramount.¹⁴⁴ The Indian Supreme Court considered that prioritising CPR instead is like ‘throwing a rope of sand to a drowning man’,¹⁴⁵ and former Chair of the Human Rights Commission, Eleanor Roosevelt pointed out, ‘You can’t talk civil rights to people who are hungry’.¹⁴⁶

Ideologically, proponents of CPR make the politically charged claim that it is more efficient to prioritise CPR, as this uses fewer resources and because ESCR naturally flow from CPR, but not vice versa.¹⁴⁷ They also argue that prioritising ESCR is dangerous, as ESCR purportedly infringe upon individual liberty through ‘state interventionism’.¹⁴⁸ Alternatively, proponents of ESCR do not accept the promise that economic liberalisation will eventually bring about ESCR,¹⁴⁹ or believe that we should wait for it to do so. They seek to debunk the supposed myth that only the implementation of ESCR is resource-intensive by showing that instituting CPR also requires a high level of state investment.¹⁵⁰

Difference of opinion about CPR and ESCR is also reflected in disagreement over the way in which *jus cogens* norms, *erga omnes* obligations, and non-derogable rights affect the hierarchy of rights.¹⁵¹ By equalising the significance of all rights, indivisibilists have

Watch, *Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty* (1992) i-ii.

¹⁴³ Overby, above n 84, 23.

¹⁴⁴ Ibid. 19, 25. See also Brecht in Grace, above n 124, 1 (online).

¹⁴⁵ Kader Asmal, ‘Designing a Bill of Rights for a Diverse Society’ (2007) 6 *European Human Rights Law Review* 597, 605.

¹⁴⁶ Roosevelt, cited in Rhonda Copelon, ‘The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.’ (1998) 3(1) *New York City Law Review* 59, 59.

¹⁴⁷ See M. Rodwan Abouharb, and David Cingranelli, *Human Rights and Structural Adjustment* (2007) 68.

¹⁴⁸ Frank B. Cross, ‘The Error of Positive Rights’ (2001) 48 *UCLA Law Review* 857; See Isaiah Berlin, ‘Two Concepts of Liberty’ in Isaiah Berlin (ed), *Four Essays on Liberty* (1958/1969) 118; Cass R. Sunstein, ‘Against Positive Rights’ in András Sajó (ed), *Western Rights? Post-Communist Application* (1996) 225.

¹⁴⁹ Abouharb, above n 147, 68.

¹⁵⁰ See, eg, Beetham, above n 94, 51; Gayle Eagan, ‘The Right to Food as a Human Right: Placing the Blame for World Hunger’ (1985) Spring *In the Public Interest* 4, 10; Koch, ‘The Justiciability of Indivisible Rights’, above n 38, 7-8; Alston, ‘Economic and Social Rights’, above n 65, 139; Fredman, above n 71, 2-3; Paul Hunt, *Reclaiming Social Rights: International Comparative Perspectives* (1996) 55-57, 60, 68-69.

¹⁵¹ Christine M. Chinkin in Charlesworth, above n 109, 349, 352; Farer, above n 109, 115; Eckart Klein, ‘Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy?’ (2008) 41(3) *Israel Law Review* 477, 482; Teraya Koji, ‘Emerging Hierarchy in International Human Rights and Beyond: From the

done away with this large and complex debate in one fell swoop. This may be viewed as a positive outcome if one considers that the discussion of one hierarchy for all time has a metaphysical character. However, it appears that replacing it with the discussion of no hierarchy for all time has the same effect. From another perspective, it could be useful to establish general principles, but only insofar as these guide how rights may be differentially prioritised according to changing circumstances, and not in relation to an ‘ultimate priority’ of rights which Méndez laments the loss of with the arrival of indivisibility:

Similarly to the magical character of indivisibility, the interdependent character of human rights, which places equal importance and homogeneity on both types of rights, has served to suppress any debate on the ultimate priority of one type or the other, generally labelled as being outmoded.¹⁵²

Association of Equality with Notions of CPR

Given that indivisibilists employ the concept of equality to express a neutral relationship in which one set of rights is not favoured over the other, it seems ironic that equality has its human rights origins in the tradition of one particular set of rights, namely CPR. Equality was popularised with the motto of the French Revolution, ‘Liberty, Equality, Fraternity’, and with the French *Declaration of the Rights of Man and of the Citizen*¹⁵³ and the United States *Declaration of Independence*.¹⁵⁴ These instruments highlight CPR, and in doing so they represent some of the first enunciated ideological foundations for incipient capitalism of the 1700s, which facilitated the structural transformation from feudalism. Equality is central to this period, as the idea that the new economic freedoms

Perspective of Non-Derogable Rights' (2001) 12(5) *European Journal of International Law* 917, 917; Francisco Forrest Martin, 'Delineating a Hierarchical Outline of International Law Sources and Norms' (2002) 65(2) *Saskatchewan Law Review* 333, 364, 367; Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) 80(1) *American Journal of International Law* 1, 22-23; Annika Tahvanainen, 'Commentary to Professor Hafner' (2004) 25 *Michigan Journal of International Law* 865, 877.

¹⁵² Méndez, above n 62, 11.

¹⁵³ *Declaration of the Rights of Man and of the Citizen* 1789 (France) art 5.

¹⁵⁴ *Declaration of Independence* 1776 (United States).

could extend to everyone through equal opportunity encouraged economic liberalisation involving the development of mass production enterprises and the hiring of wage-labour.

Benefit of CPR from Indeterminacy of Equality

Of course, in contradistinction to the two Declarations of the 1700s, indivisibilists use the concept of equality in relation to rights rather than people. However, there are important parallels. With both uses, equality serves to reinforce ideas in its context. This is because equality, in itself, lacks content. As Marx wrote in his critique of the *Declaration of the Rights of Man and of the Citizen*, equality has ‘no political significance’.¹⁵⁵ Toufouyan takes to the extreme the idea that equality is dependent on its context, arguing, “human dignity” and “equality” in human rights treaties serves to reflect and reinforce dominant, hierarchical structures and naturalizes the position of those in power who decide what is best for the “we”.¹⁵⁶ Yet what of societies which have no dominant hierarchical structures? Will they have no notion of equality?

Equality is a relational concept which creates no concrete expectations other than in terms of the nature of the relationship which is said to be equal. It is therefore inherently formalist, regardless of attempts by human rights theorists to moderate its formalism with the theory of ‘substantive equality’.¹⁵⁷ Equality begs the question: equal according to which standard? Beetham suggests two possible answers, namely, that ESCR and CPR are equally as solid, or that they are equally as precarious.¹⁵⁸ This recalls the *reductio ad absurdum* Marx pointed out regarding the notion of an equal right to education:

¹⁵⁵ Karl Marx, ‘On the Jewish Question’ in Robert C. Tucker (ed), *The Marx-Engels Reader* (2nd ed, 1843/1978) 42.

¹⁵⁶ Mark Toufayan, ‘Human Rights Treaty Interpretation: A Postmodern Account of its Claim to “Speciality”’ (2005) *Centre for Human Rights and Global Justice Working Paper Number 2*, 22.

¹⁵⁷ See, eg, Stanford Encyclopedia of Philosophy, *Equality of Opportunity* (2008) <<http://plato.stanford.edu/entries/equal-opportunity/>> at 21 October 2010.

¹⁵⁸ Beetham, above n 94, 52.

[I]t demanded that the upper classes also shall be compulsorily reduced to the modicum of education – the elementary school – that alone is compatible with the economic conditions not only of the wage workers but of the peasants as well.¹⁵⁹

If equal entities are both neglected, this still constitutes equality, as one entity is treated the same as the other. Thus the indivisibilist aim of achieving the same strong emphasis on ESCR as CPR might be better realised by advocating *full* and equal rights.

