

HUMAN RIGHTS THEORY AND SUSTAINABLE DEVELOPMENT

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I. INTRODUCTION

Human rights and sustainable development arguably share a close relationship.¹ But, the exact nature of this relationship continues to be elusive. Scholars of sustainable development have often pointed out that climate change negotiators rarely bring up sustainable development concerns as core human rights issues.² Others point out that it is often difficult to operationalize sustainable development obligations through the language of rights.³ What explains this intuitively close, but practically estranged relationship? In this essay, I argue that apart from political and strategic reasons, there are reasons rooted in how human rights are conceptualized that leads to the uneasy relationship between the two ideas. I draw attention to leading liberal theories of human rights and the normative status of sustainable development to argue that there is a weak case for at least speaking of a human right to sustainable development on such theories. My conclusion is based on an underexplored reason for why liberal human rights theories differ in conceptualising human rights. I argue that the differences between human rights theories are conventionally understood to be rooted in justificatory and normative grounds. They differ on the foundational concepts that justify human rights protection, and the values that lend normativity to the idea of human rights. However, the differences perhaps run deeper. In Part I of the paper, I examine prevailing liberal human rights theories to argue that disagreement about human rights stems not only from justificatory and normative reasons, but also from ontological ones. By pointing out key differences amongst prominent human rights

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¹ See e.g., Dominic McGoldrick, “Sustainable Development and Human Rights: An Integrated Conception”, 45(4) *International and Comparative Law Quarterly* 796 (1996).

² Gregor Beck, Cora Ditzel, Sofia Ganter and Olga Perov, “Mind the Gap – The Discrepancy between the Normative Debate and the Actual Use of Human Rights Language in International Climate Negotiations”, 14(2) *Consilience: The Journal of Sustainable Development* 25 (2008).

³ Paul G. Harris, “Affluence, Poverty, and Ecology: Obligation, International Relations, and Sustainable Development”, 2(2) *Ethics and the Environment* 121, 127 (1997).

theories, I divide them into three conceptions. In part II, I employ these conceptions to evaluate how sustainable development figures within them. I argue that sustainable development places obligations to consider a wide range of reasons pertaining to the environment and development, and to strike a balance between the two. It plays a normative role in many fields of international law as a concept and a meta-principle, but its nature is not suited to the language of rights on leading liberal theories of human rights. Its non-specific nature disables it from identifying interests or freedoms of the sorts that might qualify for human rights protection. In addition, it cannot form the basis of a right with identifiable right holders, correlative duty bearers, and interests that are to receive protection. I conclude by indicating that concepts other than rights are more useful to think about sustainable development.

II. HUMAN RIGHTS THEORY: THREE CONCEPTIONS

A. Disagreement About Human Rights: Unexplained by Theories Presupposing Ontological Agreement

The widespread use of human rights suggests at least some loose agreement on the ontology of human rights: that there exists some agreement of what populates the field of human rights. Such agreement makes communication within practices involving human rights possible.⁴ Simultaneously, there is an ongoing theoretical debate on the understanding, justifications, and requirements of the concept of human rights.⁵ This simultaneous existence of agreement on some cases, and disagreement on conceptualization is a phenomenon abounding many disciplines including law. At present, there exists an explanation for it in legal theory that is often applied to constitutional law and international human rights law. The explanation goes that often participants agree only on specific questions about human rights, without possessing a coherent theory of what human rights are, and they strategically choose not to settle on that question to keep matters open for the future and other participants. This is roughly the first class of Cass Sunstein's 'incompletely theorized agreements'.⁶ There are other variants of this argument. For example, participants in a practice may agree on a vague idea of what grounds human rights, without fleshing out what that idea specifically requires, but agree on particular requirements that fall under it. Call this the 'place-holding scenario', where the

⁴ (I will generally refer to the various scenarios in which human rights is used as practices of human rights.)

⁵ James Griffin, *On Human Rights* (2008); Charles R. Beitz, *The Idea of Human Rights* (OUP, 2009); Allen Buchanan, "The Egalitarianism of Human Rights", 120 *Ethics* 679 (2010); John Tasioulas, "Taking Rights out of Human Rights", 120 *Ethics* 647 (2010); Rainer Forst, "The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach", 120 *Ethics* 711 (2010); James Griffin, "Human Rights: Questions of Aim and Approach", 120 *Ethics* 741 (2010).

