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[See table of contents](#)

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Article abstract

The conventional wisdom of rights as a limitation on the power of the State is a product of an archaic understanding that presumed the State is the only entity capable of infringing human rights. With the increased involvement of non-State entities in functions that were erstwhile reserved to the State, we need to re-examine this State-centric approach. The international community is already challenging this State-oriented liberal rights framework. Including individual obligations within the human rights discourse is an outcome of the conflict between the 'liberal theory of rights' that emphasizes individual autonomy, and the social democracy theory, that calls for regulating private conduct to strengthen implementation of rights. This article contextualizes the feasibility of including such individual obligations within the human rights discourse, especially in a world where private conduct equally impacts the actualization of rights.

STATE-CENTRIC APPROACH TO HUMAN RIGHTS: EXPLORING HUMAN OBLIGATIONS

*Anumeha Mishra**

The conventional wisdom of rights as a limitation on the power of the State is a product of an archaic understanding that presumed the State is the only entity capable of infringing human rights. With the increased involvement of non-State entities in functions that were erstwhile reserved to the State, we need to re-examine this State-centric approach. The international community is already challenging this State-oriented liberal rights framework. Including individual obligations within the human rights discourse is an outcome of the conflict between the 'liberal theory of rights' that emphasizes individual autonomy, and the social democracy theory, that calls for regulating private conduct to strengthen implementation of rights. This article contextualizes the feasibility of including such individual obligations within the human rights discourse, especially in a world where private conduct equally impacts the actualization of rights.

La sagesse conventionnelle des droits comme limitation du pouvoir de l'État est le produit d'une conception archaïque qui présume que l'État est la seule entité capable de violer les droits humains. Avec l'implication croissante d'entités non-étatiques dans des fonctions autrefois réservées à l'État, nous devons réexaminer cette approche statocentrée. La communauté internationale conteste déjà ce cadre de droits libéraux axé sur l'État. L'inclusion des obligations individuelles dans le discours sur les droits humains est une conséquence du conflit entre la « théorie libérale des droits », qui met l'accent sur l'autonomie individuelle, et la théorie de la social-démocratie, qui appelle à la régulation de la conduite privée pour renforcer la mise en œuvre des droits. Cet article contextualise la possibilité d'inclure de telles obligations individuelles dans le discours sur les droits humains, en particulier dans un monde où la conduite privée impacte également l'actualisation des droits.

La sabiduría convencional presenta los derechos humanos como una limitación al poder del Estado, pero esto es producto de una comprensión arcaica que presume que el Estado es la única entidad capaz de infringir estos derechos. Con una mayor participación de entidades no estatales ejerciendo funciones antes reservadas al Estado, es necesario reexaminar este enfoque estado-céntrico. La comunidad internacional ya está desafiando esta concepción liberal de los derechos orientada hacia el Estado. La inclusión de obligaciones individuales dentro del discurso de los derechos humanos ha sido el resultado del conflicto entre la "teoría liberal de los derechos", que enfatiza la autonomía individual, y la teoría de la socialdemocracia, que exige regular la conducta privada para fortalecer la implementación de los derechos. Este artículo contextualiza la posible inclusión de obligaciones individuales en el discurso de los derechos humanos, especialmente en un mundo donde la conducta privada afecta igualmente la actualización de los derechos.

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The State is an integral part of the modern day socio-political and legal structure. The exact meaning and limits of the State are continuously debated. Despite the changing dynamics of international relations, the State still forms the axis of all social, political and legal discussions. The modern State, however, underwent a lengthy transformation process before attaining the present form. Though there are numerous theories and arguments regarding how the modern-day State evolved, the features for an entity to be recognized as a State under international law are widely accepted. These qualifications, included in the *Montevideo Convention*, are as follows: a permanent population, a defined territory, a government, and the capacity to enter into relations with other States.¹ The *Montevideo Convention*² echoes the principle of sovereign equality of States in international law, an idea that was legitimized through the *Peace of Westphalia* in 1648.³ The principle of sovereign equality influenced the conceptualizing of the State, both internationally and municipally. As a natural consequence of the sovereignty principle, the State became the holder of constitutional authority and the channel through which the international legal order became applicable to individuals.

