ARE THE RIGHTS TO A CLEAN, HEALTHY, AND SAFE ENVIRONMENT THIRD GENERATION RIGHTS? DECONSTRUCTING VASAK'S THREE-GENERATION RIGHTS CONCEPT

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Abstract

In addressing the global climate catastrophe, the Intergovernmental Panel on Climate Change recommended mitigation and adaptation strategies that adopt rights-based approach pathways. This article specifies a rights-based approach focused on protecting the environment as human rights approach to environmental protection (HRAEP). Since Karl Vasak's categorisation of environmental rights as third-generation rights, the concept has received wide acceptance from scholars, jurists, and, basically, the legal profession. Given the issues arising from accepting that environmental rights are third-generation rights, such as non-justiciability, it is imperative to examine the validity or otherwise of this philosophy. The article finds that Vasak's categorisation of human rights as it were into three generations fails to reflect the true nature of the International Bill of Human Rights, namely, universal, inalienable, indivisible, interdependent, and interrelated. Adopting Kooijman's definition of rights as having specific right-holders and duty-holders, the article posits that accepting that the human right to environmental protection is a third-generation right would inadvertently mean that such a right does not exist, given the absence of a specific right and duty holder. The article finds that HRAEP connotes positive and negative duties to fulfil, respect, promote, and protect, and thus, not a third-generation right.

Introduction

With the steady increase of global surface temperatures towards 1.1°C, the Intergovernmental Panel on Climate Change (IPCC) Report proffers adopting the rights-based pathway as a means to increase resilience and reduce sensitivity to climate change impacts.[1] Rights-based approach refers to using "human rights mechanism to reduce, maintain, prevent, reverse, or restore the quality of land, water, air, animal resources, plant resources, and other natural resources; by preventing the emission of pollutants or reducing the presence of polluting substances in these elements."[2] Suffice it to state that a rights-based approach focused on protecting the environment is, in summary, a human rights approach to environmental protection (HRAEP).

In understanding the application of a human rights approach to environmental protection, scholars have often categorised the formulated right as a third-generation right—the classification of HRAEP as a third-generation right was introduced by Karl Vasak in 1977. As the then Director of the UNESCO Division of human rights, Vasak introduced the concept of grouping human rights into three generations.[3] Civil and

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1 Hoesung Lee and others, 'Synthesis Report of the IPCC Sixth Assessment Report (AR6): Longer Report' (IPCC, 2023) 6 <www.ipcc.ch/report/sixth-assessment-report-cycle/> accessed 31 July 2023.

2 See Nkiruka Ugwuji Chidia Maduekwe, 'Achieving Environmental Sustainability in Nigeria's Extractive Industry: How Viable is a Human Rights Approach to Environmental Protection?' (PhD Thesis, University of Hull 2018) 33.

3 PH Kooijmans, 'Human Rights – Universal Panacea? Some reflections on the so-called human rights of the third generation [1990] 37 NILR 315, 315.

political rights are labelled as first-generation rights.[4] The economic, social, and cultural rights comprise the second-generation rights.[5] The third generation rights – which he also refers to as the 'right to solidarity' – consist of the right to peace, development, "a healthy and ecologically balanced environment, and ownership of the common heritage of man."[6]

The significance of Vasak's concept is the intellectual prominence it has assumed. In addition to its recognition by the international community,[7] the concept has produced an immense following, influencing the human rights perception of numerous legal scholars, practitioners, judges, and students studying human rights.[8] Given the often-perceived assumption that civil and political rights have more robust standing than economic, cultural, and social rights, then followed by the so-called third-generation rights, it is imperative to interrogate the validity or otherwise of grouping human rights in the three-generation hierarchy, more so, given the fact that human rights are universal, inalienable, indivisible, interdependent, and interrelated nature of human rights.

Even though Vasak's three-generation human rights concept seems to have gained wholesale acceptance in the legal community, there have been criticisms. This article lending its voice to the existing literature on the subject matter, critically examines the three-generation concept from three prisms, namely, (i) the use of the term 'generation'; (ii) classifying Civil and Political Rights and Economic, Social, and Cultural Rights as distinctively negative rights and positive actions; and (iii) categorising right to a healthy environment as rights of solidarity.

Classifying Human Rights as 'Generation.'

A study of Vasak's 1977 article indicates that the author did not explain how he arrived at his three-generation rights concept. However, it can be deduced that while discussing the changing patterns of society which influenced the Director-General of UNESCO to formulate the phrase 'third generation of human rights,' Vasak might have been obliged to further elaborate on what constituted the first and second-generation human rights.