⁶ Cass R. Sunstein, *Legal Reasoning and Political Conflict*, Ch. 2 (OUP, 1996).

vague agreement acts as a placeholder that can be subsequently filled up with content.⁷ The difference between the two formulations is that in the incomplete agreement scenario participants are later free to disagree on what justifies human rights and thus what it requires, though they may have to justify what counted in favour of their earlier points of agreement. In other words, parties do not create any historical fact that grounds human rights, other than the specific decisions they agreed on. In contrast, in the place-holding scenario, parties agree on some vague justification of human rights, say human dignity, and thus commit themselves to making it figure in future deliberations of what human rights require. They are therefore under additional constraints in the future when they deliberate on human rights. Apart from having to justify how their previous agreements figure in their present arguments, they also need to explain how those agreements and the present arguments are related to human dignity in a similar manner.⁸

Theoretical debates within human rights law can surely be explained to some extent on Sunstein's incompletely theorized arguments. Such explanations would demonstrate how participants might intentionally employ incompletely theorized agreements for a variety of purposes. But for this to be possible, we have to presuppose an identifiable range of activities that constitute the practice to which such actions are internal. For example, in the case of the UDHR drafting process, Jacques Maritain convinced participants to adopt practices they agreed on under the umbrella of human dignity without having to agree on human dignity's meaning.⁹ Similarly, evidence may be produced, as Sunstein does, for particular court decisions where judges left concepts unspecified to allow flexibility to future judges, but pronouncing on a requirement of the concept all the same. However, Sunstein's theory cannot explain two fundamental issues *about* human rights itself. It is not that Sunstein seeks to explain what human rights are. I am merely pointing out that his theory addresses questions that are pertinent to human rights instruments and adjudication, given the kinds of disagreements that exist within the field. However, such a theory cannot explain disagreements about the field itself, i.e. disagreements on what human rights are, and what generates normative reasons to treat something as a human right. Often, questions about the nature of a particular field or concept begin with disagreements about what populates the field and what count as instances of the concept; and debates about human rights seem to arise first from such disagreements. It is not my claim that such disagreements can arise only external to the practices. Rather the claim is that in the case of human rights, such disagreements arise partly from differences

⁷ For such a place-holding scenario in the case of human dignity, see Christopher McCrudden, "Human Dignity and the Judicial Interpretation of Human Rights", 19 *European Journal of International Law* 655 (2008).

⁸ (This description resembles Ronald Dworkin's theory of adjudication.) See Ronald Dworkin, *Taking Rights Seriously*, Ch. 4 (Universal Publishers Delhi, 1996).

⁹ Beitz, *supra* note 5, 21; McCrudden, *supra* note 7, 674.

about what theorists take the practice of human rights to be constituted of disagreements about what they seek to explain.

B. Ontological Problems: The Starting Point of Diverging Accounts

James Griffin and Charles Beitz present two differing theories of human rights that sharply bring out the differences between what human rights theorists take their *explanandum* to be.¹⁰ Griffin provides a foundational and substantive account grounded in the value of personhood, and considerations that he terms ‘practicalities’. Beitz provides a functional account characterizing human rights as an emergent practice, coupled with an institutional schema counting for the normativity of human rights. The differences between the two accounts can be portrayed in various binary relations: substantive v. structural, metaphysical v. political, or foundational v. plural. In addition to these, many of Griffin’s and Beitz’s differences can also be explained on ontological reasons.

Griffin takes his *explanandum* to be an ethical conception of human rights that explains much of its present and past usage. He demonstrates that there is a continuous history of human rights that can be traced from the Middle Ages to our present day notion. All through this history, the intension of the term has remained unchanged: “a right that we have simply in virtue of being human”.¹¹ This indicates that in this history, the idea of human rights has featured as a protection of our human status; which Griffin specifies, is our normative agency.¹² Griffin chooses his *explanandum* to include the concept as featuring in this continuous history.¹³ He takes the idea of normative human agency as central to grasping the *sense* of human rights for the reason that it features in the continuous use of the concept.

In contrast, Beitz takes the practice of international human rights as his *explanandum*. He seeks to explain the concept within this practice. The practice is one that exists within an international discursive community, both politically and doctrinally, with participants regarding its norms with seriousness.¹⁴ Two distinctive features of this practice are, that it is emergent, and that

¹⁰ (Griffin himself indicates the existence of different *explanadums* in his reply to critics.) See James Griffin, “Human Rights: Questions of Aim and Approach”, 120 *Ethics* 741 (2010).

¹¹ James Griffin, *On Human Rights*, 2 (2008).

¹² (There is substantial evidence in support of this claim. Take for instance the idea of human dignity used by Cicero and Parentius of Rome. The basis for the idea is a *human* status as opposed to those of animals. That status has featured in the explanation of human dignity from Cicero, through humanists like Pico, to the present day notion of human dignity found in international human rights law.) See Hubert Cancik, “‘Dignity of Man’ and ‘Persona’ in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I” in David Kretzmer and Eckart Klein, *The Concept of Human Dignity in Human Rights Discourse* 105-107 (Kluwer Law International, 2002); see also Stephen Riley, “Human Dignity: Comparative and Conceptual Debates”, 6(2) *International Journal of Law in Context* 117 (2010).

¹³ Griffin, *supra* note 10, 748-749.