The open-endedness of equality may extend to CPR in general. Markovic notes that in societies with an uneven distribution of wealth, CPR ‘partly express only abstract possibilities which, for economic reasons, cannot be brought to life’.¹⁶⁰ Indeed, unlike ESCR, emphasis is not so much on the right to material fulfilment of the individual, but the right to have the opportunity, possibility or ideal of material fulfilment. The right to property does not mean that everyone should own property, unlike the right to food which means that everyone should eat food. The focus, therefore, is on subjective or spiritual fulfilment, for example, freedom of *thought*, freedom of reputation from the perspective of the *minds* of others, *presumed* innocence until proven guilty, freedom from *degrading* treatment, and freedom to *choose* one’s government regardless of the available choices or consequences.

Similarly, there is considerable flexibility in the indivisibilist notion of equality of rights, as equality provides no clear program for the implementation of rights, particularly where resources of states are limited.¹⁶¹ For instance, Cerna questions why treaties have different time frames set for universal ratification if all rights are indivisible, and suggests that the ‘Vienna Conference might have been better off recycling the Proclamation of Tehran’ which favours ESCR.¹⁶² Moreover, there is no standard by which equality is measured, or indication of which social systems might qualify as indivisible. There are merely calls for achieving abstract goals such as ‘structures of the law that ultimately

¹⁵⁹ Karl Marx, ‘Critique of the Gotha Program’ in Lewis S. Feuer (ed), *Marx and Engels: Basic Writings on Politics and Philosophy* (1875/1972) 153.

¹⁶⁰ Marković, above n 114, 1 (online).

¹⁶¹ See, eg, Künnemann, above n 58, 334.

¹⁶² Cerna, above n 37, 1267.

treat all people, all rights, and all violations equally'.¹⁶³ Such uncertainty could allow for a significant 'margin of appreciation'.¹⁶⁴

Arguably, a margin of appreciation might more readily encompass CPR than ESCR in the current environment, with capitalism afforded a new *raison d'être* following the collapse of socialism in Eastern Europe. Nwobike states that, post-Cold War, '[t]here is now convergence on human rights',¹⁶⁵ but it would seem naïve to think that this convergence occurs at a perfect midpoint. Rather, as Beetham writes, the end of the Cold War 'has reinforced the priorities of the USA, the country which has been most consistently opposed to the idea of economic and social rights'.¹⁶⁶ Certainly, the Vienna Conference was devised by the United Nations within weeks of the fall of the Berlin Wall,¹⁶⁷ and as Alves observes, it was the first international gathering on human rights to introduce the concept of Western democracy.¹⁶⁸ Alves lists 'the establishment of the interrelated nexus of democracy, development and human rights' as one of the Vienna Conference's main 'conceptual achievements' and 'emblematic issues'.¹⁶⁹ Hence, with current human rights thinking emblazoned with Western ideas, it is not unusual that theorists, such as Cassimatis, believe that the main challenge facing indivisibility comes from developing countries whose concerns are focused on ESCR, regardless of the fact that these rights struggle to keep up with CPR in this day and age.¹⁷⁰

Prioritisation of Substance of Rights, not Rights in Abstract

It may be more constructive to give attention to achieving rights in substance, rather than simply their relative position in relation to each other as with equality. This does not

¹⁶³ Leckie, above n 75, 123.

¹⁶⁴ See Stephen Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (2000).

¹⁶⁵ Chimugwuanya Nwobike, 'Beyond Conditionally: Human Rights in EU Development Partnership with Developing Countries' (2007) 19(2) *Sri Lanka Journal of International Law* 387, 400.

¹⁶⁶ Beetham, above n 94, 43.

¹⁶⁷ Drinan, above n 45, 22; Alves, above n 48, 73.

¹⁶⁸ Alves, above n 48, 78.

¹⁶⁹ *Ibid.* 75.

¹⁷⁰ Cassimatis, above n 62, 23.

necessitate a decision about priority, but the overall effect of deeming rights in themselves important or non-important can indicate priority. Deciding which rights to support can appear to be a highly subjective exercise. Oberleitner writes that it involves ‘a value judgment and a difficult one’.¹⁷¹ Arguments for both sides can seem persuasive, particularly where they pull at the heart strings. For instance, Shelton believes that with the tragic events of September 11, 2001, the right to security has become more threatened than any other right in contemporary times.¹⁷² Former United Nations Secretary-General, Kofi Annan echoes this concern in his proposal to make human rights, development and security a ‘three-pillar unity’.¹⁷³ Yet others might argue that many more people die from hunger and sickness than terrorist attacks.

Having a dynamic historical framework in place can offer direction, particularly a framework which involves an analysis of the demands of the specific context in relation to the social character of the rights in question. This approach therefore involves considering two factors: 1. the material features of the current situation, according to what Overby describes as ‘historical and cultural fluctuations’,¹⁷⁴ and 2. the material features associated with the development of particular rights, which elucidates their potential and limits regarding the current situation. For example, while developing countries appear to be in need of development along both CPR and ESCR lines, they do not have the level of industrialisation associated with the advent of CPR. Thus it may be wishful thinking to expect that they can offer a high standard of protection of CPR, and even dangerous to insist that CPR be achieved as a matter of priority before ESCR are attended to in these countries. On the other hand, ESCR emerged out of struggles against inherent constraints of capitalism, in forms as diverse as the capitalist welfare state and socialism, crossing socio-economic boundaries and societies of low and high

¹⁷¹ Gerd Oberleitner, 'Porcupines in Love: The Intricate Convergence of Human Rights and Human Security' (2005)(6) *European Human Rights Law Review* 588, 599.

¹⁷² Shelton, 'A Response to Donnelly and Alston', above n 134, 331. See also Oberleitner, above n 171, 599.

¹⁷³ Annan, cited in Vladimir Volodin, and Yvonne Donders, 'Conclusion' in Yvonne Donders and Vladimir Volodin (ed), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 309, 309.

¹⁷⁴ Overby, above n 84, 29.

development. Notably, these struggles continue to wax and wane in Western countries,¹⁷⁵ spurred on momentarily by the likes of the *Tehran Proclamation*, and arguably deterred momentarily by the likes of the *Vienna Declaration*.

¹⁷⁵ See Michael Kirby, 'Human Rights and Industrial Relations' (2002) 44(4) *Journal of Industrial Relations* 562, 575.

Chapter 4. Indivisibility as a Shared Essence of Rights

Shared Essence, or the Sine Qua Non, of Rights

A third interpretation of indivisibility is that the major categories of rights share a deeper, underlying theme or essence, referred to herein as a ‘shared essence’. As Mubangizi writes, ‘the principle of the indivisibility of human rights is founded on the assumption that all human rights have the same basic characteristics’.¹⁷⁶ Novogrodsky, a proponent of indivisibility, similarly observes that ESCR ‘are the same in substance’ as CPR.¹⁷⁷ Thus the rights are more than simply comparable.¹⁷⁸ This is distinct from the position of theorists in the following chapter, who believe that comparability is sufficient to bring about their conclusions.

The purported shared essence often reflects the character one right, one set of rights, and even the totality of rights. As an example of the latter, in stating that ESCR and CPR ‘can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights’,¹⁷⁹ the Preambles of the ICCPR and ICESCR seem to indicate, rather circularly and contradictorily, that the shared essence of ESCR and CPR is in fact the combination of ESCR and CPR.

Shared Essence Framed in the Lexicon of CPR

Most commonly, the shared essence reflects a notion of CPR, such as Western democracy. Indivisibilist Ramcharan lists ‘democracy, good governance, the rule of law

¹⁷⁶ Mubangizi, above n 61, 97.

¹⁷⁷ Novogrodsky, above n 74, 37.

¹⁷⁸ Cf. Deval Desai, ‘“Courting” Legitimacy: Democratic Agency and the Justiciability of Economic and Social Rights’ (2009/2010) 4 *Interdisciplinary Journal of Human Rights* 29, 29.