In quoting Kooijmans, Macklem states that in a subsequent 1984 publication, Vasak specifies that his human rights-generation concept "captures how human rights came into existence in different 'waves' throughout history."[9] The first was the French Revolution which created civil and political rights; the second was the Russian Revolution ushering in economic, social, and cultural rights; and the third was the decolonisation movement struggle by the third world.[10]

On the other hand, Whelan[11] and Burns[12] opine that Vasak's human rights-generation concept was inspired by the three normative themes which emerged from the French Revolution, and they are liberty (liberté), equality (égalité), and fraternity (fraternité). They represent first, second, and third-generation rights in that order. Whelan divided the three generations into four dimensions: (i) principles reflected, (ii) types of rights, (iii) target of claims, and (iv) the group to whom the generation of rights is relevant. Whelan proposes that third-generation rights reflect fraternity principles; they are group or solidarity rights; the target of claims is anti-colonial and given priority by the third world (developing countries).

4 K Vasak, 'A 30-year Struggle: the sustained efforts to give force of law to the Universal Declaration of Human Rights' in R Caloz and O Rödel (eds), The Unesco Courier (UNESCO 1977) 29.

5 Ibid.

6 Ibid.

7 DJ Whelan, Indivisible Human Rights (UPP 2010) 209.

8 P Macklem, The Sovereignty of Human Rights (OUP 2015) 51.

9 Ibid

10 Ibid

11 Whelan (n 7) 209

12 BH Weston, 'Human Rights' (1984) 6 HRQ 257, 264

To understand the term 'generation, 'the first place to start is to define it. According to the Oxford Dictionary of English, generation refers to:

> (a) all the people born and living at about the same time, regarded collectively;
> (b) the average period, generally considered to be about thirty years, in which children grow up, become adults, and have children of their own;
> (c) a set of members of a family regarded as a single step or stage in descent.[13]

This definition shows that the word 'generation' refers to an era and what it constitutes. Also, there is the expectation that one period will produce another, signalling the end of the preceding period.[14] According to Kooijmans, classifying human rights into three generations means that the first generation's rights were succeeded by the second, followed by the third.[15] Following this analogy would mean that civil, political, economic, social, and cultural rights have outlived their era, ushering in a new generation of rights – third-generation rights.[16] Therefore, it is likely that fourth-generation rights might succeed the third after it has outlived its era.[17]

Although Boyle and Cullet accept Vasak's three-generation human rights concept, the authors argue that the "right to a healthy and ecologically balanced environment"[18] should not be limited to a generation as it transcends the three generations.[19] Horn claims that the right to the environment can be categorised as first, second, or third-generation rights.[20] In contrast, Macklem argues that civil and political rights, economic, social, and cultural rights, and rights classified as third-generation rights encompass "but one generation: a single population of entitlements."[21] It is necessary to note that the author contends this position in contradiction to his statement that a human rights generational concept is oblivious to the common purpose[22] that binds human rights.

From Macklem's proposition, it can be reasoned that although the author accepts the classification of human rights using the generational concept. However, he is against dividing it into three generations. Macklem proposes that the development of human rights be approached as a single generation. Given the definition of the term 'generation' stated above as a period, a timeline, and an era, which is set to be succeeded by another generation, this article argues that Macklem's proposition that the development of human rights is approached as a single generation may not be valid in as much as it entails labelling human rights into generations. On that basis, there is no difference between Vasak's concept and Macklem's argument.

Furthermore, Sepuldeva, Van Banning and van Genugten indicate that Vasak's three-generation rights concept has been criticised for "not being historically accurate and for establishing a sharp distinction

13 A Stevenson (ed), Oxford Dictionary of English (3rd edn, OUP 2015) <www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m_en_gb0278730?rskey=7s6kOU&result=29976> accessed 31 July 2023

14 RY Rich, 'The Right to Development as an Emerging Human Right' (1983) 23 VJIL 287, 323.

15 Kooijmans (n 3) 316-317.

16 P Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) XXIX NILR 307, 316. Whelan (n 7) 209

17 Ibid, 317.

18 Vasak (n 4) 29.

19 A Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2008) 18 FELR 471, 471; P Cullet, 'Definition of an Environmental Right in A Human Rights Context' (1995) 13 NQHR 25, 27.