¹⁴ Beitz, *supra* note 5, 11.

it plays a reason-giving role for the community. It is emergent because it is unlike a mature social practice where there exists considerable agreement on responses to failures of norm adherence. Rather, in the emergent practice of international human rights there is disagreement about all its main elements.¹⁵ Yet, it is reason-giving; not because it provides clear answers about the content of its norms or decisive reasons requiring particular action, but because it is regarded as a source of reasons where participants 'rely on the practice for an understanding of the discursive roles of human rights, not ... to delineate their scope and content'.¹⁶

Beitz's ontological field therefore consists of a shorter list of practices than Griffin's. It does not account for a large part of the history of human rights. Such a move could be justified for many reasons. It might be, as Griffin anticipates, that the emergent practice marks a break from the previous uses of human rights and thus radically changes the extension of the concept.¹⁷ Beitz in effect makes such a claim. He argues that it is the emergent practice that dominates much of the contemporary public discourse on human rights, and thus he is justified in focusing on this practice to explain the concept.¹⁸ It is therefore safe to conclude that the source of materials for his *explanandum* is the 'doctrine and practice of human rights as we find them in international political life'.¹⁹

Beitz calls his account a 'practical conception', where the question of understanding the concept is separated from questions about its grounds and requirements, though they are admittedly related to each other in some ways.²⁰ However, he later waters down this claim. Probably because the grounds that justify human rights are a part of the explanation of what human rights are; which entails that the normative reasons for deciding on the content of human rights, and establishing new rights, must track those justifications. This connection is well reflected in Beitz's own account where his two-level functional conception²¹ of explaining human rights is the anatomy sustaining his

¹⁵ *Ibid.*, 9.

¹⁶ *Ibid.*

¹⁷ Griffin, *supra* note 11, 5. (To counter the view that international human rights law now settles the extension, Griffin produces evidence on how the current practice of human rights based on the United Nations instruments preserves a fair amount of the earlier use of the term.) See Griffin, *supra* note 10, 751.

¹⁸ Beitz, *supra* note 5, 10, 102.

¹⁹ *Ibid.*, 102. (Beitz builds this conception on John Rawls's conception of human rights in *The Law of Peoples*, relying more on his idea of public reason, rather than on his specific claims about human rights.) See *Ibid.*, 96.

²⁰ *Ibid.*, 11.

²¹ (The two level conception consists of the level of the States as bearers of primary responsibilities to respect and protect human rights, and the international level where the international community and its agents act as guarantors of that responsibility. The conception has three elements: (i) Human rights protect urgent human interests against predictable dangers. (ii) Human rights primarily apply to the political institutions of the State. (iii) Human rights are matters of international concern. This two level conception describes human rights in terms

schema²² for making decisions about human rights. Beitz does not deny this connection, and therefore it is unclear as to why he thinks that questions of understanding human rights are separate from questions of justification and normativity. Be that as it may, Beitz does not make out a very convincing case for how the present practice is largely divorced from the historical uses of human rights. In his criticism of naturalistic theories, he emphasizes on two reasons that mark a break between the present international practice and the past uses of human rights. First, though he recognizes that foundational concepts like human dignity find mention both in the past practice and in the founding documents of the present practice, he argues that they do not seek to smuggle in the predominantly theological sense in which those concepts were previously understood.²³ Secondly, the lists of rights that followed the preambles of the core documents of the present practice could not possibly be justified by one single value.²⁴ Beitz concludes from these points that concepts like human dignity were incorporated into these documents not for some historical reasons but because they were valuable ‘in their own right’.²⁵ As evidence for this, he reminds us of Jacques Maritain’s strategy of persuading participants in the UDHR to agree on particular human rights without having to agree on a theoretical basis for them.²⁶ These arguments however suggest an oversight of the secular use of the concept of human dignity in Western philosophy. They also do not explain why human dignity is valuable in itself if there was no agreement on what justifies human rights. As I pointed out earlier, there exists a rich tradition of thinking about human dignity as being dependent on human nature, which has received considerable philosophical attention from thinkers ranging from Cicero and Pico della Mirandola to Immanuel Kant.²⁷ Though many of these accounts have theological inklings, drawing mainly from the idea of ‘man in the image of God’; subsequent accounts, starting with the advent of the humanists, are secular. Present day egalitarian accounts of human dignity as the foundation of human rights are primarily based on a Kantian conception of dignity, which is predominantly analytical. Theorists, and lawyers including judges, have often made use of this rich tradition to generate a controversial debate about human dignity.²⁸ It may not therefore be accurate to state that drafters of documents like the UDHR did not have

of the role played by human rights in the “public normative discourse of global politics”). See *Ibid.*, 106-109.

²² (The schema consists of three elements that are responsive to the three elements of the two level conception. Briefly, the three elements of the schema are: (i) The interest protected by the right should be fairly important and can be regarded as a political priority from the right holder’s standpoint. (ii) It is advantageous to protect it by legal and policy instruments of the State. (iii) The State’s failure to protect the interest will be a matter of international concern.) *Ibid.*, 137.

²³ *Ibid.*, 8, 20-21.

²⁴ *Ibid.*, 66-67, Ch. 5.