¹⁷⁹ *International Covenant on Civil and Political Rights*, above n 5, Preamble; *International Covenant on Economic, Social and Cultural Rights*, above n 5, Preamble.

and respect for each other' as the common denominator.¹⁸⁰ Desai suggests the same when he considers that ESCR are 'breached to the extent that it affects democratic agency'.¹⁸¹ This may in fact be consistent with the *Vienna Declaration* which states that 'Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing'.¹⁸² It goes on to highlight the importance of 'the process of democratization and economic reforms'.¹⁸³ Its emphasis on economic reforms may communicate the liberal idea that economic achievements are primary, with ESCR realised subsequently through a process of 'trickle-down', reflected, for instance, in the progressive implementation article in the ICESCR.¹⁸⁴ Similarly, Hunt structures his discussion on ESCR according to how it can best promote liberal democracy, be reconciled with it, and function within its program,¹⁸⁵ indicating that democracy is the essential component.¹⁸⁶

There exist copious instances of indivisibilists reducing rights to CPR concepts. Vyver maintains that '[h]uman rights are essentially confined to those rights that transcend, and are protected against, the exercise of political power' and which are 'particularly fundamental to the existence of the individual as a human being and as a citizen within the social structures of the body politic'.¹⁸⁷ Likewise, Künnemann posits that 'human rights must only be taken for what they are: not a dream of paradise, but a tool to limit and regulate the power of the State'.¹⁸⁸ Interestingly, Drzewicki writes that the 'first generation [of human rights] reflects rights of freedom, the second one rights of equality

¹⁸⁰ Bertrand G. Ramcharan, 'Introduction' in Bertrand G. Ramcharan (ed), *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials* (2005) 1, 1. See also Richard Burchill, 'Democracy and the Promotion and Protection of Socio-Economic Rights' in Mashood A. Baderin and Robert McCorquodale (ed), *Economic, Social and Cultural Rights in Action* (2007) 361.

¹⁸¹ Desai, above n 178, 46.

¹⁸² *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, above n 10, I.8. See also *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights [Bangkok Declaration]*, above n 41, Preamble.

¹⁸³ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, above n 10, I.9.

¹⁸⁴ *International Covenant on Economic, Social and Cultural Rights*, above n 5, art 2.

¹⁸⁵ Hunt, *Reclaiming Social Rights: International Comparative Perspectives*, above n 150, 4-5.

¹⁸⁶ *Ibid.* 184.

¹⁸⁷ Johan D. van der Vyver, 'Morality, Human Rights, and Foundation of the Law' (2005) 54(5) *Emory Law Journal* 187, 187-188.

¹⁸⁸ Künnemann, above n 58, 326.

and the third one rights of fraternity and solidarity'.¹⁸⁹ In other words, he frames rights in the language of the French CPR triad of 'liberty, fraternity, equality'. Drzewicki attributes this formulation to the founder of third generation rights, Vasak, who is said to hold that it 'remains in conformity with the United Nations' conception of the indivisibility and complementarity of all human rights',¹⁹⁰ regardless of its clear emphasis on CPR. Moreover, Havemann, and Dunne and Wheeler reduce rights to CPR notions of citizenship,¹⁹¹ and security,¹⁹² respectively. Hessbruegger, who also waves the indivisibilist flag, paints ESCR as existential rights, invoking the introspective philosophy of existentialism, consistent with the individualist character of CPR.¹⁹³

Another frequently cited shared essence of rights is the concept of human dignity. It appears to appeal to theorists along positivist and naturalist lines in that it has a solid place in the *Charter of the United Nations* and human rights instruments,¹⁹⁴ as well as in moral philosophies.¹⁹⁵ Dignity is arguably a CPR concept, having originated with the *Declaration of the Rights of Man and of the Citizen* and the *Declaration of Independence*.¹⁹⁶ O'Rawe points out that human dignity is part of the language of Western political thought,¹⁹⁷ and Shestack notes that it has been criticised for its 'Western orientation'.¹⁹⁸ Indeed, dignity has been coupled with existentialism,¹⁹⁹ equality,²⁰⁰ and,

¹⁸⁹ Drzewicki, above n 16, 27.

¹⁹⁰ Ibid. 27.

¹⁹¹ Paul Havemann, 'No Rights Without Responsibilities? Third Way and Global Human Rights Perspectives on Citizenship' (2001) 9 *Waikato Law Review* 75, 90.

¹⁹² Tim Dunne, and Nicholas J. Wheeler, 'We the People': Contending Discourses of Security in Human Rights Theory and Practice' (2004) 18(1) *International Relations* 9, 18.

¹⁹³ Jan Arno Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 *Buffalo Human Rights Law Review* 21, 78-79.

¹⁹⁴ *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Preamble; *International Covenant on Civil and Political Rights*, above n 5, Preamble; *International Covenant on Economic, Social and Cultural Rights*, above n 5, Preamble; *Universal Declaration of Human Rights*, above n 4, Preamble, Article 1. See also Otto, 'Rethinking the "Universality" of Human Rights Law' 5.

¹⁹⁵ Jerome J. Shestack, 'The Philosophical Foundations of Human Rights' in Janusz Symonides (ed), *Human Rights: Concept and Standards* (2000) 31, 53.

¹⁹⁶ Eide, 'Interdependence and Indivisibility of Human Rights', above n 3, 25.

¹⁹⁷ Mary O'Rawe, 'The United Nations: Structure Versus Substance (Lessons from the Principal Treaties and Covenants)' in Angela Hegarty and Siobhan Leonard (ed), *Human Rights: An Agenda for the 21st Century* (1999) 15, 21.

¹⁹⁸ Shestack, above n 195, 54.

¹⁹⁹ Künnemann, above n 58, 326-328.

²⁰⁰ Jean Bethke Elshtain, 'The Equality of Persons and the Culture of Rights' (2003) 1(1) *University of St. Thomas Law Journal* 5, 17.

in the *Charter of Fundamental Rights of the European Union*, the tripartite rights of the French Revolution.²⁰¹ Méndez states that ‘an existence worthy of human dignity ... is the ultimate purpose of human rights’.²⁰² Likewise, according to Dupre, ‘dignity is both the foundation and the ultimate aim of human rights systems’.²⁰³ She continues on to say that dignity is the ‘queen’ of CPR and ESCR and the likely ‘archetype’ of third generation rights, and that it ‘is therefore foundational to all types of rights, transcending these categories and drawing them together, acting as a reminder of their principled indivisibility’.²⁰⁴ Arguing in the reverse, but with the same effect, Crooms writes that indivisibility treats CPR and ESCR as ‘equally fundamental to the basic human dignity to which all are entitled’.²⁰⁵

Yet deciding what the shared essence may be, or which rights are classified as real rights, based on whether they qualify as harbouring the shared essence, is somewhat subjective. At least indivisibilists have overcome the latter problem by including, as a matter of principle, CPR, ESCR and even third generation rights within the purview of shared essences such as dignity.²⁰⁶ In contrast, Gibson argues that since the right to a clean environment is not derived from a person’s inherent dignity,²⁰⁷ it should be excluded. The same could potentially be said of ESCR, given the bias of dignity towards CPR. Fortunately, indivisibility keeps ESCR alive, but only by latching on to CPR concepts such as dignity. It serves to extend the reach of these concepts to other rights and therefore further entrenches liberal ideas in human rights discourse, as well as creating contradictions of meaning which effectively foil attempts to develop a more inclusive system of human rights.

²⁰¹ *Charter of Fundamental Rights of the European Union*, C 364/01, 18 December 2000, Preamble. See also Karon Monaghan, 'Constitutionalising Equality: New Horizons' (2008)(1) *European Human Rights Law Review* 20, 37.

²⁰² Méndez, above n 62, 12.

²⁰³ Catherine Dupre, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009)(2) *European Human Rights Law Review* 190, 201.

²⁰⁴ *Ibid.* 202.