As the world became more interconnected, the idea of absolute State sovereignty started being challenged by norms recognized as universal values. Though the idea of State sovereignty has undergone significant changes as a result of the rise of such universal norms, it still guides the practice of international law. One important piece of evidence for this assertion is that the State is still the primary subject of international law and is responsible for adhering to these universal values, both internally and externally.⁴

While internationally, the concept of sovereignty guides the understanding of State, limitation, diversification and consent may be considered the founding pillars of the modern constitutional State.⁵ Rights and liberties form the cornerstone of the modern-age constitutional ethos. The idea of liberty was envisaged as a limitation on the tyranny of the State. Mill, in his famous treatise, defines liberty as nothing but a limitation on the power of the ruler.⁶ This limitation, according to him, could be exercised in dual fashion: firstly, by conferring political liberties or rights upon individuals and casting a duty of non-interference on the State to protect it, and secondly, by devising a way of ensuring the consent of the community, which he termed

¹ *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19, 49 US Stat 3097, art 1 (entered into force 26 December 1934) [*Montevideo Convention*]. Though these features are not the sole criteria for determining Statehood, they form important criteria for recognizing Statehood. Note that this view has been challenged by the declarative theory of recognition.

² See *Montevideo Convention*, *ibid*, art 4.

³ *Peace of Westphalia*, 24 October 1648, 1 Parry 271; 1 Parry 119 (entered into force 24 October 1648) [*Westphalia*]. However, *Westphalia* cannot be credited with coming up with the notion of sovereign equality of States for the first time. It was a consequence of a gradual process. For a detailed discussion, see Dan Philpott, "Sovereignty", *The Stanford Encyclopedia of Philosophy* (Summer 2014), online: <<http://plato.stanford.edu/archives/sum2014/entries/sovereignty>>.

⁴ This statement does not ignore the position of individual as a subject of international law; it merely argues that State still remains an important subject of international law.

⁵ See generally Andrew Vincent, *Theories of State* (Oxford: Basil Blackwell, 1987), ch III.

⁶ John Stuart Mill, *On Liberty and Utilitarianism* (New York: Bantam Classic, 2008) at 4.

as constitutional checks.⁷

Our understanding of rights today is informed by such liberal ideals of individualism. These ideas have permeated our understanding of human rights, constitution and constitutionalism. Though constitutionalism developed long before the liberal movement, today both of them have become so intertwined that it is difficult to discuss one without the other, both in the domestic and international context.⁸ The international human-rights regime is also based on this conception of the State and individual relationship. The implementation of this regime is dependent on individuals being members of the States, as human rights are implemented through the agency of the State.⁹

This paper critically analyzes the liberal theory of rights and examines the efficacy of the State-centric approach to human rights. The term State-centric implies two notions that are inherent in our understanding of rights: (a) that rights are basically a claim against the State and (b) that the obligation to protect rights solely lies on the State. The second segment of this article discusses the public-private distinction that is one of the most important pillars of the State-centric theory. The third segment evaluates how this State-centric approach translates into municipal and international law. It also examines the viability of the challenges posed to this approach and the inadequacy of the current rights framework to address human-rights issues. The fourth segment draws from the prior discussions to discuss the evolution of jurisprudence on human duties/responsibilities¹⁰ as a means to ensure better implementation of rights. The final segment explores philosophical traditions that correlate rights with duties and examines the feasibility of strengthening individual obligations in order to strengthen human-rights mechanisms.