²⁵ *Ibid.*, 20.

²⁶ *Ibid.*, 21.

²⁷ For a description of such accounts see Riley, *supra* note 12.

²⁸ See McCrudden, *supra* note 7.

before them a secular tradition of human dignity to rely on as a foundation of human rights. Rather, Jacques Maritain's strategy was a response to disagreements between groups over the theoretical explanation of human rights, even though they agreed on particular practices to be incorporated as human rights.²⁹ This weakens Beitz's point that arguments about human nature were predominantly theological.³⁰ However, this does not affect Beitz's second argument that human dignity was never imagined as a single foundational basis for human rights, given the fact that lists of rights in the core international human rights documents do not reflect any such relationship. Nor do they appear to be universal rights accruing just by virtue of being human. On these points, he even finds support from opposing theorists.³¹ Beitz, thus seems justified in seeking a different explanation for international human rights. Despite these reasons, a question might yet stick. Why are the rights in the practice *human* rights and not just any other right, say political rights, socio-economic rights, or just rights to some particular valuable objects in life. Beitz's answer would be that they are human rights because they belong to the practice called international human rights, some core components of which he identifies for us.³² In other words, the term 'human rights' does not lend much substance to the practice. Rather, an explanation of the features of the practice would explain what the concept of human rights is. Though he does not expressly say so, in Beitz's account the term human rights might at best be a label. In contrast, Griffin's account takes the concept of human rights as having an intension that he thinks should be the focus of attention of our explanations. Beitz's approach is thus in stark contrast to Griffin's on ontological grounds. Though they differ on many substantive questions, it might turn out that a large part of those differences may not cross each other's paths owing to different *explanadums*.

C. Three Conceptions of Human Rights

Despite disagreements arising from ontological reasons, human rights theories form a complex matrix, intersecting and overlapping on many issues. It thus becomes difficult to clearly divide them into separate categories.

²⁹ For a description of what prompted Maritain to adopt such a strategy, see *Ibid*.

³⁰ (It might also be interesting to examine whether such concepts were *only* theological, given the fact of being theological does not deny the logical, scientific, humanist or other values that they may hold. Though, of course, being theological would make the other merits suspect.)

³¹ (Griffin points out rights listed in human rights documents that do not seem to be closely related to human dignity or personality. He however suggests that we might be wrong in taking them to be human rights in such cases.) See Griffin, *supra* note 11, 5. (On a different note, John Tasioulas questions Griffin on why there should be one foundational value justifying all human rights. Rather there could be a plurality of values justifying different human rights. James Nickel also advocates this view.) Tasioulas, *supra* note 5; James W. Nickel, *Making Sense of Human Rights*, Ch. 4 (Blackwell Publishing, 2007).

³² Beitz, *supra* note 5, 14-27.

However, in what follows, I try and map the different kinds of human rights theories based on their ontological, justificatory, and normative differences.

a. The Moral Rights Conception

This conception takes human rights to be a subset of moral rights and grounds their distinguishing feature in substantive values that account for what makes some moral rights *human* rights. James Griffin and John Tasioulas are clear adherents of this conception. Joseph Raz also takes human rights to be moral rights, but grounds their distinguishing feature not in substantive values but in their capability of being enforced by law³³, and their claim of being applicable across sovereign state boundaries.³⁴ I will therefore restrict my comments to Tasioulas' and Griffin's accounts.

Despite agreeing on the fact of human rights being moral rights, Tasioulas and Griffin differ *inter alia* on the following two issues. First, Tasioulas argues that Griffin does not provide an explanation of what moral rights are. Specifically, he does not account for the *directed character* of rights, which highlights the fact that individual moral rights have identifiable right holders and violation of duties by others amount to wronging the right holder.³⁵ Secondly, while Griffin takes personhood as the single justifying value of human rights, Tasioulas favours a plural justification.³⁶ James Nickel too provides a plural account where he takes human rights to be moral rights protecting four secure claims.³⁷ However, his account differs from Griffin's and Tasioulas' on three important grounds. First, the four justificatory claims he proposes are consequential in nature. Secondly, he proposes six content-independent principles that settle the question of which specific rights are human rights. Third, unlike Griffin he does not take his *explanandum* to strictly be the continuous history of human rights. Rather he prefers sticking to explaining the present practice of international human rights. Despite these differences, the following can be taken to be the distinguishing features of this conception³⁸:

³³ Joseph Raz, "Human Rights in the Emerging World Order", 1 *Transnational Legal Theory* 31, 44 (2010).

³⁴ *Ibid.*, 42; see also Joseph Raz, "Human Rights without Foundations" in *The Philosophy of International Law* [Samantha Besson and John Tasioulas (eds.), Clarendon Press Oxford, 2010].

³⁵ Tasioulas, *supra* note 5, 658.

³⁶ *Ibid.*, 662-63.