20 L Horn, 'Reframing Human Rights in Sustainable Development' (2013) 6 JALTA 1, 7.

21 Macklem (n 8) 52.

22 Which Macklem identifies as mitigating injustice – see Macklem (n 8) 52.

between all human rights."[23] The authors argue that the concept contradicts the accepted norm that rights are interrelated, interdependent, and indivisible.[24] Supporting this position, Alston opines that:

> [T]he implication that the concept of human rights can be split up into different generations, each with its distinctive characteristics and each more evolved and sophisticated than its predecessor…is…directly at odds with the United Nations' insistence that all human rights are indivisible and interdependent.[25]

Having understood the term 'generation' and applied it to Vasak's classification, juxtaposed against the United Nations' standing on the interrelated, interdependent, and indivisible nature of human rights, this article posits that it might not be valid to classify human rights into generations as that fails to reflect the historical development and negates its indivisible, interrelated, and interdependent nature.

Civil and Political Rights and Economic, Social and Cultural Rights: Negative rights and Positive actions

Before examining Vasak's usage of the terms 'negative rights' and 'positive actions,' it is necessary to define what these terms connote. For clarity of analysis, 'positive action' shall be called 'positive duty.' Negative rights and positive duties can be traced to moral philosophy, where the word 'rule' is used instead of 'rights'. Singer distinguished between the negative rule and the positive rule.[26] According to Singer, a negative rule prohibits the doing of an action and, in doing so, imposes a negative duty, that is, a duty not to do the action. On the other hand, a positive rule requires doing an action, creating a positive duty, which is a duty to carry out an action. Therefore, a positive duty "cannot be fulfilled by inaction."[27]
Belliotti, while agreeing that negative duties require refraining from doing an act, he extends that of a positive duty to mean requiring the rendering of assistance (to those in need or distress).[28] Thus, according to Belliotti, positive duty is not just the requirement to do something but, more specifically, the requirement to render assistance. Furthermore, Belliotti opines that while negative duties produce a corresponding right to demand that it is fulfilled, positive duties do not create similar enforceable rights.[29]

It is necessary to note that while Singer and Belliotti agree that negative duties proscribe the doing of an act, they disagree on the nature of obligation ensuing from positive duties. According to Singer, positive duties require the duty-holder to do an action, and the obligation remains pending until the action is carried out. For Belliotti, positive duty entails rendering assistance, and the duty-holder cannot be compelled to perform that act. Cruft summarises this as "the assistance/non-interference distinction and the act/refrain distinction."[30]

In human rights discourse, the general presumption is that human rights give rise to negative rights, which

23 Sepuldeva M, Van Banning T and van Genugten WJ, Human Rights Reference Handbook(UP 2004) 13. See also Alston (n 12) 316; A Eide, 'Economic, Social and Cultural Rights as Human Rights' in A Eide, C Krause, and A Rosas (eds), Economic, Social and Cultural Rights (NP 1995) 24-29.

24 Sepuldeva, Van Banning and van Genugten (n 19).

25 Alston (n 12) 316.

26 MG Singer, 'Negative and Positive Duties' (1965) 15 TPQ 97, 98-99. See also H Breakey, 'Positive duties and human rights: Challenges, Opportunities and Conceptual Necessities' (2015) 63 PS 1198, 1198.

27 Singer (n 22) 99.

28 See RA Belliotti, 'Negative Duties, Positive Duties, and Rights' (1978) 16 ASJP 581, 581; RA Belliotti, 'Negative and Positive Duties' (1981) 47 Theoria 82, 82.

29 Belliotti, 'Negative Duties, Positive Duties, and Rights' (n 24) 581.

30 R Cruft, 'Response to World Poverty and Human Rights: Human Rights and Positive Duties' (2005) 19 EIA 29, 30.

create negative duties and nothing else.[31] Freedman states, "Where positive duties are acknowledged, they are usually associated with socio-economic rights."[32] Thus, legal scholars often label civil and political rights as negative rights while referring to economic, social, and cultural rights as embodying positive duties. This distinction is also reflected when interpreting the perceived role of the state in meeting its obligation to fulfil, protect, and respect the citizens' rights.[33] While the state is expected to do nothing except ensure that it does not interfere with civil and political rights, on the other hand, economic, social, and cultural rights would necessitate that the state actively put in place measures – legislative and administrative measures.