²⁰⁵ Lisa A. Crooms, 'Indivisible Rights and Intersectional Identities or, What Do Women's Human Rights Have to Do with the Race Convention' (1997) 40(3) *Howard Law Journal* 619, 632.

²⁰⁶ *Ibid.*; Dupre, above n 203, 202; Overby, above n 84, 28; Gui-mei Bai, 'Are There Any Hierarchies of Human Rights in International Law?' in Fried van Hoof Peter R. Baehr, Liu Nanlai, Tao Zhenghua and Jacqueline Smith (ed), *Human Rights: Chinese and Dutch Perspectives* (1996) 133, 141; Puta-Chekwe, above n 100, 39-40, 45; Ssenyonjo, above n 36, 13.

²⁰⁷ Noralee Gibson, 'The Right to a Clean Environment' (1990) 54(1) *Saskatchewan Law Review* 5, 11.

Towards a More Dynamic Approach of Relative Independence

Certainly, CPR and ESCR have some sort of shared essence, even if it can only be said that it is that they are both rights. The further one ascends the scale of classification, from species to genus, where there is a diminishing point at which rights express ideological content or a particular world view, the more likely they are to be perceived on the same plane.

At the same, time, it might be argued that for rights to have no essence of their own is illogical, even where they are complementary. It is a necessary condition for complementarity that there be a point of difference, otherwise the phenomena in question are not complementary but merely the same. Difference is also necessary for rights to interact through the process of mutual reinforcement. It is difficult to conceive of rights impacting each other so as to advance each other's cause – as, for instance, with freedom of education making participation in the conduct of public affairs more realisable – if they have no cause or essence of their own. The existence of distinct essences is even more apparent where rights are not complementary or mutually reinforcing, but are in direct competition and are advanced to the detriment of others.

Therefore, we should not simply accept that a shared essence negates the phenomenon of distinct essences, or vice versa, but rather that they complement each other, as with the dialectical relationship of the universal and the particular. In this way, rights are relatively independent of one another, as opposed to wholly independent or dependent, such that they both share and do not share an essence.

If the shared essence of rights is portrayed with reference to the features of only one particular set of rights, such as CPR, then the discussion of the universal is reduced to the level of the particular, such that the dialectic cannot properly function. The consequence is a static conception of rights. If instead the universal is relatively free of historically

determined content, then new possibilities for particular rights may present themselves more readily, or at least not be contradicted by the universal and excluded as rights at the outset.

Chapter 5. Indivisibility as No Essence of Rights

Non Essentialism and the De-Categorisation of Rights

A related interpretation of indivisibility is that the major categories of rights bear no essential distinguishing features. This is referred to herein as the ‘no-essence’ approach. Unlike the shared essence approach, the no-essence approach categorically rejects any idea of essence, whether in relation to the particular (ie, distinct essences of categories) or the universal (ie, shared essences across categories). Proponents claim that human rights should reflect the ‘complexity of human activity’,²⁰⁸ and not be bound by rigid and ‘artificial distinctions’ which have ‘the effect of eroding the notions of indivisibility, universality and interdependence of human rights’.²⁰⁹ Indeed, so inimical to categories are certain indivisibilists that they refer to ‘civil, political, economic, social and cultural rights’ in single formation instead of using the two expressions CPR and ESCR,²¹⁰ or maintain the two categories merely for the sake of consistency with norms of international human rights law.²¹¹

To do away with categorisations, it is necessary to prove the weight of exceptions. This usually consists of demonstrating similarities between the categories of rights,²¹² which may be ironic considering that the no-essence approach is founded on a celebration of complexity and difference. Koch writes:

²⁰⁸ Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights* (2009) 4.

²⁰⁹ Mubangizi, above n 61, 96-97.

²¹⁰ Baxi, 'What Happens Next is Up to You: Human Rights at Risk in Dams and Development', above n 134, 1515; Hamlyn, above n 2, 13; Michele L. Radin, 'The Right to Development as a Mechanism for Group Autonomy: Protection of Tibetan Cultural Rights' (1993) 68(3) *Washington Law Review* 695, 704; Ssenyonjo, above n 36, 13; *Declaration on the Right to Development*, A/RES/41/128, 97th plenary meeting (4 December 1986); *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights [Bangkok Declaration]*, above n 41; *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, above n 10.

²¹¹ Viljoen, above n 46, 7.

²¹² Cf. Shelton, 'A Response to Donnelly and Alston', above n 134, 524.

There is a certain overlapping and intertextuality between the two sets of rights that seems to permit or even mandate an interpretation that dissolves the boundaries between the two distinct categories. ... there are no watertight divisions between the two sets of rights.²¹³

Similarly, rights are described as ‘multidimensional’;²¹⁴ “double” or “mixed” in nature;²¹⁵ ‘not so radically dissimilar’;²¹⁶ including ‘in theory and practice’;²¹⁷ and realisable ‘to the same extent’.²¹⁸ Rights are said to either not adequately fit into any one category or fall under a number of categories,²¹⁹ which is echoed by many theorists who identify rights that are the same or similar in the ICCPR and ICESCR, including Olowu who describes this as ‘cross-cutting linkages’ between the treaties.²²⁰ Accordingly, categorisation has been chastised as ‘neatly compartmentalized’;²²¹ an example of ‘shorthand conveniences’;²²² particularly for ‘law school professors, who find it an easy way to compartmentalize for teaching purposes’;²²³ a ‘simplistic distinction’;²²⁴ and a ‘false’ or ‘artificial’ distinction based on ‘legal fiction’.²²⁵

²¹³ Koch, 'Social Rights as Components in the Civil Right to Personal Liability: Another Step Forward in the Integrated Human Rights Approach?', above n 126, 33.

²¹⁴ Sané, above n 79, 2.

²¹⁵ Kotey, above n 51, 30.

²¹⁶ Hamlyn, above n 2, 25.

²¹⁷ Kenneth Asamoah Acheampong, 'Reforming the Substance of the African Charter on Human and Peoples' Rights: Civil and Political Rights and Socio-Economic Rights' (2001) 2 *African Human Rights Law Journal* 185, 190.

²¹⁸ Kitty Arambulo, 'Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?' (1996) 2(1) *University of California Davis Journal of International Law and Policy* 111, 135.

²¹⁹ Mubangizi, above n 61, 99.

²²⁰ Olowu, above n 53, 75-76. See also Howse, above n 12, 77; Johnstone, above n 67, 185; Kotey, above n 51, 30; Scott, cited in Puta-Chekwe, above n 100, 39; Triggs, above n 41, 893.

²²¹ Foster, above n 60, 181.

²²² Kotey, above n 51, 30.

²²³ Shelton, 'A Response to Donnelly and Alston', above n 134, 526. See also Acheampong, above n 217, 190.

²²⁴ Decaux, above n 109, 27.

²²⁵ Nolan, above n 98, 253; Tinta, above n 39, 431-432.

Veiled Significance of Rights and Perpetuation of Norms

Indivisibilists differentiate rights in terms of form not content. Künnemann maintains that because rights are ‘intimately interlinked’, differences are ‘in degree, not in substance’.²²⁶ Viljoen adds that it is more acceptable to distinguish between rights according to ‘the various forms of government obligations imposed’ than their ‘nature’.²²⁷ It is significant that Viljoen frames rights with reference to government obligations. This bears a strong connection to the positive-negative dichotomy of liberties advanced by liberal theorist Isaiah Berlin and members of the Frankfurt School, which also frames rights with reference to the role of the state, albeit a paternalistic one.²²⁸ According to Berlin, CPR involve freedom *from* the state and other external influences, whereas ESCR involve freedom *of* the state whereby individuals are said to be oppressed by the state. While Berlin’s theory is generally discredited by indivisibilists, based of the conclusion that CPR and ESCR are essentially different,²²⁹ Viljoen borrows from it the idea that rights are a variable of the state’s level of influence in society, not a variable of the type of society itself. For Berlin, socialist and capitalist states are both as opprobrious to the extent that they ‘intervene’ in the affairs of citizens. Similarly, for Viljoen, different types of societies cannot have a qualitatively different effect on rights, which are not distinguished according to their nature.

