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# Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights

*James W. Nickel\**

## ABSTRACT

Indivisibility is the idea that no human right can be fully realized without fully realizing all other human rights. When indivisibility occurs it has the practical consequence that countries cannot pick and choose among rights. This article offers a framework for understanding supporting relations between rights and gives a number of arguments against strong claims of indivisibility. A central thesis is that the strength of supporting relations between rights varies with quality of implementation. Rights with low quality implementation provide little support to other rights. This is why early UN formulations of indivisibility said that it occurs when the rights in question are *fully* realized. Even if strong claims about the indivisibility were true under high quality implementation, they would be of limited relevance to developing countries because high quality implementation of rights is generally not an immediate possibility in those countries. Developing countries do not run afoul of indivisibility if they implement some rights before others.

## I. INTRODUCTION

Within a system of successfully implemented human rights, many rights support and reinforce other rights. For example, due process rights support

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the fundamental freedoms by constraining abuses of the criminal law that undermine those freedoms. Due process rights also support equality rights by blocking some manifestations of racism in criminal trials. Awareness that many supporting relations exist among rights has led to grand claims that all human rights are interdependent and indivisible.

The indivisibility of human rights is an official doctrine of the United Nations, supported both by the General Assembly and by the Office of the High Commissioner for Human Rights. An early statement is found in the 1968 Proclamation of Teheran: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."<sup>1</sup> The UN General Assembly endorsed the indivisibility thesis in a 1977 resolution, dropping the important qualification about full realization (the importance of this qualification is explained below). The indivisibility thesis was reaffirmed in the 1993 Vienna Declaration, again without the qualification: "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."<sup>2</sup> The political aim of the first two resolutions was to defend economic and social rights, to say that countries endorsing civil and political rights are also committed to endorsing economic and social rights. The statement about interdependence in the Vienna Declaration had other aims as well; it was directed to countries endorsing most human rights while rejecting women's rights or rights of democratic participation as inappropriate to their societies.<sup>3</sup>

Some will be tempted to view claims of interdependence and indivisibility as high flown political rhetoric without much content, as saying little more than "Hurray for taking all types of human rights seriously!" or "Boo to those who try to pick and choose among human rights!" This deflationary temptation will be provisionally resisted. Instead, this article will take these claims at face value and consider whether they are defensible and how much they need to be qualified. The overall goal is Socratic: to sow doubt about indivisibility that stimulates reflection and deeper understanding, not to show that some families of human rights are unjustified.<sup>4</sup>

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1. Proclamation of Teheran, International Conference on Human Rights, 22 Apr.–13 May 1968, ¶ 13, U.N. Doc. A/CONF.32/41 (1968), available at [http://www.unhchr.ch/html/menu3/b/b\\_tehern.htm](http://www.unhchr.ch/html/menu3/b/b_tehern.htm).
  2. Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., 22d plen. mtg., part I, ¶ 5, U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M. 1661 (1993).
  3. See MORTON EMANUEL WINSTON, *INDIVISIBILITY AND INTERDEPENDENCE OF HUMAN RIGHTS* 1–2 (2000).
  4. For the author's views on the justification of human rights, see JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* 53–91, 136–53 (2d ed. 2006). Chapter 9 constructs a justification for social rights.

There are at least three levels at which supporting relations can be investigated. The broadest and most abstract—and also the most familiar—explores supporting relations at the level of two grand families of human rights: “civil and political rights” on the one hand and “economic and social rights” on the other. This broad perspective keeps things simple but is not very penetrating. To achieve the most detailed understanding we could take each particular right and put it together with every one of the others in order to see which supporting relations exist. We might take a particular right such as the right to freedom of association and ask whether and how it supports other specific rights such as the right to a fair trial, the right to vote, or the right to equality before the law. Looking at relations between particular rights is illuminating and cannot ultimately be avoided, but fully realizing this perspective requires much tedious work. If there are forty particular human rights, then combining them into pairs yields 1560 places where supporting relations may exist.<sup>5</sup> Maximal penetration comes at the cost of great complication. An intermediate perspective uses several families of rights, combining each family with every one of the others in order to see which supporting relations exist. Using a scheme of seven families, this approach offers the best balance of penetration and manageability. The seven families are (1) security rights, (2) due process rights, (3) fundamental personal freedoms, (4) rights of political participation, (5) equality rights, (6) social rights, and (7) minority and group rights.<sup>6</sup> Combining the seven families into pairs yields forty-two possible supporting relations. For example, we could begin by asking of security rights whether and how strongly they support due process rights, fundamental personal freedoms, rights of political participation, equality rights, social rights, and minority and group rights.