Hence, civil and political rights are presumed to cost the state little or no financial burden, are justiciable, and immediately effective. Conversely, economic, social, and cultural rights would require positive state action, are primarily non-justiciable, require progressive implementation, and are often considered aspirational objectives to be achieved by the state when resources become available.[34] Courtis defines justiciability as:

> [T]he ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur; it implies access to mechanisms that guarantee recognised rights; and a justiciable right grants the right-holder a legal course of action to enforce that right whenever the duty-bearer fails to comply with their duties. [35]

Responding to the above presumption of the dichotomy between positive and negative rights, the Committee on Civil and Political Rights in *General Comment No 31,* dealing with the legal obligations of state parties to the ICCPR, interprets states' legal obligation under Article 2 of the ICCPR[36] as creating both negative and positive duties.[37] The Committee further holds that the purposes of ICCPR would be defeated where measures – which may require changes in a state party's legislation – are not taken to prevent the recurrent violation.[38] Thus, state parties are mandated by Article 2 of the ICCPR to "adopt legislative, judicial, administrative, educative, and other appropriate measures to fulfil their legal obligations."[39]

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31 T Pogge, 'Poverty and Human Rights' <www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf> accessed 31 July 2023; S Freedman, Human Rights Transformed: Positive Rights and Positive Duties (OUP 2008) 1.

32 Freedman (n 27) 1.

33 A Eide and A Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in A Eide, C Krause, and A Rosas (eds), Economic, Social and Cultural Rights (NP 1995) 17.

34 See A Conte and R Burchill, 'Introduction' in A Conte and R Burchill (eds), Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee (2nd edn, APL 2009) 2-3; Freedman (n 27) 66; TC van Boven, 'Distinguishing Criteria of Human Rights' in K Vasak (ed), The International Dimensions of Human Rights (Vol 1, English edition, P Alston (ed), UNESCO and GP 1982) 50; Sepuldeva, Van Banning and van Genugten (n 19) 9; M Scheinin, 'Economic and Social Rights as Legal Rights' in A Eide, C Krause, and A Rosas (eds), Economic, Social and Cultural Rights (NP 1995) 41; UNGA 'Annotations on the text of the draft International Covenants on Human Rights' UN Doc A/2929 (1955) <www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/A-2929.pdf> accessed 31 July 2023; A Nolan, B Porter and M Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' [2007] <http://socialrightscura.ca/documents/publications/BP-justiciability-belfast.pdf> accessed 31 July 2023

35 C Courtis, Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability (ICJ 2008) 6 .

36 International Covenant on Civil and Political Rights, UNGA Res 2200 (XXI) (16 December 1966).

37 UNCHR, 'General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 6.

38 Ibid, para 17.

39 Ibid, para 7.

Likewise, concerning state parties' legal obligation under article 2 of the ICESCR,[40] the 1987 Limburg Principles provides that state parties' commitment towards implementing the rights guaranteed in the ICESCR is immediate through the use of "all appropriate means, including legislative, administrative, judicial, economic, social, and educational measures."[41] Expatiating on the issue of 'progressive implementation', the Limburg Principles explains that 'progressive implementation' does not imply that states have the right to indefinitely defer the execution of the rights guaranteed by the ICESCR. Instead, because the obligation on the state requires the efficient use of available resources and not the existence of increased resources,[42] state parties must "move as expeditiously as possible towards the realisation of the rights."[43]

Expounding on the Limburg Principles, the Committee on Economic, Social, and Cultural Rights (CESCR), in its *General Comment No 3,* provides that:

> Among the measures considered appropriate, in addition to legislation, is the provision of judicial remedies concerning rights that may be justiciable by the national legal system.[44]

In a subsequent comment dealing with the domestic application of ICESCR, the Committee states that:

> Regarding civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption about economic, social, and cultural rights is too often made. The nature of the rights or the relevant Covenant provisions does not warrant this discrepancy…The adoption of a rigid classification of economic, social, and cultural rights which puts them, by definition, beyond the reach of the courts, would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[45]

Taking cognisance of the explanations given by the Committee on Civil and Political Rights and the Committee on Economic, Social, and Cultural Rights, and the Limburg Principles, it is evident that civil and political, economic, social, and cultural rights entail negative rights and positive rights. Thus, Vasak's concept, which demarcates negative rights as strictly civil and political rights and positive duty as exactly that of economic, social, and cultural rights, is contrary to this. Kooijmans sums it up by stating, "It is not true that civil and political rights imply only a duty to abstain on the part of the government, while social and economic rights suggest a duty to act."[46]

Other authors have echoed Kooijman's statement.[47] During the drafting process of the UDHR – which is

40 International Covenant on Economic, Social and Cultural Rights, UNGA Res 2200 (XXI) (16 December 1966).

41 UNCHR, 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' UN Doc E/CN.4/1987/17 <www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UN_Limburg_Principles_1987_En.pdf> accesse 31 July 2023, pt 1 cls 16 -17.