I. Public-Private Distinction

The idea of the State has always been crucial to how law theorizes rights. Since rights are considered a protection against the tyranny of the State, the liberal theory of rights seeks to distinguish between what may be regulated and what may not. For example, if we scrutinize the words of the *International Bill of Rights*,¹¹ which ensured that human rights became the ‘common moral language’¹² of the global society, we see the obligation to guarantee and protect human rights being imposed primarily on the State. This obligation was so imposed because documents such as the *International Bill*

⁷ *Ibid* at 4-7.

⁸ Andrew Vincent, *supra* note 5.

⁹ This State-centric approach is elaborated in this article subsequently.

¹⁰ The term obligation has been used as an umbrella term to denote both duty and responsibility. Duty has primarily been used to denote moral obligation and responsibility has been used to indicate legal obligations. However, in some contexts (e.g. while discussing the Indian concept of dharma), duty includes both moral and legal obligations.

¹¹ *International Bill of Human Rights*, GA Res 217(III) A-E, UNGAOR 3rd Sess, UN Doc A/RES/3/217 (1948), online: <<https://www.refworld.org/docid/3b00f08b48.html>> [*International Bill of Rights*].

¹² Charles R Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2011) at 1. Beitz uses the phrase “common moral language”, for human rights in this book.

of *Rights* were drafted in a world that saw the State as the only relevant actor in international law. Consequently, these documents, couched in the language of rights and guided by the idea of individual autonomy, obliged States to protect and guarantee human rights. A similar understanding of rights is also discernible from the constitutions of the world, where human rights are placed in a vertical framework of ‘state vis-à-vis individual’. The language of rights, both in international and municipal law, is premised on the general idea that “rights protect certain inalienable rights of human beings against kings, in particular, and against the social state in general”.¹³

Discussion of rights is often limited to State interference because the State is the most conspicuous entity from whom rights are to be protected and also because the State is considered responsible for the way rights function within it. Consequently, individual autonomy, the quintessence of human-rights jurisprudence, is generally viewed as a protection against State interference.

This perception is evident in the emphasis given to civil and political rights over economic and social rights in the early years of the rights talk. Since civil and political rights cast a negative duty of non-interference on the State, they were considered easier to guarantee and implement compared to the economic and social rights, which obliged States to take positive action. However, in almost all instances, rights were granted as a protection against the State or as an obligation of the State.

As Morton Horwitz points out, this emergence of the public-private divide can be ascribed to two factors: first, crystallization of the idea of a distinct public realm in response to “the emergence of the nation-state and theories of sovereignty in the sixteenth and seventeenth centuries” and secondly, “in reaction to the claims of monarchs and, later, parliaments to the unrestrained power to make law, there developed countervailing effort to stake out distinctively private spheres free from the encroaching power of the state”.¹⁴

The second factor can be traced back to our understanding of the State-individual relationship. The relation between the individual and the State has for a long period been considered a ‘contractual’ arrangement, wherein limits to political authority are viewed as political obligations.¹⁵ Defined as limitation on the power of the ruler, the concept of liberty evolved in the backdrop of this vertical understanding of the socio-political setup.¹⁶

This understanding of rights is reflected in most of the constitutions of the world. For instance, Article 12¹⁷ of *The Constitution of India* guarantees protection

¹³ Thomas Buergenthal, *International Human Rights* 1 (1988) cited in Juan Manuel Amaya Castro, “Human Rights and the Critiques of the Public-Private Distinction”, VU Migration Law Series No 7 (2010) at 185.

¹⁴ Morton J Horwitz, “The History of Public/Private Distinction” (1982) 130 U Pa L Rev 1423 at 1423.

¹⁵ For a detailed discussion on theories of social contract, see Michael Lessnof, *Social Contract* (London: Macmillan, 1986).

¹⁶ Mill, *supra* note 6.