³⁷ (These claims are: a claim to have a life, a claim to lead one's life, a claim against severely cruel and degrading treatment, and a claim against severely unfair treatment.) See Nickel, *supra* note 31, 62.

³⁸ They are a simplified and shorter version of the first feature that Tasioulas identifies as central to Griffin's theory, and Tasioulas own claim that human rights are moral *rights* in three senses: they are a source of duties, have an individualistic grounding, and have a directed character.

- i. Human rights are moral rights that human beings have simply by virtue of being human. It is an understanding of our humanity in terms of substantive values that best explains human rights.
- ii. Human rights are *rights* and therefore individualistic in nature. (On Griffin and Tasioulas' account, Nickel accepts group rights that may admit a non-individualistic element.)
- iii. By virtue of the above, human rights are basic, mandatory standards that are urgent and have priority.

b. The Freedom-Based Political Conception

Identified here with Amartya Sen's account, this conception takes human rights to be ethical demands protecting important freedoms. The candidate freedoms for protection are to be identified not by substantive values, but by content-independent factors. Unlike the moral rights conception, it extends human rights to include cases of imperfect obligations, and generates a wider range of duties for various agents. The following are some of its central features³⁹:

- i. Human Rights protect freedoms that are of 'special importance' and have 'social influenceability'. These are content-independent characteristics that distance it from the moral rights conception, which takes values related to humanity as the distinguishing feature of human rights.
- ii. Human rights generate reasons for actions for agents who are in a position to help in promoting and safeguarding the freedoms protected by rights. They can generate broad duties like working towards institutional expansion and reform.
- iii. Human Rights are universal in that they would survive in unobstructed public discussion. This feature takes the account closer to a political conception based on the idea of public reason.
- iv Human Rights can be implemented by recognition, agitation, and legislation.

c. The Practice-Based Political Conception

This conception is a political and functional explanation of human rights. It draws heavily from John Rawls' idea of public reason, though

³⁹ (These are a condensed form of the six answers that Sen gives to what he takes are the core issues concerning human rights.) Amartya Sen, "Elements of a Theory of Human Rights", 32 *Philosophy and Public Affairs* 315, 319-20 (2004).

variants of this conception do not adopt all of Rawls' views on human rights.⁴⁰ Its distinguishing feature is its focus on the function of human rights within the present politico-legal practice of international human rights. It seeks to explain the present practice of international human rights, and mostly draws up structural and functional conclusions. Charles Beitz's account clearly falls within this conception. Though Beitz maintains a neat distinction between questions of explanation and justification, I club some of them to list the distinguishing features of this conception.⁴¹

- i. Human rights protect urgent interests against predictable dangers. The interests protected must reasonably qualify as political priorities from the perspective of the interest holders.
- ii. They apply primarily to the institutions of states and should be capable of enforcement through legal and policy instruments of the state.
- iii. Human rights are a matter of international concern and can be reasons for international intervention. The international community acts as a guarantor of human rights, and may hold states accountable for human rights violations.⁴²

The three conceptions identified above broadly capture the dominant trends in human rights theory. They are not comprehensive descriptions of the theories involved, but identify their central claims about human rights. Some features are common amongst them: that human rights are universal, are basic standards having priority, and are a matter of international concern. In Part II.B, I use these conceptions and their common features to assess how a human right to sustainable development would fare within them.

III. SUITABILITY OF HUMAN RIGHTS LANGUAGE FOR SUSTAINABLE DEVELOPMENT

A. The Indeterminacy and Normativity of Sustainable Development

Despite having a considerably long presence in international law and policy, sustainable development has remained a general and incomplete concept. There is however some agreement on its constitutive elements: intergenerational

⁴⁰ (For example, Beitz draws heavily from Rawls, but does not strictly follow Rawls' short list of human rights.)

⁴¹ (These features are a combination of the elements of Beitz's two level model and normative schema.) See Beitz, *supra* note 5, 109, 137.

⁴² (This feature also finds support in Rawls *The Law of Peoples*.) For a strong interpretation of Rawls' account of human rights as a trigger for international intervention, see John Tasioulas, "From Utopia to Kazanistan: John Rawls and the Law of Peoples", 22 *Oxford Journal of Legal Studies* 367, 380-90 (2002); John Tasioulas, "Are Human Rights Essentially Triggers for Intervention?", 4 *Philosophy Compass* 938 (2009).

equity, intra-generational equity, sustainable use, and integration of economic development with environmental protection.⁴³ These elements are themselves controversial, with critics arguing that their articulation, particularly in the Rio Declaration, is unduly premised on state-centered, development-oriented, and anthropomorphic terms, ignoring ecological and intrinsic reasons for protecting the environment.⁴⁴ Many envision the concept to be of wider import, connoting elements of political and cultural sustainability.⁴⁵ Others might lay stress on features that identify the strategies to be adopted for implementing the concept.⁴⁶ Notwithstanding these, the concept has introduced new considerations to International Law relating to the environment and development by integrating the two. Given that it was introduced and developed through instruments with normative value, sustainable developments' elusive meaning and indeterminacy has remained at the heart of matters.⁴⁷ Consequently, international lawyers have been preoccupied with questions about the meaning and requirements of the concept.⁴⁸