By opposing any substantial distinction of the content of rights, indivisibilists are obliged to downplay the significance of the generational history of rights and ideological differences which have arguably informed the varied development of human rights law. Indivisibilists give the impression that the division of rights merely arose from historical anomalies, and does not reflect the true status of rights in themselves. Künnemann writes that differences of rights ‘do not have conceptual explanations but rather historical

²²⁶ Künnemann, above n 58, 327, 329.

²²⁷ Viljoen, above n 46, 7. See also Méndez, above n 62, 11.

²²⁸ Berlin, above n 148; Erich Fromm, *The Fear of Freedom* (1941).

²²⁹ See, eg, Roger Dunston, 'Delivering on the Promise of Human Rights - Where Are We and Where Do We Need to Be' (1997) 4(1) *Australian Journal of Human Rights* 5, 2-3 (online); Hamlyn, above n 2, 16; Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective', above n 97, 406; Fredman, above n 71, 4; Steiner, above n 84, 188.

ones'.²³⁰ In other words, history, in particular the ideological and political conflict between East and West, has disturbed the natural expression of rights as balanced and harmonious entities.²³¹ To make sure ideology and politics do not continue to distort natural indivisible rights, Bai exhorts that '[w]e should try, though it is by no means easy, to cast off political influences'.²³²

Yet it appears that rights do not have a basic character in themselves than can simply be disassociated from the material and ideological context. The material features of a society go a long way towards informing the content of rights. Once the material features change in a fundamental way, often the legal and human rights framework follows suit. This is why bills of rights have frequently arisen at major turning points in history, such as the French Revolution, the American War of Independence, South Africa's end to apartheid, and Venezuela's Bolivarian Revolution.²³³ The UDHR was drafted following WWII in response to fascism. At these points in history, problems of the old order have been overcome by a revamped legal framework, laying a new groundwork for new problems to arise and be overcome in the future, with the same transformative process re-occurring *ad infinitum*. Whelan notes, indivisibility, on the contrary, 'reifies the overcoming of divisions – ideological, religious, cultural',²³⁴ in that it sees that the solution to divisions can be a manifestation of an absolute truth. This tendency towards reification is also reflected in the view that human rights are unique to modern history, arriving in a more or less fully developed form with capitalism.²³⁵ Yet history paints a significantly different picture, of rights existing from the days of the first human made laws and developing alongside other social developments over millennia.

²³⁰ Künnemann, above n 58, 333-334.

²³¹ Cassimatis, above n 62, 23. See also Rachel Murray, 'International Human Rights: Neglect of Perspective from African Institutions' (2006) 55(1) *International and Comparative Law Quarterly* 193, fn 2; Puta-Chekwe, above n 100, 39; Eide, in Ssenyonjo, above n 36, 27.

²³² Bai, above n 206, 141.

²³³ *Constitution of the Bolivarian Republic of Venezuela 1999*, title 3, ch 1; *Constitution of the Republic of South Africa 1996*, ch 2; *Declaration of Independence*, above n 154; *Declaration of the Rights of Man and of the Citizen*, above n 153.

²³⁴ Whelan, above n 6, 208.

²³⁵ Anthony Woodiwiss, *Human Rights* (2005) 137, 149.

Various indivisibilists seem to suggest that before the Cold War, rights were in fact indivisible. Tomaševski observes that human rights were split into separate categories only when the world became divided along capitalist and socialist lines,²³⁶ and Koch believes, contrary to the timeframe of the Vienna Conference, that it was during this period that indivisibility first became a subject of discussion, as it was only when people started to live without indivisibility that they saw a need for it.²³⁷ Even the United States is portrayed as an indivisibilist state in the early days of socialism, due to President Roosevelt's Four Freedoms speech.²³⁸ Importantly, as indivisibility purportedly existed before socialism, and there are supposedly better conditions for indivisibility now that socialism has lost much of its steam, the suggestion is that socialism was responsible for depriving the world of indivisibility, and moreover, that indivisibility is best suited to capitalism. However, capitalism is the society tied most closely to CPR, indicating bias of indivisibilists towards CPR. Certainly, there is no indication by indivisibilists that indivisibility is best served by a synthesis of capitalism and socialism, which in any case may not be possible. Whelan expresses such dilemma:

We thus have to reject the idea that the indivisibility of human rights rests on a grand synthesis between liberalism and socialism. What we are left with is the need to accept an inconvenient truth that many human rights advocates are uncomfortable with: that the indivisibility of civil, political, economic, and social rights must rely on modern political and economic institutions: the liberal-democratic welfare state and a market economy.²³⁹

Some indivisibilists maintain, in the spirit of postmodernist Fukuyama,²⁴⁰ that the end of the Cold War has brought about an end to ideology and ideological tensions.²⁴¹ This is problematic because they fail to recognise that the victor is in fact liberal ideology, with tensions nevertheless remaining, and that these realities significantly influence the achievement of rights. Without awareness of this situation, it appears that indivisibilists

²³⁶ Tomaševski, 'Human Rights: The Right to Food', above n 107, 1325.

²³⁷ Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights*, above n 208, 11.

²³⁸ Künnemann, above n 58, 332.

²³⁹ Whelan, above n 6, 212.

²⁴⁰ Francis Fukuyama, *The End of History and the Last Man* (1992).

²⁴¹ See, eg, Ssenyonjo, above n 36, 27.

are prone to unwittingly entering into the liberal territory of CPR, which has stronger gravitational pull than ESCR in the current climate. In doing so, they can play a role in perpetuating liberal norms. A better approach would be to use an understanding of the historical significance of rights to attempt to make sense of what indivisibilists refer to as the complex ‘totality of rights’.²⁴² Importantly, classifications based on historical factors can assist in the identification of human rights problems in society, such as the under-emphasis on ESCR, and thereby place human rights theorists in a better position to respond to such problems.

Resistance to Oppression Constituting a Defence of CPR

Theorists who espouse the no-essence interpretation of indivisibility often do so on the basis that there are no universal truths which can inform general categories of rights, and if there were, there would be no way of knowing them.²⁴³ In postmodern speak, they maintain that there is no legitimacy of the ‘grand narratives’ of the human rights project of modernity.²⁴⁴ This is because rights are essentially open to individual interpretation,²⁴⁵ and global theories of human rights cannot hope to cover the field of subjective experience of rights or capture it in precise categories.²⁴⁶ Categorising rights excludes people who do not belong to any category.²⁴⁷ Consequently, indivisibilists entertain the diversity of rights that exists across different societies and sections of society, beyond the major categories of rights.²⁴⁸ They are critical of the classification of rights according to what they claim is a hierarchical order of first, second and third generations which gives undue precedence particularly to CPR,²⁴⁹ but also ESCR.²⁵⁰

²⁴² Mubangizi, above n 61, 97.

²⁴³ See, eg, Dianne Otto, 'Everything is Dangerous: Some Poststructural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law' (1999) 5(1) *Australian Journal of Human Rights* 17, 16 (online).

²⁴⁴ Rolando Gaete, 'Postmodernism and Human Rights: Some Insideous Questions' (1991) 2(2) *Law and Critique* 149, 149.

²⁴⁵ Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights*, above n 208, 318.

²⁴⁶ Cartwright, above n 78, 19.

²⁴⁷ Mubangizi, above n 61, 98.

²⁴⁸ Otto, 'Defending Women's Economic and Social Rights: Some Thoughts on Indivisibility and a New Standard of Equality', above n 138, 53-54.

²⁴⁹ Mubangizi, above n 61, 98.