42 UNCHR, 'The Limburg Principles' (n 37) cl 23. See also UNCHR 'General Comment 3: The nature of States parties' obligations' (14 December 1990) E/1991/23 <www.refworld.org/docid/4538838e10.html> accessed 31 July 2023

43 UNCHR, 'The Limburg Principles' (n 37) cl 21.

44 UNCHR, 'General Comment 3' (n 38) para 5.

45 UNCHR, 'General Comment 9: The domestic application of the covenant' (3 December 1998) E/C.12/1998/24 <www.refworld.org/docid/47a7079d6.html> accessed 31 July 2023

46 Kooijmans (n 3) 321.

47 See Freedman (n 27) 9; Cruft (n 173) 37; Macklem (n 8) 58-59; UNGA 'Consideration by the General Assembly at its Third Session' (1948-49) UNYB <www.unmultimedia.org/searchers/yearbook/page.jsp?volume=1948-49&bookpage=i> accessed 31 July 2023

the foundation for both the ICCPR and ICESCR – the representative from Brazil stated that "by making human rights international, the United Nations Charter had placed upon states positive legal obligations."[48] The statement confirms that human rights confer on states not only negative duties but, more so, positive duties.[49] According to White, duty (or obligation) implies that the duty-holder has to do something for the right-holder.[50] This article concludes that all duties, whether negative or positive, mandate action by the duty holder. Based on this conclusion, instead of referring to duty as either negative or positive, this article argues that duty should be
regarded plainly as a duty.

Third-generation rights (rights of solidarity)

According to Vasak, the "right to a healthy and ecologically balanced environment"[51] falls within the categorisation of third-generation rights. These third-generation rights

> [R]eflect a particular conception of community life; they can only be implemented by the combined efforts of everyone: individuals, States and other bodies, and public and private institutions.[52]

An examination of Vasak's description of first, second, and third-generation rights indicates that their execution methods demarcate these generation rights. Essentially, the first-generation rights entail the non-interference of state to individual freedom; the second-generation rights necessitate positive state action; and the third-generation requests would require the combined efforts of individuals, states, private and public institutions, and other bodies. Following Vasak's postulation, it can be deduced that third-generation rights are neither implemented by state actions nor by non-interference of States on individual freedom. Also, while the state is specified as the duty holder in the first- and second-generation rights, Vasak identifies 'everyone' as the duty holder in third-generation rights.[53] The implication is that the "right to a healthy and ecologically balanced environment"[54] becomes a right with unidentified duty-holders and right-holders.

Kooijmans argues that for a right to exist, there has to be an identifiable right holder who can bring a claim against the duty holder obliged to fulfil that claim.[55] The right holder and duty holder ought to be distinct and recognisable.[56] Since third-generation rights do not have identifiable rights holders and duty holders, it is necessary to question whether they should be recognised as existing rights.

In his 1977 paper, Vasak referred to third-generation rights as "rights of solidarity."[57] This article contends that examining what connotes 'rights of solidarity' might aid in understanding the type of rights Vasak's third-generation rights embody. It is necessary to note that Vasak did not explicitly expound on what the rights of solidarity mean. Notwithstanding, Alston alleges that Vasak, in his 1979 inaugural lecture at the International Institute of Human Rights, expatiated on what constitutes the rights of solidarity.

According to Alston, Vasak stated that the rights of solidarity "may be both invoked against the state and

48 UNGA, 'Consideration by the General Assembly at its Third Session' (n 43).

49 Ibid.

50 A White, Rights (OUP 1984) 56.

51 Vasak (n 4) 29.

52 Ibid.

53 C Wellman, 'Solidarity, the Individual and Human Rights' (2000) 22 Human Rights Quarterly 639, 644.

54 Vasak (n 4) 29.

55 Kooijmans (n 3) 323.

56 Ibid.

57 Vasak (n 4) 29.

demanded of it."[58] The author further indicates that Vasak argued against the issue that the right of solidarity lacked a precise object.[59] In answer to that, Alston states that Vasak contended that earlier requests lacked duty holders when they were first formulated and "modern rights concept does not necessarily require the identification of any specific guarantor."[60]

Given the seeming absence of clarification on what constitutes the rights of solidarity, there needs to be more scholarly engagement to decipher this. According to the 1978 UNESCO Expert Meeting report, the rights of solidarity would entail that all accept their responsibilities or all would be unable to enjoy the right.[61] The report emphasised that the "appropriate analytical tools and machinery for implementing the rights of solidarity are yet to be elaborated."[62] The report further recommends that based on the various formulations and interpretations of the concept of solidarity, it is necessary to clarify the objects, content, and subjects of solidarity rights.[63]

In 1980, a working group of the standing committee of international non-governmental organisations (NGOs) organised a symposium under the auspices of UNESCO to examine the concept of 'solidarity rights.'[64] According to the NGO working group, the rights of solidarity "entail duties of solidarity."[65] The NGO working group defined solidarity as

> The recognition of our common destiny and the desire to enable each individual to exercise his rights and assume his share of responsibility for safeguarding and improving the future of humanity.[66]

The NGO working group further held that the ability of an individual to enjoy the rights of solidarity extensively depended on whether that person can legitimately claim these rights from the "local, regional, national, international, or private communities"[67] to which they belong.