The indeterminacy of sustainable development is perhaps inevitable, as is the case with other concepts aiming to capture valuable goals. It is unreasonable to expect that such concepts would always possess determinacy. However, when they are expressed in normative fields like law, determinacy is desirable. Yet it would be naïve to say that all concepts used in instruments of legal nature are, or should be, highly determinate. Rather, both determinate and indeterminate concepts play differing roles in various legal fields. Indeterminate concepts generally find a place in articulating values and principles that require further development by adjudicative and other bodies. That is precisely the role

⁴³ Philippe Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles" in *Sustainable Development and International Law* [Winfried Lang (ed.), Graham and Trotman, 1995].

⁴⁴ See Edith Brown Weiss, "Intergenerational Equity: A Legal Framework for Global Environmental Change" in *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press, 1992) (Pointing out the anthropomorphic bias); Gunther Handl, "Sustainable Development: General Rules versus Specific Obligations" in *Sustainable Development and International Law* 37 [Winfried Lang (ed.), International Environmental Law and Policy Series, 1995] (pointing out the bias towards development and State sovereignty over resources); Alexander Gillespie, *International Environmental Law, Policy, and Ethics* 107-124 (OUP, 1997) (For a critique of the rights of future generations as a justification for environmental protection).

⁴⁵ See Richard J. Estes, "Toward Sustainable Development: From Theory to Praxis", 15 *Social Development Issues* 7 (1993).

⁴⁶ (For example, an important thrust area for Sustainable Development identified by the Brundtland Commission was to encourage multilateral talks on environmental law. This was a strategy intended to address fears of developing countries that developed countries would more easily influence them, if the relationship between them was bilateral. Developing countries would enjoy greater bargaining power when bargaining collectively.)

⁴⁷ For an analysis of the difficulties surrounding the meaning of sustainable development, see Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in *International Law and Sustainable Development: Past Achievements and Future Challenges* 25-26 [Alan Boyle and David Freestone (eds.), OUP, 1999].

⁴⁸ See Handl, *supra* note 44, 37.

being developed and envisaged for sustainable development.⁴⁹ Philippe Sands thinks of this role in terms of a principle that has generated further specific principles when understood in the context of its historical evolution.⁵⁰ Vaughan Lowe takes sustainable development to be more general than a principle and describes its normative status as ‘a meta-principle acting upon other legal rules and principles--a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other.’⁵¹ Analysing Judge Weeramantry’s opinion in the *Case Concerning the Gabčíkovo-Nagymaros Dam*,⁵² Lowe argues against sustainable development being a binding norm of international law in the traditional sense. However, he does accord it normative status as a meta-principle that plays a special role in judicial reasoning.⁵³ Lowe explains, that the concept is developed and provided content by judges, unlike in customary international law where concepts are created by a “traditional combination of ‘state practice and *opinio juris*’.”⁵⁴

Both Sands and Lowe thus assign the concept a normative role despite its indeterminacy. Sands takes it to be a principle, meaning that it has an open texture capable of being assigned a wide range of meanings that emerge only within the facts of cases.⁵⁵ His focus thus is on the nature of principles that in turn explains the nature of sustainable development. He however does not further investigate the nature of principles and how exactly they function within legal institutions alongside other norms. Rather he carves out the different principles that have evolved in the context of sustainable development. In contrast, Lowe provides an explanation of how the meta-principle of sustainable development operates as a ‘modifying norm’ that does not have a direct bearing on the actions of legal persons, but establishes relationships between primary norms.⁵⁶ Such norms are unlike norms that judges must apply in accordance with the promulgation by some other authority. Rather judges exercise their power that flows from the fact of their being judges to apply such norms. In short, Lowe employs the nature of the judicial role to explain how

⁴⁹ Sands, *supra* note 43, 57.

⁵⁰ *Ibid.*, 57-62 (Sands speaks of the following principles as associated with the principle of sustainable development: the principle of inter-generational equity, the principle of sustainable use, the principle of equitable use, and the principle of integration. At another place however, he thinks of sustainable development as a principle, objective, and process.); see Philippe Sands, “International Law in the Field of Sustainable Development”, 65 *British Yearbook of International Law* 303 (1994) (In considering its normative role however, the idea of a principle is what is particularly relevant given its ability to guide decisions. The idea of it being an objective is not inconsistent with being imagined as a principle. It could be an objective to ensure the consistent application of a principle.)

⁵¹ Lowe, *supra* note 47, 31.

⁵² *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, Sales Number: 692, ICJ Reports 1997, p. 7.

⁵³ Lowe, *supra* note 47, 31.

⁵⁴ *Ibid.*, 35.

⁵⁵ Sands, *supra* note 43, 56.