¹⁷ Article 12 of *The Constitution of India*, 26 January 1950, reads as follows: “unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India”.

against fundamental-rights violations, primarily by the State.¹⁸ The need to draw a line defining a private space of autonomy led to the creation of this public-private distinction in law. This divide has been challenged and questioned by many, but it still informs the way we perceive human rights. With the changing nature of governance, wherein non-governmental institutions and civil society play a very important role, the boundaries of this distinction are continuously blurring. However, since this fictional divide enables us to “identify, with relative certainty, the situations in which entrenched constitutional limits apply and do not apply”¹⁹, legal systems across the globe still prefer to solve questions involving rights within this legal fiction. This vertical understanding of human right is facing several challenges because of the impact of globalization on human rights governance model, a model where private entities are assuming the functions of the State.

As far back as 1987, Fiss criticized the narrative that presumes that the State is innately autocratic and, consequently, morally challenged to protect guaranteed liberties.²⁰ Though, he primarily argued in favor of reposing more confidence in the State and thereby using it to limit individual transgressions, he also challenged the rationale of differentiating the strengths and weaknesses that the liberal narrative ascribed to the State and other institutions. In the context of free speech, he remarked that:

Of course, the state might act wrongfully, and thereby restrict or impoverish rather than enhance public debate. We must always stand on guard against this danger, but we should do so mindful of the fact that this same danger is presented by all social institutions, private or public, and that there is no reason for presuming that the state will be more likely to exercise its power to distort public debate than would any other institution.²¹

The validity of this argument is becoming apparent in today’s globalized world, where private entities exert major influence on the application and impact of human rights, and is being felt on many fronts. Insistence on the horizontal application of rights has emerged in response to the concern that actions of dominant private entities have a pervasive impact on individual rights. Also, literature on developing a framework of individual duties has emerged in response to the aforementioned changing governance structure. The attempt to find a solution to the conflict between the liberal theory of State, which imputes a primary obligation to protect human rights on the State, and the social-democracy theory,²² which argues for limitations on the exercise of effective social power through control of resources by private individuals, is

¹⁸ Though some provisions, such as articles 15(2), 17 and 23, impose obligations on individuals, claims of fundamental-rights violation can be primarily invoked against the State.

¹⁹ Richard Kay, “The State Action Doctrine, the Public- Private Distinction, and the Independence of Constitutional Law”, (1993) 10 Const Commentary 329 at 341.

²⁰ Owen M Fiss, “Why the State?” (1986-1987) 100 Harv L Rev 781 at 784-87.

²¹ *Ibid* at 787.

²² The social democracy theory believes that both public and private power threaten liberty. This theory emerged in response to the realisation that private entities can impact right in the same manner as the State.

apparent in both municipal and international law.²³

II. Municipal Laws and the State-action Doctrine

The State-action doctrine holds that only the State can be directly held responsible for fundamental-rights violations. In order to claim a remedy for a human rights violation, the litigant has to prove that the alleged violator qualifies as the State. The justification for this doctrine can again be traced to the need to protect private autonomy and to prevent the constitution from becoming a means to restrict private conduct. Domestically, courts have been trying to find an alternative or exception to the State-action doctrine, so that private entities can also be held responsible for human rights violations.²⁴ As a result of the ambiguity of these exceptions, the law has not yet been able to provide a sound theoretical basis for determining the extent to which private entities are bound by constitutional mores. Consequently, the State-action doctrine has become a “conceptual disaster”.²⁵

The municipal courts have tried to carve exceptions to the State-action doctrine to facilitate some form of horizontality within the vertical-rights framework. For example, the public-function exception argues that private entities performing functions traditionally reserved for the State are also bound by constitutional obligations.²⁶ Similarly, the entanglement exception imputes human rights obligations on the non-State actors on the basis of the extent to which government is involved with

²³ For detailed discussion, see Mark Tushnet, “The Issue of State Action/Horizontal Effect in Comparative Constitutional Law” (2003) 1:1 *Intl J Constitutional L* 79-98.

²⁴ The State-action doctrine holds that an action for human right violation can only be brought against the State. This doctrine can be located in almost all the constitutions of the world, e.g. *The Constitution of India*, 1950, art 12 and *US Const amend XIV*.