It would be helpful to know not only which, if any, supporting relations exist between each pair of families, but also the strength of those supports. For example, it would be good to know how much, if any, support the fundamental personal freedoms provide to equality rights. It seems likely that these freedoms (unlike rights of political expression and participation) provide little support to equality rights. In pursuit of a better view of supporting relations we might work up a view of what major protections each family is likely to provide once it is implemented, as well as a view of what main threats each family faces. Claims about supporting relations involve both normative propositions (such as ones setting out the main threats to a family of rights)<sup>7</sup> and empirical propositions, ones about what one part of a

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5. Forty times forty equals 1600, but we can ignore the forty relations of rights to themselves.

6. NICKEL, *supra* note 4, at 93–94.

7. Conceptions of the main threats to the realization of rights have a normative dimension because they involve views about the strength of tendencies to do particular kinds of evil in individuals, governments, and groups. For example, one's view of the strength and

social and legal system contributes to another part. The empirical claims are not easily settled from an armchair—unless the person in the chair already has an enormous knowledge of history, law, and politics.<sup>8</sup> Further, concepts such as “interdependence,” “support,” “indispensability,” and “indivisibility” are more complex than they first appear, and the nature and strengths of supporting relations may vary by country. Such variation occurs because different countries experience somewhat different threats to rights and use different means of implementation. A right that is indispensable to another at a high threat level may be merely useful when the threat level is low.

The second section of this article lays out a scheme for understanding interdependence and indivisibility, arguing that indivisibility is a very strong form of interdependence. Section three argues that the strength of supporting relations between rights depends heavily on how well the rights are implemented. Rights with high quality implementation provide more support to other rights than ones with low quality implementation. The fourth section argues against system-wide indivisibility. The fifth section argues that claims about the indivisibility and interdependence of human rights have much less relevance to developing countries than is generally realized. Section six analyzes linkage arguments—defenses of a controversial right that appeal to the valuable support it provides for an uncontroversial right.

## II. SUPPORTING RELATIONS, INTERDEPENDENCE, AND INDIVISIBILITY

Indivisibility and interdependence are not the same. Many more rights are interdependent than are indivisible. Indivisibility is a very strong form of interdependence (or bidirectional support).<sup>9</sup>

A supporting relation between two things exists when one of them contributes to the functioning or stability of another. Without the support,

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universality of the tendency to discriminate along racial and ethnic lines will make a big difference in what protections against discrimination one takes to be necessary—and thus affect one's views about what supports from other rights are useful and indispensable. If one thought that only some countries are infected by serious racism then one might reject the claim that all countries need strong equality rights to combat racial and ethnic discrimination. This in turn might lead one to reject the claim that all countries need to use security and due process rights to provide strong supports for rights against discrimination.

8. For example, it would be useful for the theorist or international lawyer in the armchair to know whether Castro's Cuba proved in practice that it is possible to fully implement social rights without fully implementing the fundamental personal freedoms and rights of political participation.
9. I do not mean to suggest, of course, that rights are only supported by other rights. Many other factors support rights. The effective functioning of rights is supported, for example, by strong economies, tolerant and fair-minded people, and the absence of civil war.

the second thing would function less well or be less stable. Here the focus is on supporting relations between two rights (or families of rights) *held by everyone*.<sup>10</sup>

Respecting and implementing one right can promote the realization of another right by: (1) protecting against some of the main threats to the supported right, as when effective implementation of a right to freedom of movement protects against those violations of the right to freedom of assembly that block people from moving to the location of the assembly; (2) providing a remedy or process that is sometimes, often, or always useful in protecting the supported right—such as the assistance the right of access to the courts sometimes provides to other rights by making available remedies for their violation; (3) making the institutions and procedures used to implement the supported right less vulnerable to corruption and abuse, as when rights of democratic participation subject governmental officials to democratic scrutiny and thereby help protect the right to a fair trial; (4) improving the capacities of rightholders, as when one right promotes people's ability to use, benefit from, and protect some other right.

Supporting relations have different strengths. Strong supporting relations can be defined in terms of logical or practical inconsistency. An assisting right strongly supports the assisted right when and only when it is inconsistent—logically or as a practical matter—for a person to endorse the implementation of the assisted right without endorsing the simultaneous implementation of the assisting right. The inconsistency lies in trying to have a functioning right without being willing to endorse something else that is indispensable or necessary to its functioning.