⁵⁶ Lowe, *supra* note 47, 33.

concepts like sustainable development can be assigned a normative role without their being expressly assigned such a role by other norm-creating bodies. The existence of the concept is enough for it to be employed as a modifying norm by judges.⁵⁷ Instruments that use the norms, or brought them into existence, need not completely specify its requirements in order for judges to employ them. Lowe concludes that by virtue of being a modifying norm, concepts like sustainable development predominantly play a procedural role in decision-making. For example, one role that it plays is requiring a holistic approach to dispute resolution.⁵⁸ The concept might also indicate what kinds of factors must be taken into account before a decision is made. Thus, though the substantive outcome is not determined by the concept, it places other positive obligations. To go a step further, such concepts may also lend a dimension of weight in actual cases, indicating decision-makers to consider certain factors like environmental concerns with more gravity.⁵⁹

To sum up, we could combine the versions of Lowe and Sands in the following manner. Sustainable development articulates the value in integrating the twin concerns of environment and development. Legal instruments and decisions have specified many of its components. Unlike determinate rules of law that predominantly take the nature of exclusionary reasons, that defeat other available reasons,⁶⁰ values like sustainable development do not exclude other reasons but place obligations to take into account a wider range of considerations. In this role, they influence decision makers in various ways. They may mediate between conflicting norms, might widen the range of relevant considerations in a case, or might tilt the decision-makers view in favour of particular considerations. The factors that it makes relevant are numerous, given the fact that there are no closed lists of considerations that capture environmental and developmental concerns. Thus, the concept does not identify to whom and what it clearly applies. All such matters are left to the facts of cases and the concerns that affected parties might argue as being relevant. Given this nature of the concept, many take it to be a goal that human society seeks to achieve. Again, the broad-based and vague nature of its constituent elements makes the goal elusive. If the goal is to achieve sustainability, then there exists no unit in terms of which to measure or even articulate it. At best, sustainable development identifies relevant concerns and requires them to be mutually

⁵⁷ *Ibid.*, 34.

⁵⁸ *Ibid.*, 36.

⁵⁹ (Ronald Dworkin speaks of the difference between rules and principles on the basis of principles adding a dimension of weight, while rules determining an issue in an all-or-nothing fashion.) See Dworkin, *supra* note 8, 26-27.

⁶⁰ ("An *exclusionary reason* is a second order reason to refrain from acting from some other reason.") Joseph Raz, *Practical Reason and Norms* 39 (OUP, 1999) (Most rules of law authoritatively claim to govern our actions in this manner where other reasons for actions are sought to be excluded.)

balanced.⁶¹ In what follows, I examine how such a conception of sustainable development would fare in its candidacy for human rights protection.

B. Sustainable Development as a Human Right

a. The Problem of Justification: No Necessary Connection with Humanity; and Inability to Identify Urgent and Prior Interests or Freedoms

To qualify for human rights protection, sustainable development must identify valuable interests/freedoms/claims that deserve human rights protection. This is because the analysis of human rights theories in Part I.C demonstrated that under all the three conceptions, it was only certain such things that deserved strong protection. The material question therefore was: what justified human rights protection, and what interests/freedoms/claims would qualify under such justifications. On this question, sustainable development does not fare well within any of the three conceptions. Under the moral rights conception, it is only some moral rights justified by certain substantive values relating to our humanity that qualify to be human rights. Though Article 1 of the Rio Declaration speaks of human beings being at the centre of sustainable development concerns, it does not imply that those concerns are an expression of our humanity or are suited for rights protection.⁶² Rather, an anthropomorphic justification for protection of the environment is a seriously contested issue in international environmental law, given the strong arguments in favour of recognizing the intrinsic value of nature.⁶³ In any event, even anthropomorphic conceptions of the concept do not establish a relationship between a universal human nature and the requirements of sustainable development. It cannot identify which human interests in the environment are closely related to our humanity and how.⁶⁴

⁶¹ (Some have claimed the element of inter-generational equity to be a justification for protection of the environment. Such views have however come under strong criticism based on both practical and theoretical problems, much of which is again rooted in vagueness of meaning.) For criticism of this kind, see Gillespie, *supra* note 44, Ch. VI.

⁶² (A similar point is made by Dominic McGoldrick when he distinguishes between human beings being at the 'centre of concerns', from them being at 'the centre of the concept'.) See McGoldrick, *supra* note 1, 798.

⁶³ Gillespie, *supra* note 44, Ch. VII.

⁶⁴ (Interestingly sustainable development addresses concerns wider than those of human rights. It is wide enough to incorporate many ecological interests that are intrinsically valuable without any strong relationship to values articulating our common humanity. These interests might even act as restrictions on many modes of providing for urgent human needs by placing greater burdens on institutions to think of alternative modes. In this sense, taking cue from the conventions on biodiversity and climate change, considerations of sustainable development may not be purely anthropocentric.)