²⁵ Charles L Black, “The Supreme Court, 1966 Term—Foreword: ‘State Action,’ Equal Protection, and California’s Proposition 14” (1967), Faculty Scholarship Series Paper 2591, online: Digital Commons <http://digitalcommons.law.yale.edu/fss_papers/2591>. This phrase was first used by Black and has since been used by jurists to describe the status of this doctrine.

²⁶ For example, in one of the first such instances, this doctrine was used by the United States Supreme Court in *Marsh v Alabama*, 326 US 501 (1946). It was held that people living in company-owned towns are free citizens of their State and country, just as residents of municipalities. Therefore, rights guaranteed by *US Const amends I & XIV* cannot be curtailed. The following remarks provide the basis of this ruling: “The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it”: at 506. This doctrine has also been used by the Indian Supreme Court to expand the ambit of article 12 of *The Constitution of India* and include private entities within its ambit. In *Ajay Hasia v Khalid Mujib*, [1981] 1 Supreme Court Cases 722, the Supreme Court of India laid down six tests to determine whether an entity is an instrumentality of State: “(1)[...] if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (3)[...] whether the corporation enjoys monopoly status which is the State conferred or State protected. (4) Existence of deep and pervasive State control [...] (5) If the functions of the corporation of public importance and closely related to governmental functions [...] (6)[...] if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government”: at 735.

the conduct of the private party or is a “joint participant in the operation of its activities”.²⁷

Rather than challenging the verticality of the constitutional structure of rights, these exceptions merely ease the apparent tension arising as a result of its insufficiency. They do so because these exceptions do not challenge the dominance of vertical regime of human rights. Even while imputing obligations on non-State entities, these exceptions work within the vertical framework by characterizing these entities as State or State-like. According to these exceptions, a non-State entity is not obliged to guarantee human rights *per se*; it is held responsible for such a guarantee only in exceptional situations wherein it performs functions traditionally reserved for State or partakes of State-like characteristics.

As an answer to this doctrinal tautness, the idea of ‘horizontal application’ of rights strives to change the framework within which constitutions operate and make rights the governing code of conduct between individuals. The proponents of the individualist conception of liberty often criticize horizontality for seeking to unduly burden individuals with constitutional obligations. They believe that “limiting the scope of constitutional rights to the public sphere enhances the autonomy of citizens, preserving a heterogeneous private sphere free from the uniform and compulsory regime constructed by constitutional norms”.²⁸

This belief follows the liberal understanding of rights that primarily sees liberty as protection from the State. However, this individualist conception of rights fails to justify certain instances of rights assertion which impair the environment necessary for rights to flourish in a State. Horizontality perceives liberty as an ideal that promotes non-subjugation of individuals, both by the State and society, instead of a sphere immunized against State interference.²⁹

It would not be wrong to argue that jurisprudence supporting horizontality has gained traction as a means to regulate private conduct. There are two variants of horizontal application of rights, direct and indirect. The doctrine of direct horizontality directly subjects private actors to constitutional norms by making them accountable for violation of constitutional obligations.³⁰ This doctrine allows direct invocation of constitutional provisions against non-State entities. Indirect horizontality, on the other hand, subjects private law to constitutional norms; therefore, individuals governed by law are obliged to conform to human rights standards.³¹ Indirect horizontality may be viewed as a ‘hybrid’³² of vertical and direct horizontal approaches, as it does not

²⁷ *Burton v Wilmington Parking Authority*, 365 US 715 (1961); for detailed discussion, see Christopher W Schmidt “On Doctrinal Confusion: The Case of the State Action Doctrine” (2016) BYUL Rev 575 at 589-92.

²⁸ Stephen Gardbaum, “The Horizontal Effect of Constitutional Rights” (2003) 102 Mich L Rev 387 at 394 [Gardbaum, “The Horizontal Effect”].