Let a thick arrow,  $R_1 \rightarrow R_2$ , represent a strong supporting relation from one right ( $R_1$ ) to a second right ( $R_2$ ). This can be read as "right 1 strongly supports right 2" or as "right 2 strongly depends on right 1." The right to security against physical attack is practically indispensable to the full protection of the right to freedom of assembly. If people have no protection against violent attacks it will sometimes be risky to assemble for unpopular purposes. Thus, it is practically inconsistent to advocate implementing the right to freedom of assembly while rejecting all rights to protections against physical attack.

A baseline problem arises in assessing the indispensability of one right to another. If we are considering whether the right to freedom of assembly is indispensable to the right to equal protection of the law, should the baseline

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10. For some purposes it is useful to focus on supporting relations between different people's rights. For example, a journalist exercising her right to freedom of expression may help support the realization of a hungry person's right to adequate nutrition. See Craig Scott, *Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights,"* 21 *HUM. RTS. Q.* 633, 645 (1999).

situation be (1) the absence of any assemblies or (2) simply the numbers and kinds of assemblies that would exist even without any specific protections for free assembly? The second baseline is the appropriate one because it focuses on what the right itself contributes. It is a mistake to assert the indispensability of the right to freedom of assembly to other rights on the grounds that if no assemblies occurred this would be disastrous for other rights. Indispensability should be assessed in light of the actual threat level to assemblies and how much the recognition and implementation of a right to freedom of assembly will do to reduce that level.

Weak supporting relations exist when the supporting right is useful but not indispensable to the supported right. For example, a functioning right to education is generally useful but not indispensable to a functioning right to a fair trial in criminal cases. If  $R_1$  is useful or even highly useful to  $R_2$  there is no contradiction, logical or practical, in endorsing the implementation of  $R_2$  without endorsing the simultaneous implementation of  $R_1$ . Let a weak supporting relation be represented by a thin arrow,  $R_1 \rightarrow R_2$ .

To call some supporting relations "weak" is not to deny their importance. Many (perhaps most) supporting relations between rights are of the weak variety. They make the supported right more secure without being indispensable. For example, implementation of a right to free public education is highly useful to the implementation of most other rights because its implementation improves levels of literacy, competency, and legal and political knowledge.

Many good things carry with them evils, costs, and dangers. A thing that is supporting also can be simultaneously damaging. For example, running every day can be generally good for a person's overall health while causing long-term damage to the joints. The same is possible in the realm of rights. Security rights support rights to the fundamental freedoms, but the system of criminal law used to implement security rights generates risks to those freedoms. For a relation to be supportive, the beneficial support provided must outweigh the damages and risks created. Countervailing harms and risks should be taken into account when assessing the strength of supporting relations between rights. If a right does more harm than good to the functioning of another, then, overall, it provides no support.

Redundancy in a structural system means that a component has more support or reinforcement than is necessary to its strength or stability. For example, if a tall radio antenna is supported both by strong diagonal braces at its base and by a multitude of guy wires, the system has redundancy if some of the supports could be removed without any loss to the stability of the antenna. Some of the supports that other rights provide to freedom of religion, for example, may be redundant. In the absence of some of those supports people could continue to enjoy fully the right to freedom of religion. Redundancy is relative to threat levels, however. Supports that are redundant

in countries with low threat levels may be indispensable in countries with high threat levels.

Supporting relations are sometimes, but not always, bidirectional. Strong bidirectional support between rights can be represented by thick arrows in both directions,  $R_1 \leftrightarrow R_2$ . For example, strong bidirectional support exists between the full realization of the right to free and regular elections of government officials and the full realization of the right to political participation. For a biological example consider that the liver's functioning is indispensable to the heart's functioning, and vice versa (liver  $\leftrightarrow$  heart). This is strong interdependence.

Weak bidirectional supporting relations create weak interdependence,  $R_1 \leftrightsquigarrow R_2$ . For example, the right to freedom of speech is weakly supported by and weakly supportive of the right to free public education. For a biological example, the functioning of the left hand is useful but not indispensable to the functioning of the right hand and vice versa (left hand  $\leftrightsquigarrow$  right hand).

The third possibility is mixed-strength interdependence. Here there is a strong supporting relation in one direction and a weak supporting relation in the other. The heart's functioning is indispensable to the functioning of the hands, and the functioning of the hands is useful (in assisting with eating, for example) but not indispensable to the functioning of the heart (heart  $\leftrightarrow$  hands). Mixed-strength interdependence of rights is perhaps illustrated by the fully realized right to freedom of movement and the fully realized right to freedom of expression. Free movement is indispensable to free expression, but free expression is not indispensable to free movement (movement  $\leftrightarrow$  expression). Henry Shue argued that security rights and subsistence rights are basic in the sense that it is impossible to fully enjoy any other rights if these families are not enjoyed.<sup>11</sup> In his view, security and subsistence are indispensable to each other and to all other rights, but non-basic rights are, at best, useful to the basic rights (basic rights  $\leftrightarrow$  non-basic rights).