Indivisibilists believe that universal truth and hierarchy of rights are used as a language of 'domination' and 'oppression',²⁵¹ to 'reflect and reproduce dominant regimes of global power'.²⁵² They operate as 'a proxy for a political ideology',²⁵³ with 'hidden priorities and principles of political value'.²⁵⁴ In communicating the language of oppression, human rights instruments and norms have enabled oppression to become deep-seated in society. As Crooms observes, 'proponents of indivisibility see oppression as caused by interlocking and interdependent institutions that operate in both the public and the private spheres'.²⁵⁵ She proposes that '[r]emediating the injuries suffered within this "matrix of domination" requires approaches that can simultaneously reach all the causes of those injuries'.²⁵⁶

Oppression can also be overcome by 'destablising hierarchies of difference',²⁵⁷ and constructing 'a culturally-plural human rights corpus'.²⁵⁸ Human rights should not be part of a mainstream dialogue, but rather relegated to the periphery.²⁵⁹ Theorists have even begun to reformulate rights in an attempt to counter oppression. Alves points out that a new eco-centric account of environmental rights perceives humans as the invader and destroyer, in reaction to the modern belief of the Enlightenment in man-made progress.²⁶⁰

²⁵⁰ Otto, 'Rethinking the "Universality" of Human Rights Law', above n 14, 13.

²⁵¹ See, eg, Sumbal Mahmud, 'Cultural Human Rights: The Need for Qualified Universality' (2003) 11(2) *Tilburg Foreign Law Review* 560, 577; Otto, 'Everything is Dangerous: Some Poststructural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law', above n 243, 15 (online). Cf. Costas Douzinas, 'The End(s) of Human Rights' (2002) 26 *Critique and Comment* 445, 445; Méndez, above n 62, 10; Winston, above n 21, 1.

²⁵² Otto, 'Rethinking the "Universality" of Human Rights Law', above n 14, 23.

²⁵³ Makau wa Mutua, 'The Ideology of Human Rights' (1996) 36(3) *Virginia Journal of International Law* 589, 607.

²⁵⁴ Martti Koskeniemi, 'Hierarchy in International Law: A Sketch' (1997) 8(4) *European Journal of International Law* 566, 582.

²⁵⁵ Crooms, above n 205, 626. See also Scott Splittgerber, 'The Need for Greater Regional Protection for the Human Rights of Women: The Cases of Rape in Bosnia and Guatemala' (1996/1997) 15(1) *Wisconsin International Law Journal* 185, 200-201.

²⁵⁶ Crooms, above n 205, 626.

²⁵⁷ Otto, 'Everything is Dangerous: Some Poststructural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law', above n 243, 15 (online).

²⁵⁸ Mahmud, above n 251, 576.

²⁵⁹ Koskeniemi, cited in Balakrishnan Rajagopal, 'Book Reviews: The Allure of Normativity' (1998) 11 *Harvard Human Rights Journal* 363, 369.

²⁶⁰ Alves, above n 48, 67.

The spirit of indivisibilist criticism of the oppressive language of human rights does not appear to be entirely new. Rather, it mirrors the classical liberal argument against rights which are perceived as infringing on the liberties of the individual. Certainly there are differences regarding the rights under scrutiny, and philosophical differences whereby liberal theory *objectifies* the individual in human rights discourse, compared with the postmodern approach which *absolutises* the individual and his/her experience to the point that it questions the basis of a human rights regime. However, there are also notable similarities. For instance, when Koskeniemi, representing the postmodern approach, states that universal human rights law ‘undermine[s] the individuality of cases and impose[s] homogeneity over difference, enshrining a bureaucratic culture of blind obedience’,²⁶¹ or Mutua warns of the ‘[c]ertain institutions’ of the state encroaching on the private sphere of family,²⁶² this calls to mind the liberal critique of positive liberties. This critique also refers to the purported over-bureaucratisation of society and its detrimental and oppressive effect on the private life of the individual. This may not be surprising, as both theoretical approaches are the progeny of the Western tradition.

By upholding negative liberties, liberal theorists are recognised as defending CPR against the incursion of ESCR. Indivisibilists, on the other hand, make no such assertion. However, to the extent that indivisibilists who claim that there is no essence of rights have internalised postmodern ideas about individualism and subjectivism, they will similarly seek to defend perceived attacks on the individual. Western thought informs us that the greatest threat to individualism occurs in the form of collective activity, including the organisation of our lives along parallel lines by the state. Thus indivisibilists are prone to cynicism towards ESCR which have a collective nature, and favourableness towards CPR which have an individual character, such that their critique of oppression may well constitute a defence of CPR, regardless of claims by indivisibilists to neutrality. For instance, although Thomas writes that both CPR and ESCR possess ‘the potential denial to women of their individual personhood’, she promotes in the same breath

²⁶¹ Koskeniemi, above n 254, 582.

²⁶² Mutua, 'Limitations on Religious Rights: Problematizing Religious Freedom in the African Context', above n 141, 80-81.

individual freedoms of women arising from their ‘individual personhood’, which will likely take the form of CPR such as freedom of expression.²⁶³

Reducing ‘No Categories of Rights’ to ‘No Rights’

If comparability indicates that it may not be necessary to categorise otherwise separate entities, at what point of comparability do we stop categorising? Perhaps men and women are sufficiently comparable to withdraw the distinction of people according to sex. Some theorists suggest that the fact that rights are relational – in that they only exist in relation to other rights, particularly if one considers the right to development – demonstrates that they are indivisible and thus should not be categorised.²⁶⁴ Yet men and women each rely on both sexes for their existence, and still the distinction remains acceptable.

Indivisibilists who espouse the no-essence approach look for exceptions to categories everywhere, to the point that the category of rights itself may not meet their standards, by virtue of the fact that rights are proclaimed as universal. Even universal rights of minorities, who indivisibilists supposedly have a special interest in protecting, can be difficult for indivisibilists to defend, as Howard illustrates:

What benefits a person with one disability may harm someone with one disability may harm someone with another disability. Low drinking fountains and telephones are harder to use for the elderly or those with bad backs. High toilets make transfer easier from a wheelchair, but make bowel movements harder for everyone else, especially the elderly. Curb cuts are more dangerous for the blind ... Warning bumps at the edge of train platforms are good for the blind but bad for those in wheelchairs.²⁶⁵

²⁶³ Thomas, cited in Schoenmeyer, above n 19, 611.

²⁶⁴ Douzinas, above n 251, 463; Radin, above n 210, 704-705.

²⁶⁵ Howard, cited in Schoenmeyer, above n 19, 614.

Howard claims that rights simply leave ‘no room’ for looking at situations from everybody’s perspective.²⁶⁶ With such pessimism, it is no wonder that there exists a sentiment in the human rights community that human rights have ‘become worn out’ and that the ‘vogue is already passed’.²⁶⁷ Human rights thinkers such as Baxi feel that there is ‘overproduction’ and ‘bureaucratisation’ of rights which compromise their effectiveness.²⁶⁸ This concern echoes famous words of Kundera describing a paradox of human rights: ‘The more the fight for human rights gains in popularity, the more it loses any concrete content, becoming a kind of universal stance of everyone towards everything’.²⁶⁹ However, such dismal conclusion can only be arrived at from an over-orientation towards the individualisation of human rights, which overlooks their collective character. Moreover, it should not be forgotten that there exists an objective element even to individual ideas about human rights, which is demonstrated by the phenomenon of shared or common concerns that people have regarding the protection of their human rights.

²⁶⁶ Howard, cited in Ibid. 614.

²⁶⁷ Sérgio Vieira de Mello, 'Five Questions for the Human Rights Field' (2004) 1 *Sur - International Journal on Human Rights* 165, 171.

²⁶⁸ Baxi, 'Too Many, or Too Few, Human Rights?', above n 89, 5-9; Upendra Baxi, 'Voices of Suffering and the Future of Human Rights' (1998) 8(2) *Transnational Law and Contemporary Problems* 125, 127.