According to Marks[68] and Wellman,[69] solidarity rights comprise both individual and group/collective rights. Also, unlike first and second-generation rights, the rights of solidarity impose joint obligations on all States and obligations on all actors in the international fora.[70] Relating the individual and collective rights dimension of the rights of solidarity to the "right to a healthy and ecologically balanced environment,"[71] Marks described the individual rights as the "right of any victim or potential victim of an environmentally damaging activity to obtain the cessation of the activity and reparation for the damage

58 K Vasak, 'For the Third Generation of Human Rights: The Rights of Solidarity' (Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, Strasbourg, 2-27 July 1979) as cited in P Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) XXIX NILR 307, 311.

59 Ibid.

60 Ibid.

61 UNESCO, 'Final Report: Expert Meeting on Human Rights, Human Needs and the Establishment of a New International Economic Order' (29 December 1978) SS-78/CONF.630/COL.2 para 238 <http://unesdoc.unesco.org/images/0003/000326/032647eb.pdf> accessed 31 July 2023

62 Ibid, para 2.

63 Ibid, para 240.

64 UNESCO, 'Symposium New Human Rights: the Rights of Solidarity; the Rights of Solidarity: an attempt at conceptual analysis' (9 July 1980) SS-80/CONF.806/6 para 11 <http://unesdoc.unesco.org/images/0004/000407/040770eo.pdf> accessed 31 July 2023

65 Ibid.

66 Ibid, para 9.

67 Ibid, para 11.

68 SP Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1981) 33 RLR 435,444.

69 Wellman (n 49) 650.

70 Ibid.

71 Vasak (n 4) 29.

suffered."[72] On the other hand, the collective dimension referred to "the duty of the State to contribute through international cooperation in resolving environmental problems at a global level."[73]

Taking a different stance from Marks and Wellman's position that rights of solidarity constitute both individual and group/collective rights, Boyle adopts the view that solidarity rights are collective rights that communities, and not individuals, can enforce to manage and protect their environment and natural resources.[74] The question then is whether rights of solidarity encompass both individual and collective/group; or merely collective rights.

The Oxford Dictionary of English defines solidarity as "*unity or agreement of feeling or action, especially among individuals with a common interest; mutual support within a group*."[75] From this definition given by the Oxford Dictionary of English, it is evident that the term 'solidarity' refers to something a group or community holds. Solidarity involves a plural and not a singular action. The definition supports Boyle's position that rights of solidarity are collective rights and not, as suggested by Marks and Wellman, consisting of both individual rights and group/collective rights. Thus, individuals can only enjoy these rights with their community but not as individuals.[76]

Levy believes that what constitutes a collective right is imprecise based on the uncertainty as to whether collective right refers to "a right to a collective good? A right which could only be exercised by members of a collective? A right which could only be exercised by a collectivity (sic) itself?"[77] Describing the nature of collective rights, Jones states that members of the collective group cannot enforce these rights against members of that group; the rights can only be enforced against externals.[78] This is because "right holders cannot hold rights against themselves."[79] Jones argues that, like individual rights, which are enforced against external persons, collective rights must be directed externally against other individuals or groups of individuals; and not internally against itself – the right holders.[80] Hence, "individuals who incur the duty entailed by a collective right cannot figure amongst the holders of that right."[81]

From the above discussion, it is evident that scholars need to hold a common position as to what constitutes rights of solidarity. Although, according to Alston, Vasak argues that rights of solidarity may be invoked and demanded from a state, it still needs to be determined who the identified right holders and duty holders are. Thus, the pertinent questions include whether the rights of solidarity are 'for all rights';[82] rights individuals have to claim from their community,[a] combination of individual and group/collective rights;[83] or simply collective rights.

This lack of clarity underlines the recommendation by the 1978 UNESCO Expert Meeting that the subject,

72 Marks (n 64) 444.

73 Ibid.

74 Boyle, 'Human Rights or Environmental Rights?' (n 15) 471.

75 Stevenson (n 9).

76 See Boyle, 'Human Rights or Environmental Rights?' (n 15) 471; P Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21 HRQ 80, 94.