²⁹ Alastair Richardson, “Lateral Thinking: Justifying the Horizontal Application of Constitutional Rights” (2018) 21 Trinity College L Rev 159 at 166-69.

³⁰ Stephen Gardbaum, “Where the (State) action is” (2006) 4:4 Intl J Constitutional L 760.

³¹ *Ibid.*

³² Gardbaum, “The Horizontal Effect”, *supra* note 28 at 398.

directly impose human rights obligations on individuals, but ensures that individuals are legally governed by them. Thus, constitutional provisions may not be invoked against individuals directly, but the State can be mandated to take legislative, administrative and policy measures to ensure that non-State entities are obliged to observe human rights standards.

Nations such as South Africa, Canada and Ireland are the chief proponents of horizontality. Ireland allows individuals to directly invoke constitutional provisions against an entity, other than the State.³³ The *South African Constitution* binds “a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.³⁴ While Canada does not have a provision like this one in the *South African Constitution*, the *Canadian Charter of Rights and Freedoms*, 1982³⁵ (1982 *Charter*) stipulates that laws inconsistent with the *Canadian Constitution* shall be void to the extent of inconsistency. Interpreting this stipulation, the Canadian Supreme Court has ruled in favor of indirect horizontality by reasoning that the courts can interpret the common law in conformity with constitutional values. Thus, the 1982 *Charter* does not directly impose obligations on non-State entities, but the courts can “apply and develop the principles of common law in manner consistent with the fundamental values enshrined in the *Charter*”.³⁶

A similar provision can be found in *The Constitution of India*. However, the Indian courts have been reluctant to challenge the vertical arrangement of fundamental rights in the *Constitution*.³⁷ The *United Kingdom Human Rights Act* 1998 dilutes the State-action doctrine by explicitly including a public-function exception in the legislation.³⁸ Also, because courts and tribunals are bound to conform to the obligations under the *European Convention on Human Rights (ECHR)*,³⁹ it can be argued that even private conduct in UK must conform to *ECHR* principles.

Despite the emerging jurisprudence on horizontality, municipal legal systems

³³ See *Meskeil v Coras Iompair Eireann* [1973] IR 121 at 133; *Hosford v John Murphy & Sons*, [1987] IR 621. For detailed discussion, see Gardbaum, “The Horizontal Effect”, *supra* note 27 at 394.

³⁴ *Constitution of South Africa*, 1996, s 8(2). See also, art 9(4).

³⁵ *Canadian Charter of Rights and Freedoms*, s 52(1), Part I of *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

³⁶ *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573.

³⁷ *Constitution of India*, 1950, art 13(1) provides that laws inconsistent with Part III (on “Fundamental Rights”) shall be void to the extent of inconsistency. Though individuals may not directly invoke Part III against private entities, the constitutionality of private laws may be challenged for violating fundamental rights. Interestingly, the judiciary has carved out an exception in this regard, wherein personal laws are immune from the application of Part III: see e.g. *State of Bombay v Narasu Appa Mali*, (1952) All India Reporter Bombay 84. Though certain provisions of *The Constitution of India*, 1950, such as arts 15(2), 17 and 23, impose obligations on individuals, the vertical framework envisaged under art 13 precludes the acceptance of direct horizontality by the Indian courts. Efforts have, however, been made to expand the ambit of “state”.

³⁸ *Human Rights Act 1998* (UK), s 6(3) reads as follows: “In this section “public authority” includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament”.

³⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

are still grappling with the boundaries between individual autonomy and constitutional obligations of individuals. The conflict has been aptly summarized by Tushnet:

Liberal autonomy consists in decision making pursuant to an individual's own criteria of the right and good, not the public's. In contrast when constitutional courts find state action or give constitutional provisions direct horizontal effect, they require private actors to conform to constitutional, i.e., public norms.⁴⁰

III. State-centric Approach to Human Rights under International Law

As mentioned before, under international law the State-centric view has been the most relevant doctrine of human rights governance. Presently, the international regime does not directly subject individuals to a duty to protect human rights, the obligation being imposed on the State to ensure conformity through law and policy.