²⁶⁹ Milan Kundera, *Immortality* (1991) 153. See also Orla Sheehy, 'The Right to Development and the Proliferation of Rights in International Law' (2002) 5 *Trinity College Law Review* 251, 251.

Chapter 6. Indivisibility as a Complete Form of Rights

Rights in Totality, Whole and Undivided

A final interpretation of indivisibility is that the contemporary canon of human rights forms a 'single'²⁷⁰ and 'unified whole',²⁷¹ or 'one coherent system of global human rights'.²⁷² This is based on an 'underlying unity of human rights',²⁷³ which 'cannot be divided',²⁷⁴ and must be 'taken as a whole'.²⁷⁵ Hence rights are often referred to as 'indivisible part[s]'²⁷⁶ of an 'indivisible whole',²⁷⁷ with the latter phrase recognised in the *American Protocol of San Salvador*.²⁷⁸

There are a number of implications of this interpretation of indivisibility. Firstly, the monitoring of human rights treaties, and judicial consideration of human rights complaints, require a 'holistic approach' by human rights bodies.²⁷⁹ A second implication

²⁷⁰ Hunt, *Reclaiming Social Rights: International Comparative Perspectives*, above n 150, 173; Ssenyonjo, above n 36, 15.

²⁷¹ Paul Hunt, 'Reclaiming Economic, Social and Cultural Rights' (1993) 1 *Waikato Law Review* 141, 146; Kartashkin, above n 111, 113; Ssenyonjo, above n 36, 15. See also A. Belden Fields, and Wolf Dieter-Narr, 'Human Rights as a Holistic Concept' (1992) 14 *Human Rights Quarterly* 1, 19-20.

²⁷² Lord Lester of Herne Hill, 'The Challenge of Bangalore: Making Human Rights a Practical Reality' (1999)(3) *European Human Rights Law Review* 273, 288.

²⁷³ Künnemann, above n 58, 325.

²⁷⁴ Laplante, above n 77, 176.

²⁷⁵ Winston, above n 21, 1, 4.

²⁷⁶ Lester of Herne Hill, above n 272, 288; Stacy R. Sandusky, 'Women's Political Participation in Developing and Democratizing Countries: Focus on Zimbabwe' (1999) 5 *Buffalo Human Rights Law Review* 253, 258; Margaret L. Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) 8 *Yale Human Rights and Development Law Journal* 1.

²⁷⁷ Agbakwa, above n 50, 179; David Thomas, 'European Social Charter: Collected Texts [Book Review]' (1998)(4) *European Human Rights Law Review* 513, 513; David Thomas, 'Fundamental Social Rights: Case Law of the European Social Charter. Lenia Samuel [Book Review]' (1998)(4) *European Human Rights Law Review* 513, 513; David Thomas, 'Social Charter of the 21st Century [Book Review]' (1998)(4) *European Human Rights Law Review* 513, 513; Sarmiento, above n 11, 3.

²⁷⁸ *Additional Protocol to the American Convention On Human Rights in the Area of Economic, Social, and Cultural Rights* ["Protocol of San Salvador"], above n 32, Preamble. See also Acheampong, above n 217, 190.

²⁷⁹ Johnstone, above n 67, 184; O'Flaherty, above n 67, 167.

is that all human rights should be simultaneously promoted and implemented.²⁸⁰ Eide thus writes:

The importance of treating the system of human rights as indivisible is that it requires the state to ensure the implementation of the whole set of rights, even if individuals within the state are concerned only with limited and separate parts of the rights.²⁸¹

Cerna gives the example of counter-terrorism strategies, and suggests that these be based on consideration of the ‘full panoply’ of rights, which would engender a proportioned rather than excessive response to threats to security.²⁸² Dunston notes that even where implementation consists of progressive phases of implementation, each phase should engage the full complement of rights.²⁸³

A significant concern of indivisibilists relates to the practice of sacrificing some rights to achieve others. This is communicated by Kofi Annan: ‘Human rights are ... indivisible; one cannot pick and choose among them, ignoring some, while insisting on others’.²⁸⁴ The *Asian Human Rights Charter* reiterates this sentiment: ‘rights and freedoms are indivisible and it is a fallacy to suppose that some types of rights can be suppressed in the name of other rights’.²⁸⁵ According to Winston, governments should not honour some rights in an ‘exceptionalist or selectivist’ way, while treating others as ‘optional, dispensable, non-obligatory, or even as “unreal”’.²⁸⁶

These statements make the reasonably uncontroversial point that it is important not to ignore or suppress some rights. Indeed, human rights practitioners need to be aware of,

²⁸⁰ See, eg, Tahvanainen, above n 151, 876.

²⁸¹ Eide, 'Interdependence and Indivisibility of Human Rights', above n 3, 11.

²⁸² Greg Carne, 'Reconstituting Human Security in a New Security Environment: On Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25(1) *Australian Year Book of International Law* 1, 21.

²⁸³ Dunston, above n 229, 10.

²⁸⁴ Annan, cited in Melissa Robbins, 'Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement' (2005) 35(2) *California Western International Law Journal* 275, 275.

²⁸⁵ *Asian Human Rights Charter*, above n 42, art 2.2.

²⁸⁶ Winston, above n 21, 1-2.

and display an objective attitude towards, the whole corpus of human rights, even if they are making decisions to prioritise certain rights in particular circumstances.

However, other indivisibilists additionally proscribe the bargaining or trading of rights. The NGO submission at the Bangkok regional preparatory conference, leading up to the Vienna Conference, states: 'One set of rights cannot be used to bargain for another'.²⁸⁷ The World Commission on Dams similarly posits that 'fulfilling development needs requires respect for fundamental rights, and not any trade off between them'.²⁸⁸ Yet it could be argued that a central purpose, if not the *raison d'être*, of the discipline of human rights should be to trade and balance rights in determining how to best respond to each circumstance of competing rights or limited resources for instituting rights. Volodin and Donders suggest that giving particular attention to certain rights at certain times is not antithetical to the holistic approach to indivisibility,²⁸⁹ but this seems to be a case of having one's cake and eating it too.

Metaphysical Foundations of Complete Rights

Eide maintains that the body of international human rights law developed thus far is now complete, otherwise rights could not be universal:

We can allege universality of human rights because we have agreed to the comprehensive system of rights. ... by recognizing the broad package of rights, being the best products of several cultural traditions and/or visions for the future, we accept that we now have a universal system of rights.²⁹⁰

²⁸⁷ Cited in Sarah Pritchard, 'The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice' (1995) 2(1) *Australian Journal of Human Rights* 3, 5.

²⁸⁸ World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, 204, (2000). See also Baxi, 'What Happens Next is Up to You: Human Rights at Risk in Dams and Development', above n 134, 1515.

²⁸⁹ Volodin, above n 173, 309-310.

²⁹⁰ Eide, 'Interdependence and Indivisibility of Human Rights', above n 3, 11. Cf. Méndez, above n 62, 10-11.

So according to Eide, rights as they currently exist are fully developed. However, it would seem that once rights stop developing, so must society, as rights generally reflect changes in society. Therefore, Eide's theory leaves us with a metaphysical or static view of both rights and society. Another perspective in the indivisibility literature is that '[a]lthough the list' of rights 'remains incomplete and debatable this does not mean that it cannot be finalised in the future'.²⁹¹ In other words, while rights do not have a metaphysical character now, they may well have one in the future. Viera de Mello, former United Nations High Commissioner for Human Rights, similarly writes:

I suspect, obviously, there are still other categories or areas to be discovered. ... Yet there is a limit to the expansion of these different types or categories of rights, as there is a limit also to the proliferation of treaties and mechanisms and special procedures.²⁹²

However, as Kartashkin notes, the corpus of rights is meant to be general and not all-inclusive, given the assumption that states grant their citizens a more specific level of rights according to the unique nature of their social system, including 'its level of economic development, its national and class structure and historical traditions'.²⁹³ Thus with universalism tempered by relativism in the national digestion of international law, Eide's justification for a complete system of rights based on universalism is further embroiled in doubt.