77 See JT Levy, 'Classifying Cultural Rights' (1997) 39 Nomos 22, 23; S Wall, 'Collective Rights and Individual Autonomy' (2007) 117 Ethics 234, 236; W Kymlicka, 'Cultural Rights and Social-Democratic Principles: Dialogue with Alfredo Gomez-Muller and Gabriel Rockhill' in A Gomez-Muller and G Rockhill (eds), Politics of Culture and the Spirit of Critique: Dialogues (CUP 2012) 148-149.

78 P Jones, 'Group Rights and Group Oppression' (1999) 7 TJPP 353, 373.

79 Jones, 'Human Rights, Group Rights, and Peoples' Rights' (n 72) 94.

80 Ibid, 94-95.

81 Jones, 'Group Rights and Group Oppression' (n 74) 373.

82 UNESCO, 'Final Report' (n 57) para 238.

83 See Marks (n 64) 444; Wellman (n 49) 650.

content and object of the rights of solidarity needs clarification.[84] More so, should the definition of rights of solidarity as collective rights be adopted – that is, about the "right to a healthy and ecologically balanced environment"[85] – it would mean that this right can only be enjoyed by communities and not individuals. It would also mean that should a community member engage in activities that cause environmental degradation and pollution because the individuals or group of individuals collectively hold the position of right holders with the community, and given that the community cannot enforce the collective right against itself. Consequently, the community cannot enforce the right against these individuals or groups of individuals. Vasak argues that the community may invoke or demand this right from the state.

Given the above, it is suggested that cataloguing the "right to a healthy and ecologically balanced environment"[86] as a third-generation right would mean labelling it a non-existing right because it does not clarify who the right holders and duty holders are. It is impossible to hold 'everyone' responsible for 'everyone' and for 'everyone' to claim rights from 'everyone. Kooijmans states that a right must have precise rights holders and duty holders to be identified as a right.[87]

Research Argument

Having examined Vasak's three-generation human rights concept, this article argues that Vasak's classification of generation rights is imprecise, invalid, and especially fails to reflect the true nature of the international bill of human rights. According to Eide, although it is not clearly spelt out in the International Bill of Rights, "but are gradually clarified through additional more specific instruments and the practice of monitoring bodies,"[88] it is trite that rights create correlative duties. This factor is missing in Vasak's third-generation rights classification (rights of solidarity), as Vasak did not state precisely who the rights holders and duty bearers of these rights are.

Furthermore, Shelton argues that Vasak's proposition that third-generation rights are distinguished based on the fact that the combined efforts of all parts of the society are required to implement the rights "does not seem to be a distinctive feature in practice, as all human rights involve correlative duties for individuals, groups, and governments."[89]

Regarding Vasak's classification of civil and political rights as precisely negative rights; and economic, social, and cultural rights as positive rights, this article posits that this proposition might not be accurate. According to the *General Comments* of both the CCPR and CESCR, it is evident that in adopting the International Bill of Rights, state parties that make up the UNGA accepted an International Bill of Rights, creating both positive and negative obligations on the state parties. That is an indivisible,[90] interrelated,[91]

84 UNESCO, 'Final Report' (n 57) para 240.

85 Vasak (n 4) 29.

86 Ibid.

87 Kooijmans (n 3) 323.

88 Eide, 'Economic, Social and Cultural Rights as Human Rights' (n 19) 35.

89 D Shelton, 'Human rights, Environmental Rights, and the Right to Environment' (1991) 28 SJIL 103, 124. This position is confirmed in the UDHR – see The Universal Declaration of Human Rights, UNGA Res 217 (III) (10 Dec 1948) preamble para 8.

90 "All civil, cultural, economic, political, and social rights are equally important. Improving the enjoyment of any right cannot be at the expense of the realisation of any other right" – see OHCHR, 'Human Rights Indicators: A Guide to Measurement and implementation' [2012] 11 <www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf> accessed 31 July 2023

91 "Improvement in the realisation of any one human right is a function of the realisation of the other human rights" – see ibid.

inalienable,[92] universal,[93] and interdependent[94] body of human rights.[95] Thus, according to Whelan, "If we subscribe to the idea that (something about) human rights is truly indivisible, the generation's approach confronts us with significant contradictions."[96]

According to the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights 1997, in the same manner, state parties who do not comply with the treaty obligations in ICCPR are said to be in violation. Likewise, state parties who fail to fulfil their obligations as agreed under ICESCR violate the Treaty.[97] This further reflects the indivisible, interrelated, interdependent, universal, and *of-equal-importance*[98] characteristics of the International Bill of Rights. The Maastricht Guidelines additionally provide that the ICCPR and ICESCR impose on states the obligations[99] to respect,[100] protect,[101] and fulfil;[102] failure to do so creates a violation of the rights guaranteed therein.