Under the practice-based political conception, human rights are urgent interests facing predictable threats. They must be political priorities from the perspective of the right holders. Here sustainable development might fare better, as the criteria to be satisfied are content-independent. Thus, urgent environmental and developmental concerns argued to be priorities might qualify. However, there are two difficulties. First, sustainable development does not claim to identify interests that are to be protected. It identifies a wide range of relevant considerations that may or may not be interests. Even if some of them were interests, it speaks of balancing them against other interests rather than highlighting the important nature of those that must receive priority. This brings us to the second point: nothing in the idea of sustainable development conclusively establishes the urgency or priority of some interests over others. That would have to be established on some substantive interest that is reasonably regarded as important in the discursive community of human rights. The same arguments apply to Amartya Sen's freedom-based conception, where sustainable development may not assist in identifying which freedoms have 'special importance' and 'social influenceability'.

Sustainable development considerations do get invoked in human rights cases, but they do not figure as a constituent part of a human right. Rather, they figure as standards to be satisfied in arguing for or against a claim of human rights violation. For example, they might be invoked in defense of actions that infringe rights by demonstrating that they have been duly considered; or in support of arguments alleging rights violation by arguing that non-satisfaction of the conditions set by such considerations indicates a failure to discharge the required burden imposed by sustainable development. Such considerations therefore do not establish the basis of rights but lend weight in favour or not of a claim on rights violation, where the right involved is not to sustainable development but to some other valuable interest that is either related to our humanity, and is urgent and deserves priority.

b. Unsuitable for the Language of Rights

If it does not clearly identify specific interests or freedoms for human rights protection, how else would sustainable development be a candidate for such protection? Is it sensible to conceive of a human right to sustainable development itself? Perhaps not, as in the first instance, there are considerable hurdles in using the language of rights for sustainable development. An accepted feature of rights is their specific and directed character. For rights to exist, there must be identifiable rights holders, duty bearers, and interests that the right protects. In all these aspects, sustainable development as a concept faces difficulties. Since the concept captures a 'relationship' between environment and development, identifies relevant considerations in that realm, and requires the process of balancing to be applied to them, it does not aim at identifying interests, right holders, and correlative duty bearers. In fact, it

directly places an obligation on different actors to acknowledge the relationship and give due weight to both considerations. One could draw connections between this obligation and particular rights, say a right to environment, or development, or a right against being treated arbitrarily, which impose a burden on certain actors to consider reasons identified by sustainable development. These rights would undoubtedly have specific holders and duty bearers. However, they would not in any manner point towards a right to sustainable development.

To conclude, the relationship between sustainable development and human rights can be close in a way that does not force us to take sustainable development as a right. Recognition and protection of certain rights will result in promoting sustainable development. For example, an instance of protecting the right to environment or even recognizing it involves taking principles of sustainable development into account. Conversely, the application of sustainable development concerns would help further the cause of some human rights. Thus, it is possible to imagine a close relationship between the two without having to bracket them as the same kinds of conceptual entities.

IV. CONCLUSION

In this essay, I considered whether there is a good case for a human right to sustainable development. I started by stating how both human rights and sustainable development are concepts that have low levels of determinacy and witness high levels of contestability. For human rights, I pointed out that theorists disagree about its meaning and requirements not only on grounds of normativity and justification, but also on ontological reasons. I mapped out some dominant conceptions of human rights on the basis of these differences to evaluate whether they can support a human right to sustainable development. For this purpose, I argued that the concept of sustainable development is at best closest to what Vaughan Lowe describes as a meta-principle playing the role of a modifying norm. In addition, I argued that it is a concept that places obligations to consider relevant concerns relating to development and the environment, and prescribes that such concerns should be balanced. This role is mostly a procedural one, placing obligations for consideration rather than determining substantive outcomes. I went on to argue that this nature of sustainable development concerns makes it unsuitable for human rights protection. It can neither identify interests, freedoms, or claims that qualify for human rights protection, nor can it provide reasons for why some interests or freedoms are urgent and should receive priority. Moreover, the concept is not suitable to be applied through the language of rights as it is incapable of identifying specific interests, right holders, and duty bearers. To conclude, let me make two further points that might speak to the uneasy relationship between sustainable development and human rights. First, sustainable development does not easily incorporate international and universal dimensions as human rights

do. Many questions of sustainable development may only be relevant locally, and may be resolved at the domestic level without necessity of any international guarantee or intervention. As argued earlier, most such questions do not necessarily relate to our common humanity, or to urgent and prior interests or freedoms that justify international action. There may of course be cases concerning sustainable development that are of global concern due to the importance and urgency of the interests involved. Here again, like in the case of interests and freedoms, importance and urgency will probably be due to reasons that are independent of sustainable development.

Secondly, it might be best to articulate concerns of sustainable development in terms of duties to recognize and deliberate relevant concerns. Since sustainable development predominantly imposes obligations to consider and balance relevant concerns, its cause might be better furthered by articulating its requirements in terms of duties that institutions should discharge while dealing with matters of the environment and development.