Indivisibility is strong interdependence or indispensable bidirectional support. If two items are mutually indispensable, then they are bidirectionally indivisible. You cannot destroy either without destroying both. The heart and the liver are bidirectionally indivisible; one cannot function without the other. Weak bidirectional supporting relations, however, do not create indivisibility. A person's two hands are mutually supportive but not indivisible because one can function without the other. Mixed-strength supporting relations create indivisibility in one direction but not the other. One can sacrifice a hand to save a heart, but not a heart to save a hand.

Because weak supporting relations do not create indivisibility, they cannot be invoked as an explanation of why indivisibility occurs. Jack Donnelly

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11. HENRY SHUE, *BASIC RIGHTS* 21–28 (2d ed. 1996).



seems to make this mistake when he says, "The Universal Declaration model treats internationally recognized human rights holistically, as an indivisible structure in which the value of each right is significantly augmented by the presence of many others." This fails to recognize the genuine possibility that each right could be supported weakly by many others without this generating an indivisible structure.<sup>12</sup> One can interconnect five sturdy freestanding columns with millions of strings without making them indispensable to each other.

System-wide indivisibility is strong interdependence between all of the units in a system. Each unit is bidirectionally indispensable to every other unit. A system of seven families of rights with system-wide indivisibility can be represented as follows:

$$R_1 \leftrightarrow R_2 \leftrightarrow R_3 \leftrightarrow R_4 \leftrightarrow R_5 \leftrightarrow R_6 \leftrightarrow R_7$$

System-wide indivisibility is interesting because under some circumstances it precludes sacrificing any unit and because it equalizes priority between the units. Some people who endorse the indivisibility of rights probably mean to assert that system-wide indivisibility holds between all the families of human rights, or even between each and every particular human right. System-wide indivisibility is discussed in the next section.

The following claims have been defended in this section:

(1) Supporting relations between rights have different strengths that range from useful to indispensable. Supporting relations can run in one ( $\rightarrow$ ) or both ( $\leftrightarrow$ ) directions. If two rights are useful to each other this is not enough to make them indivisible. Indivisibility requires that the two rights be indispensable to each other in a wide range of situations ( $\leftrightarrow$ ).

(2) Indivisibility and interdependence are not the same relation, even though both are bidirectional. Indivisibility between two or more rights requires that they be mutually indispensable.

### III. THE STRENGTH OF SUPPORT DEPENDS ON THE QUALITY OF IMPLEMENTATION

So far we have discussed the functioning of rights, without sufficiently attending to how well they function. The quality of functioning or implementation must now be introduced into the framework because of the fact that high quality functioning generally requires more support from other elements in a system than does low quality functioning.

Introducing the quality of functioning into the framework adds an additional element to the specification of supporting relations. Consider three

12. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 27 (2003).

levels of implementation: (1) non-implementation (the right is unrecognized or exists only on paper); (2) low quality implementation, and (3) high quality implementation. "Full realization" occurs when there is high quality implementation of rights. High quality implementation requires more and stronger support from other rights—and from conditions that are not themselves rights—than does low quality implementation. Further, rights with low quality implementation provide less support to other rights than do rights with high quality implementation.

A right is fully implemented or has high quality implementation when all of the major threats to the right have been adequately blocked or neutralized through actions such as gaining recognition and compliance with the right's associated moral and legal duties, providing protections and other services, and providing legal and other remedies for noncompliance with the right.<sup>13</sup> Realization is the end and implementation is the means. In some cases realizing a right requires little implementation. If governmental officials and the public already accept the right and its associated duties, threats may be few and implementation easy. In religiously tolerant Brazil, for example, not much implementation is required for the realization of the right to freedom of religion. In religiously divided Nigeria, on the other hand, serious implementation is necessary.

It is now clear why the Teheran Proclamation mentioned full realization ("the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible").<sup>14</sup> This was in recognition of the fact that what is indispensable to the full realization of a right may not be indispensable to partial realization. Shue was also careful to restrict to "full enjoyment" his claims that security and subsistence are indispensable to other rights.<sup>15</sup> Restricting claims about indivisibility to those countries where rights are fully realized means that these claims will have little relevance to troubled and impoverished countries where at best rights are only partially realized.