The present individualistic conception of social ordering is a comparatively recent phenomenon. Traditionally, duties were given primacy over rights, and the community, instead of individuals, formed the axis of socio-legal structure. However, post-French Revolution, individuals became the kingpin of society.⁴¹ The idea of the modern state evolved around this notion of individualism, leading to development of liberty as virtue to be protected by and against the State. The community is subservient to individual aspirations and “individual rights are political trumps held by individuals”.⁴²

Consequently, *Universal Declaration of Human Rights*⁴³ (UDHR), the document that paved the way for the 20th century human rights movement, did not insist on the duties of the individual in detail, as the main purpose of the declaration was protection of the individual against the State.⁴⁴

The UDHR is guided by the ideals of individualism and personal autonomy, which view the State as the only institution that can pose threat to the exercise of human rights. But an examination of the travaux préparatoires of the UDHR suggests that the role and status of individual duties had been seriously deliberated upon. These

⁴⁰ Tushnet, *supra* note 23.

⁴¹ For detailed discussion, see Eric R Boot, *Human Duties and the Limits of Human Rights Discourse* (Cham: Springer, 2017)

⁴² Ronald Dworkin, *Taking Rights Seriously*, reprint (New Delhi: Universal Publishing Company, 2014) at xi.

⁴³ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [UDHR].

⁴⁴ Erica-Irene A Daes, “The Individual’s Duties To The Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights a Contribution to the freedom of the Individual under Law”, online: United Nations Digital Library System <https://digitallibrary.un.org/record/52410/files/E_CN.4_Sub.2_432_Rev.2-EN.pdf>

deliberations culminated to form article 29⁴⁵ of the *UDHR*, which makes a passing reference to individual duty but without enumerating its substance.

Initially, it had been proposed that the *UN Charter* should contain a document for the declaration of rights. This declaration was to consist of the following paragraph on individual duties:

In society complete freedom cannot be attained, the liberties of the one are limited by the liberties of others and the preservation of freedom requires the fulfillment by individuals of their duties as members of society.⁴⁶

During the initial phases of the drafting of the covenants on rights,⁴⁷ clauses obligating individuals to perform corresponding duties towards one's State and the international community, as well as a clause that "man does not have rights only; he owes duty to the society of which he forms part",⁴⁸ were also proposed. These phrases, especially the latter one, saw duty as a corollary to right. However, the emphasis on duties was diluted, as it was felt that without providing the specifics of what exactly constituted duty, it was not feasible to mention it. Eventually, the *ICCPR* and *ICESCR* in their preambles would come to include a reference to individual duty:

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant...⁴⁹

Interestingly, the main texts of the covenants do not enumerate the specifics of such duties. Individual duty is incidental (as a corollary to individual right) and not the foundational concept in the right-centric approach. Though human rights treaties provide grounds on which liberties may be restricted, these restrictions serve more as guidance to the State regarding the extent to which it may interfere with the 'sanctimonious' sphere of individual autonomy.

This additional nature of 'duty' requires excessive outer sanctions for its performance, instead of forming the foundational premise of a rights framework. The rationale behind the reluctance of a human-rights framework to equally emphasize duties and rights can be best summarized by the response of Germany to the inclusion of duties in the rights covenants:

⁴⁵ *UDHR*, art 29 reads as follows: "Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society..."

⁴⁶ Daes, *supra* note 44 at 17

⁴⁷ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, 6 ILM 368 (1967) (entered into force 23 March 1976) [*ICCPR*]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 6 ILM 368 (entered into force 3 March 1976) [*ICESCR*].

⁴⁸ Daes, *supra* note 44 at 20.

⁴⁹ *Ibid* at 50.