Divisibility as an Alternative to Indivisibility

Indivisibilists maintain that in the interests of balance,²⁹⁴ CPR and ESCR form equal halves of the canon of rights, which are of corresponding importance.²⁹⁵ However, while this formulation might be satisfactory for those who appreciate Epicurean simplicity,

²⁹¹ Genève Université d'Été des Droits de l'Homme, *An Indivisible Set of Human Rights* <http://www.aidh.org/uni/Formation/02Ens_indiv_a.htm> at 19 August 2010.

²⁹² Vieira de Mello, above n 267, 167.

²⁹³ Kartashkin, above n 111, 36.

²⁹⁴ Hunt, 'Reclaiming Economic, Social and Cultural Rights', above n 150, 146.

²⁹⁵ Michael Kirby, 'Human Rights and Economic Development' (1996) 1996 *Australian International Law Journal* 1, 13.

from a rigorous theoretical perspective, it does not appear possible to view opposites as equally significant. Indeed, the history of philosophy has taught us that opposites cannot be equal, whether in the physical environment or in social life. For the Gestaltists, it is because the ‘whole’ is greater than its opposite, the sum of constituent parts.²⁹⁶ For Hegel, it is because a dominant force or ‘prime mover’ is inherent in the interplay of opposites, otherwise there can be no change or movement.²⁹⁷

Having a theory which allows for change is important if we are to recognise, as Kibwana does, that rights ‘are growing entities’.²⁹⁸ He perceptively observes that ‘[a]s society develops, new human rights spring to life or new emphasis on existing human rights leads to some human rights acquiring new prominence’.²⁹⁹ This stands in contrast to Földesi’s position that although human rights, in particular CPR, ‘carry permanent signs of their origins’, their essence is not based on historical particularities but rather ‘the expression of what is universally human’.³⁰⁰ There appears to be a misleading assumption in Földesi’s work that some societies produce notions of rights, which can extend to other societies which do not produce notions of rights, namely socialist countries. Yet once it is perceived that human rights can radically break away from their history, then one’s attention is unnaturally fixated on the break-away rights, to the detriment of all other rights and their development. This can afford rights such as CPR a much greater degree of significance than what they may have in reality and in the long term when the body of rights has developed and acquired new meaning and content.

In view of the fact that rights are organic entities, it is proposed that the human rights canon should not be perceived as indivisible, but rather divisible. This is because as the parts of a whole change, so does the overall form of the whole, particularly where significant changes to the parts take place, rendering the whole divisible. For instance, changes in individual voting can result in a completely new form of government. In such

²⁹⁶ See Barry Smith (ed), *Foundations of Gestalt Theory* (1988).

²⁹⁷ See Georg Wilhelm Friedrich Hegel, *The Philosophy of Hegel* (Carl F. Friedrich ed, 1954).

²⁹⁸ Kibwana, above n 127, 47.

²⁹⁹ Ibid. 47.

³⁰⁰ Tamás Földesi, ‘Reflections on Human Rights: An Eastern European Perspective’ (1989) 23(1) *Israel Law Review* 26, 31-32.

case, the ‘particular’ (ie, individual voters) dialectically reacts against the ‘general’ (ie, the former government) to achieve a change to the ‘general’ (ie, a newly elected government). Likewise, as a divisible form, the human rights canon is permeable, reflecting its inherent potential to entertain new rights,³⁰¹ cast off obsolete rights,³⁰² and refashion existing rights within the context of social developments. At any one time, the totality of these rights can inform the overall form of the human rights canon, for example, as a generally ‘Western construct’.³⁰³

³⁰¹ See, eg, Kartashkin, above n 111, 59.

³⁰² See, eg, Beetham, above n 94, 50; Földesi, above n 300, 31-32.

³⁰³ See O’Rawe, above n 197, 23. See also Splittgerber, above n 255, 200. Cf. Ssenyonjo, above n 36, 13.

Conclusion

While indivisibility has become a popular catchword in human rights discourse,³⁰⁴ with many human rights theorists acknowledging it for good measure, it is questionable whether the indivisibility thesis can substantially influence the state of human rights. One of its goals of bringing the treatment of ESCR up to the standard of CPR has not been met or even approached, leaving indivisibilists scratching their heads as to why this should be the case '[d]espite the end of the cold war'.³⁰⁵ Yet, contrary to expectations of indivisibilists, the end of the Cold War did not suddenly create a period of calm and political neutrality which could lay the groundwork for a new harmony of rights assisted by a balanced theory of indivisibility. The rise of so-called globalisation in fact served to create sharp tensions in society, fuelling various types of conflict. Alves observes that at the time of the Vienna Conference, '[e]thnic conflict raged in so many places as to justify Samuel Huntington's 'Clash of Civilizations' as the new paradigm of international relations'.³⁰⁶

Indivisibilists put the poor performance of indivisibility in practice down to failure to clarify the content of ESCR and corresponding obligations,³⁰⁷ unclear legal implications of indivisibility,³⁰⁸ and inadequate thoughtfulness and cooperation at a national level.³⁰⁹ However, it is not simply that the form of indivisibility is underdeveloped and requires tweaking at the edges, or that United Nations' reflections on indivisibility are merely

³⁰⁴ Agbakwa, above n 50, 178; Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective', above n 97, 406; Cassese, cited in Koch, 'The Justiciability of Indivisible Rights', above n 38, 38. Cf. Whelan, above n 6, 207-208.

³⁰⁵ Koch, 'Social Rights as Components in the Civil Right to Personal Liability: Another Step Forward in the Integrated Human Rights Approach?', above n 126, 30. See also Agbakwa, above n 50, 178; Ewelukwa, above n 55, 117; Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective', above n 97, 406.

³⁰⁶ Alves, above n 48, 73.

³⁰⁷ Volodin, above n 173, 311.

³⁰⁸ Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective', above n 97, 406.

³⁰⁹ Koch, 'Social Rights as Components in the Civil Right to Personal Liability: Another Step Forward in the Integrated Human Rights Approach?', above n 126, 51.

‘broad overstatements of more modest truths’, as opposed to actual misstatements.³¹⁰

Rather, the content of indivisibility is abstract and metaphysical, given that it is not based on social and historical analysis or an appreciation of rights within their dynamic context.

As demonstrated in this thesis, promoting neutral and historically void concepts of interconnectedness, equality and similarity of rights via the theory of indivisibility can ultimately lead indivisibilists to acquire content and absorb values from existing social and legal norms. As these tend to have a CPR character, this can mean that the theory actually reinforces the *status quo* under the guise of challenging it. Therefore, not only can indivisibility have a nil effect on improving the status of ESCR, it can also have a negative effect, rendering the fundamental challenge of ‘resisting the homogenization of human rights as civil and political rights’ unresolved.³¹¹

Finally, a sound theory on the relationship of human rights should not simply constitute a general response to CPR and its ‘homogenization’ in Western society. It should also seek to respond to the perpetual nuances of the interactions of CPR and ESCR which occur in reaction to developing social conditions, such as the recent Global Financial Crisis. Indivisibilists attempt to correct what they perceive as a permanent imbalance, with the solution of permanent balance. However, if we can demonstrate that there exists fluctuation and divisibility with any tilt towards CPR, then the dilemmas facing the international human rights community require more creative answers.

³¹⁰ Nickel, 'Rethinking Indivisibility: Towards a Theory Supporting Relations Between Human Rights', above n 111, 1001.

³¹¹ Brenda Cossman, 'Reform, Revolution, or Retrenchment? International Human Rights in the Post-Cold War Era' (1991) 32(2) *Harvard International Law Journal* 339, 351.

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