Sometimes countries only accept and implement narrow rights when broad rights are called for. In such cases moving to better quality implementation involves giving rights more adequate scopes. A better-implemented right is not necessarily one with a larger scope. It may simply do a better job of protecting the original scope or extend the right to more people. Consider an analogy between rights and insurance policies.<sup>16</sup> Inexpensive insurance policies have large co-payment requirements and cover only a limited range

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13. James W. Nickel, *How Human Rights Generate Duties to Protect and Provide*, 15 *HUM. RTS. Q.* 77, 80–86 (1993); reprinted in abridged form in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 190, 190–91 (Henry Steiner, Philip Alston, & Ryan Goodman eds., 2007).

14. Proclamation of Teheran, *supra* note 1, ¶ 13.

15. SHUE, *supra* note 11, at 21, 24.

16. See JOHN RAWLS, *A THEORY OF JUSTICE* 108, 176, 179, 204, 230, 248, 275, 277 (1971).

of risks. More expensive policies reduce the co-payment and cover more risks. Analogously, low quality implementation covers only some risks and leaves all or some people to fend for themselves in particular areas. High quality implementation of rights covers more people and risks, and relies less on self-help. The more risks one attempts to eliminate, the greater the costs and the amount of support needed from other rights.

Human rights problems sometimes take the form of low quality implementation for everyone, but they also frequently take the form of high quality functioning for some and nonfunctioning for others—where these others may be defined in terms of individuals, groups, or regions. In a developing country, residents of the main cities may enjoy good quality implementation of some rights while rural people, particularly those in remote areas, receive no protection whatsoever, or receive very inadequate and spotty protection.

Unequal distribution of the benefits of rights need not be a matter of formal exclusion from the group of rightholders. Even if rights are thought of as rights of all citizens or persons, implementation can be very unequal for different areas or different sorts of persons. Indeed, fully equal implementation is difficult and costly to achieve because it is frequently the case that some people and groups are extremely vulnerable or live in distant or troubled areas.

There are connections between quality and distribution. When the implementation of a right is of generally low quality, some people are likely to be protected inadequately or not at all. For example, if the courts are poorly organized, underfunded, and only found in regional centers, implementation of some people's due process rights is likely to be not merely poor but nonexistent. Low quality implementation often addresses risks to some of the population while totally or partially failing to address risks to other parts of the population. It often leaves pockets of insecurity. Better-quality implementation eliminates some of these pockets, and perfect implementation would eliminate them all.

The quality and distribution of the implementation of a supporting right normally needs to reach a medium level before it begins to help much with the realization of the supported right. If only a few of the people convicted of serious crimes have access to an appeal process, and if the appeal process is very slow and cumbersome, this does little to support the general fairness of criminal trials—although it may give justice in a few particular cases. If the benefits of a right depend on the creation of a public good such as a low crime rate or an informed public, low quality implementation of the right may mean that the public good never emerges. Doing a little but not much to implement a right often fails to produce any support for other rights.

High quality implementation means that good legal and political institutions are in place and that those mechanisms work well in achieving

respect and protection for people's rights. Still, high quality implementation does not mean perfect implementation. Instead, it means the sort of implementation actually achieved by the countries today that are most successful in promoting and protecting human rights domestically. Further, high quality implementation does not mean that the protections extend to every imaginable threat. It is wise here to follow Shue in treating full realization as a matter of having high quality protections against the main or standard threats to the right. According to Shue, "[T]he social guarantees required by the structure of a right are guarantees, not against all possible threats, but only against what I will call standard threats. . . . People are [not] entitled to social guarantees against every conceivable threat."<sup>17</sup> When we speak of supporting relations between rights we mean assistance in dealing with the standard threats. Potential assistance in dealing with nonstandard or exotic threats will be insufficient to establish a supporting relationship. Even the best insurance policies do not cover Martian invasions.

This section has defended the following theses.

(3) The strength of supporting relations between rights varies with the quality and distribution of implementation. The high quality implementation of a right requires (but also provides) more and stronger support from (to) other rights. Rights with low quality implementation provide (and need) less support to (from) other rights.

(4) A system of rights that has low quality implementation for most rights will tend to have low levels of interdependence among its rights.

#### IV. AGAINST SYSTEM-WIDE INDIVISIBILITY

This section presents two arguments against system-wide indivisibility. The first argument shows what a strong claim this is and suggests that counterexamples are available. The second argument shows that system-wide indivisibility would have the implausible consequence that there can be no priority variations among the rights in the system.