Bridging the seeming gap between ICCPR and ICESCR,[103] on the 10th of December 2008, UNGA adopted the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights;[104] to equip the CESCR to achieve the purposes of the ICESCR and implement its provisions.[105] Similar to the regime obtainable for violation of rights guaranteed in the ICCPR,[106] the Optional Protocol makes it possible for the CESCR to receive communications brought by or on behalf of individuals or groups who have been victims of a violation of any rights guaranteed by the ICESCR.[107]

92 "Human rights are inherent in all persons and cannot be alienated from an individual or group except with due process and in specific situations" – see ibid.

93 "Human rights are universal, regardless of political, economic or cultural systems" – see ibid.

94 "Human rights are interdependent, as the level of enjoyment of anyone's right is dependent on the level of realisation of the other rights" – see ibid.

95 The UN has consistently reiterated this fact – see UNGA, 'Preparation of two Draft International Covenants on Human Rights' Res 543 (VI) (5 February 1952) preamble, para 2; UNGA, 'Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights' A/RES/63/117 (10 December 2008) preamble, paras 4-5; UNCHR, 'The Limburg Principles' (n 37) pt1 cl3. See also art 5 Vienna Declaration and Programme of Action 1993; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (1 December 2011) (2017) 29 NQHR 578, 580, para 5 <https://doi.org/10.1177%2F016934411102900411> accessed 31 July 2023

96 Whelan (n 7) 211.

97 Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights (22-26 January 1997), para 4-5 <http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html> accessed 31 July 2023

98 Highlighted by this article

99 See also Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (1 December 2011) (2017) 29 NQHR 578, 580, para 3 <https://doi.org/10.1177%2F016934411102900411> accessed 31 July 2023

100 This requires the state to refrain from interfering with the enjoyment of civil, political, economic, social, and cultural rights– see Maastricht Guidelines 1997 (n 93) para 6.

101 This requires the state to prevent violations of civil, political, economic, social, and cultural rights by third parties – see ibid.

102 This requires the state "to take appropriate legislative, judicial, budgetary, administrative, and other measures towards the full realisation of" civil, political, economic, social, and cultural rights – see ibid.

103 Whelan (n 7) 206.

104 Which came into force on the 5th of May 2013 – see United Nations, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3-a.en.pdf> accessed 31 July 2023

105 UNGA, A/RES/63/117 (n 91) preamble, para 6.

106 UNGA, 'Optional Protocol to the International Covenant on Civil and Political Rights' (16 December 1966) art 2 <https://treaties.un.org/doc/Treaties/1976/03/19760323%2007-37%20AM/Ch_IV_5p.pdf> accessed 31 July 2023

107 UNGA, A/RES/63/117 (n 91) art 2.

Therefore, it is evident that the obligations created by the International Bill of Rights are obligations to act and not obligations to render assistance. These obligations create a correlative right to demand that the right is fulfilled, as failure to do so results in a treaty violation. Therefore, unlike Belliotti's moral philosophy, positive duties, which do not create a correlative right to demand enforcement, positive duty obligations from human rights give individuals and groups the correlative right to demand that the right is fulfilled.[108] Freedman refers to this right as the right to state action.[109]

Conclusion

This article critically interrogated the validity of Vasak's concept of categorising human rights into three generations. The article examined the concept from three prisms, namely, (i) the use of the term 'generation'; (ii) classifying Civil and Political Rights and Economic, Social, and Cultural Rights as distinctively negative rights and positive actions; and (iii) categorising right to a healthy environment as rights of solidarity.

In conclusion, this article finds that such a classification might not be valid because (i) the three-generation human rights concept needs to reflect the true nature of the international bill of human rights. (ii) According to the CCPR and CESCR, human rights cannot be distinctively divided as positive or negative. Every human right connotes positive and negative duties to fulfil, respect, promote, and protect. (iii) Given Kooijman's definition of rights as having specific right-holders and duty-holders, accepting that the human right to environmental protection is a third-generation right would inadvertently agree that such a right does not exist. Also, such rights can only be enforced against persons not part of the community, which does not reflect human rights' universal, inalienable, indivisible, interdependent, and interrelated nature. Thus, the right to a clean, healthy, and safe environment is not a third-generation right but a fundamental human right, pure and simple.

108 Freedman (n 27) 88.

109 Ibid.