System-wide indivisibility requires strong bidirectional supporting relations (mutual indispensability) among all the families of rights. To assert that system-wide indivisibility exists is a very strong claim, and it is only remotely plausible under high quality implementation of all human rights. Even in that happy situation, mutual indispensability is unlikely to hold among *all* of the families of rights. All that is required for its absence is for one family of rights to fail to be indispensable to all of the others, and there are likely to be such cases. For example, it seems possible to have high quality implementation of security rights together with nonrealization of

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17. SHUE, *supra* note 11, at 29, 32.

the fundamental personal freedoms. It also seems possible to have at least medium quality implementation of the fundamental freedoms without full realization of social rights.

The second argument against system-wide indivisibility requires the introduction of the idea that the indivisibility of rights produces priority equalization. In general, if achieving A is genuinely indispensable to achieving B, then whatever reasons an agent has for pursuing B are also equally strong reasons for pursuing A. This principle transfers priority from a supported right to its supporting right. When we realize that  $R_1$  is truly indispensable to  $R_2$ , we realize that  $R_1$  has at least as much priority or importance as  $R_2$ . If  $R_1$  is useful but not indispensable to  $R_2$ , the boost in priority that  $R_2$  gives to  $R_1$  will be much smaller. Weak supporting relations yield much smaller boosts to the priority of the supporting right than strong supporting relations.

If there are many strong supporting relations among the members of a group of rights, this tends to reduce variations in priority among those rights. This is clearest in the case of system-wide indivisibility, because it equalizes priority among all the rights (or families of rights) in the system. Suppose that we have system-wide indivisibility between four rights ( $R_1 \leftrightarrow R_2 \leftrightarrow R_3 \leftrightarrow R_4$ ). Suppose also that when we assess the priority of those rights one-by-one without attending to the relations between them we assign the following priority scores (using a ten point scale):  $R_1$  has priority 6;  $R_2$  has priority 5;  $R_3$  has priority 7; and  $R_4$  has priority 9. When we consider the fact that  $R_2$  is indispensable to 6 priority  $R_1$ , we raise  $R_2$ 's score to 6. When we consider that  $R_1$  and  $R_2$  are indispensable to  $R_3$ , we raise their scores to 7. When we consider that  $R_1$ ,  $R_2$ , and  $R_3$  are indispensable to  $R_4$ , we raise their scores to  $R_4$ 's level (9). All four rights end up with a priority score of 9. System-wide indivisibility equalizes priority at the level of the highest priority right.

Weak supporting relations have a smaller impact on variations in priority. If  $R_1$  is very useful but not indispensable to  $R_2$ , then  $R_1$  only inherits part of  $R_2$ 's priority. If a set of rights is linked together by numerous weak supporting relations but only by a few strong ones, substantial variations in priority remain possible.

When two rights or families of rights are mutually indispensable this equalizes their priority. It follows that if all families of human rights formed an indivisible system then all the families would have the same priority. A plausible objection to the existence of system-wide indivisibility is that it contradicts the attractive idea that rights protecting people's lives have higher priority than many other human rights. For example, many countries that value both security and liberty nevertheless assign higher priority to protecting people's lives. Five murders committed by a government will yield a much louder international outcry than twenty violations of freedom of assembly. More generally, the fact that some rights are *jus cogens* and that

some "super-rights" qualify for the protection of the International Criminal Court also suggests that there is priority variation among human rights.<sup>18</sup> Thus, if system-wide indivisibility implies that there is no priority variation among families of human rights, and if that implication is implausible, then system-wide indivisibility is implausible.

This objection to system-wide indivisibility might also defend the existence of priority variation by appealing to the non-derogation clauses found in the European Convention on Human Rights,<sup>19</sup> the International Covenant on Civil and Political Rights,<sup>20</sup> and the American Convention on Human Rights.<sup>21</sup> These clauses permit the suspension of most rights during emergency situations but forbid the suspension of some very important rights. It is doubtful, however, that the non-derogation clauses provide a sound argument against system-wide indivisibility. The reason is that system-wide indivisibility is only likely to exist under high quality implementation but these emergency clauses are designed for extreme situations in which high quality implementation for all rights is impossible to maintain. For example, a disaster may make it impossible temporarily to run schools, conduct fair criminal trials, or to ensure equality before the law. Further, appropriate government responses to the emergency often involve restricting rights, such as freedom of movement and assembly. Without high quality implementation of all the families of rights, priority equalization will not occur. Hence it is possible for there to be priority variation among rights in emergency situations even if no priority variation occurs in nonemergency situations in which all the families of rights enjoy high quality implementation.

System-wide indivisibility, which occurs when all the families are indivisible, is a very strong notion. A slightly weaker notion may be useful. *Widespread* indivisibility exists when *most* of the families are mutually indispensable. The arguments given above against system-wide indivisibility do not show that widespread indivisibility does not exist among the seven families of rights. If widespread (but not system-wide) indivisibility exists among all the families of human rights then this is of great interest.

System-wide indivisibility might be defended on the grounds that if all human rights are derived from a single value, such as human dignity, the

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18. See IAN D. SEIDERMAN, *HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION* chs. 3, 4, 8 (2001).
  19. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, art. 15, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953).
  20. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 4, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).
  21. American Convention on Human Rights, *signed* 22 Nov. 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.LV/II.23, doc. 21, rev. 6, art. 27 (*entered into force* 18 July 1978), *reprinted in* 9 I.L.M. 673, 683 (1970).

result will be that all the families of human rights will have a strong form of unity akin to indivisibility.<sup>22</sup> The threats to human dignity are quite varied, however, and this results in families of rights that are equally varied. For example, the threats addressed by the fundamental freedoms are mostly different from the threats addressed by equality rights. Consider the following analogy: Just because all of the departments of an excellent hospital are devoted to the promotion, preservation, and restoration of health, it does not follow that a hospital cannot have surgery and internal medicine departments but no department devoted to liver transplants, that there cannot be real competition between the hospital's departments, or that some departments cannot be reduced or eliminated in order to cope with poor economic conditions. A common origin in a single underlying value may produce some sort of unity among institutions constructed to protect that value, but it does not make these institutions indivisible.<sup>23</sup>

This section has defended the following theses:

(5) System-wide indivisibility is not plausible at the level of seven families of rights. It requires that each of the families be indispensable to all of the others. If some families are much more supported than supportive in a wide range of circumstances, then system-wide indivisibility will not obtain.

(6) If system-wide indivisibility really existed, it would be inconsistent with the idea that some rights, or families of rights, have higher priority than others.

(7) The priority variations implied by the derogation clauses are compatible with system-wide indivisibility because the measures taken to deal with the emergency are likely to undermine high quality implementation for some rights, and system-wide indivisibility is only likely to exist under high quality implementation of all rights.

## V. THE LIMITED RELEVANCE OF INDIVISIBILITY TO DEVELOPING COUNTRIES

Claims about the indivisibility and interdependence of human rights have much less relevance to developing countries than is commonly thought. Developing countries trying to get into the realm of human rights are not initially concerned with high quality implementation for all. A realistic short-term aspiration for many developing countries would be to have low quality implementation for most of the population. But such implementation yields fewer and weaker supporting relations between rights. Bidirectional indispensability between all rights, or all families of rights, is unlikely to exist.

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22. DONNELLY, *supra* note 12, at 45–46.

23. See NICKEL, *MAKING SENSE OF RIGHTS*, *supra* note 4, at 103–04.

Indivisibility, as formulated in the Teheran Proclamation, as well as in Shue's theory of basic rights, is a thesis about supporting relations that exist when rights are fully implemented or enjoyed.<sup>24</sup> But most developing countries are not in a position to fully implement all the rights for everyone. Hence, claims of indivisibility and interdependence do not have much relevance to their situation. Thinking they do is a mistake based on failure to attend to the quality and distribution of implementation. These claims will be relevant only when these countries get closer to achieving high quality implementation.

Another reason to doubt the relevance of claims about indivisibility and interdependence to developing countries is that interdependent structures are not necessarily built in ways that involve interdependence in the early stages of construction. Consider as an analogy an arched stone bridge. Such a bridge is a strongly interdependent structure in the sense that if you remove any major piece from the arch the whole span will fall. But this interdependence does not mean that you have to build all parts of the bridge at one time. Workers can carve some stones before others and build the ends of the bridge before building the center. Temporary scaffolding or even earthen ramps can provide temporary support for the arch during construction.

As this analogy suggests, some parts of a system of rights can be created before others. For example, a country can achieve low quality implementation of a system of criminal law and due process before protecting fundamental freedoms. Trying to implement criminal law and due process before providing free public education may run into difficulties in places where educated participants would be helpful in supporting the system of law and due process, but perhaps temporary scaffolding can be arranged. If uneducated people who are charged with crimes cannot understand the complexities of the operations of the criminal justice system and how best to defend their innocence, temporary scaffolding might be arranged by providing free lawyers or lay counselors to help them cope. If this is the case, then claims about indivisibility and interdependence do not imply that developing countries should follow the policy of doing a little to implement every family of rights. It is possible to pick and choose among rights in developing countries. Debate should continue about how best to move from non-implementation to low quality implementation and then on to high quality implementation. The best way to sequence the implementation of various rights may depend on country-specific factors such as where governmental capacities needed for implementation are already in place or partially developed.

There is also reason to think that across-the-board partial implementation in its early stages creates few relations of support. Rights with very low

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24. SHUE, *supra* note 11, at 21.



levels of implementation do little to support other rights. The protection they provide to other rights is like an insurance policy issued by a company that has just come into business and as yet has no phones or claim adjusters. This is not to say, however, that no supporting relations exist under low quality implementation. The relations that do exist, however, will mostly be of the weak variety.

System-wide indivisibility would be very bad news for human rights in developing countries if it meant that moving into the realm of human rights was an all-or-nothing matter, that is, if it implied that a developing country had to implement all of the families in order to implement any of them. Low quality implementation provides a way of easing into the realm of human rights, allowing some families to be implemented before others. Even if system-wide or widespread indivisibility exists between the seven families of rights under high quality implementation, this does not imply that such strong interdependence exists under low quality implementation.

This section has defended the theses that:

(8) Claims about the indivisibility and interdependence of human rights are of limited relevance to the situation of developing countries because high quality implementation—which produces stronger relations of interdependence—is generally not an immediate possibility.

(9) Low quality implementation provides developing countries with a way of easing into the realm of human rights. Even if system-wide or widespread indivisibility exists under high quality implementation, this does not imply that such strong indivisibility exists when the general quality of implementation is low.

## VI. LINKAGE ARGUMENTS BASED ON SUPPORTING RELATIONS

Linkage arguments defend controversial rights (such as economic and social rights) by arguing that they are justified because they provide indispensable support to some already justified or accepted rights (such as civil and political rights). If  $R_2$  is already recognized as a justified right, and if it can be shown that  $R_1$  provides truly indispensable support for  $R_2$ , then full implementation of  $R_2$  requires simultaneous implementation of  $R_1$ . Many theorists have used linkage arguments.<sup>25</sup> Weak supporting relations only yield weak linkage arguments. The fact that  $R_1$  is useful or even very useful to  $R_2$  provides a reason for having  $R_1$  but not a full justification. Because strong supporting relations between rights will be rare in developing countries, linkage arguments will have very limited immediate use in those countries.

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25. See, e.g., NICKEL, MAKING SENSE OF RIGHTS, *supra* note 4, at 129–31, 144–45; AMARTYA SEN, DEVELOPMENT AS FREEDOM 152, 181–82 (1999); SHUE, *supra* note 11, at 11–64.

The success of linkage arguments is less important if there are good freestanding justifications for all seven families of rights. For example, the right to freedom of religion does not provide indispensable support to most other rights, but the small role it plays in supporting other rights does not undermine it due to the availability of good freestanding justifications.

Linkage arguments are double-edged swords because their effect can be to drag down the supported right rather than to justify the supporting right. Suppose that  $R_2$  is thought to be justified, but just barely because of its high costs.  $R_2$  does not have a large margin of justification that would allow it to support new and heavy costs.<sup>26</sup> Also suppose that an indispensable supporting right  $R_1$  is not yet implemented. Under these assumptions, discovering that the implementation of  $R_1$  is indispensable to the implementation of  $R_2$  may lead to the conclusion that  $R_2$  is not justified after all by revealing a large area of unsuspected costs.

The conclusions of this section are:

(10) Linkage arguments only provide conclusive support for a right when the supporting right being defended is indispensable to the supported right whose high priority is already established or accepted.

(11) Linkage arguments have limited immediate use in developing countries.

## VII. CONCLUSION

This article has identified a number of possible mistakes that should be avoided in thinking about supporting relations between rights. They include:

(1) Ignoring differences in the strength of supporting relations (not recognizing that many supporting relations are useful but not indispensable).

(2) Using the wrong baseline in estimating the indispensability of one right to another (proceeding as if no right to freedom of assembly meant that no assemblies would occur).

(3) Not recognizing the difference between one-way and mutual support.

(4) Failing to attend to the quality of implementation and its effects on the strengths of supporting relations.

(5) Failing to recognize that claims about what is necessary to the *full* realization of a right have limited relevance to the situation of developing countries.

Overall, this article has cast doubt on comfortable and often-repeated claims about the indivisibility of human rights. The goal has been to encour-

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26. On the costs of rights see NICKEL, MAKING SENSE OF RIGHTS, *supra* note 4, at 82–85; STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 35–83, 220–21, 233–36 (1999).

age deeper and more useful thought about supporting relations between rights. As an aid to such thought and study, a conceptual framework for thinking about interdependence and indivisibility was constructed. When one applies this framework it appears likely that the United Nations statements about indivisibility are broad overstatements of more modest truths. One may have suspected this antecedently, but the framework helps one understand how and why.