The state and the community, with their inherent monopoly of power, can protect themselves against dereliction of duty and abuses of the law by individual citizens. For this reason, the rights of the community vis-à-vis the individual and the individual duties corresponding to these rights do not need to be protected and given institutionalized safeguards in the same way as human rights.⁵⁰

In recent times, the normative understanding of rights has been continuously challenged internationally. The State-centric framework of the international rights regime, as in municipal law, has proven insufficient in tackling new issues of human rights. Environmental rights, the right to privacy and rights against hate speech are just some of the many that have challenged this State-centric approach. The horizontality critique has also posed a strong challenge to the idea of rights in a globalized world.

For example, hate-speech laws have generated intense discussion because they directly affect the freedom of expression, a right “where the demand for limited government is strongest and most appealing”⁵¹ and which significantly impacts the exercise of individual autonomy. Also, the extent to which this right is promoted and protected is often seen as an indicator of democracy and constitutionalism. The basic premise of hate-speech laws is that equality and liberty are complementary to each other, having equal status. The concern behind hate-speech laws is the same as the one articulated by Fiss: that is, the capacity of and realization by private entities to protect the individual autonomy of others.⁵² The right to “offend, shock and disturb”⁵³ is gradually being questioned in light of the increased potential of speech to perpetrate discriminatory attitudes. The Human Rights Council has also recognized hate speech as a permissible limitation on freedom of expression.⁵⁴ This development seems to challenge the assertion that individual autonomy should be protected at all costs and that humankind cannot silence even a single contrary opinion.⁵⁵ The development of hate-speech laws indicates that accumulation of resources in the hands of individuals has the capacity to defeat the purpose of human rights: that is, the creation of a just and fair society.

A similar development has taken place in environmental law. Not only has environmental law been trying to impose positive obligations on non-State entities,⁵⁶ States have also been formulating innovative methods to circumvent the individual-centric approach of rights. One of them is granting legal personality to rivers

⁵⁰ *Ibid.*

⁵¹ Fiss, *supra* note 20 at 783.

⁵² *Ibid* at 787.

⁵³ This famous statement that the right of expression includes the right to “offend, shock and disturb” was articulated by the European Court of Human Rights in *Handyside v United Kingdom*, (1976) 1 EHRR 737 at para 49.

⁵⁴ Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, 17th Sess, A/HRC/17/27 (16 May 2011), online: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf> .

⁵⁵ Mill, *supra* note 6.

⁵⁶ Principles like polluter pays and precautionary approach stress the importance of individual obligations in furthering environmental rights.

and the Earth.⁵⁷ These developments signify the limitations of the present rights discourse in tackling rights violations. They also indicate a developing consensus on the importance of exploring the role of individual obligations and duties in rights discourse. This discourse attempts to make individuals responsible actors in human-rights dynamics.

One pertinent criticism against the prevalent rights-based framework is that it ignores “those spheres of human normative agency that cannot be framed in terms of rights, leading to an impoverishment of moral discourse”.⁵⁸ Since the State-centric approach makes the State the primary protector of rights, discussion of the individual’s responsibility towards protecting rights often takes a backseat. Also, there is an inherent reluctance and apprehension to accord equal status to duties in rights parlance, because historically, we have witnessed that emphasis on duties stifles individual aspirations and is used as a tool for subordination by the State and society. Recognizing the impact of conduct of non-State actors on human rights, Clapman argues that “existing general rules of international human rights law, created and acknowledged by states, now fix on non-state actors so that they may be held accountable for violations of this law”.⁵⁹

It can be argued that the potential of non-State enterprises to wield State-like influence on human rights strengthens the argument for developing a strong jurisprudence on human duties. This approach challenges the State-centrism inherent in human rights discourse and seeks to extend the obligation to protect human rights to non-State actors.

IV. Declaration on Human Duties

As discussed, the *International Bill of Rights* does not stress individual duty or responsibility. Discussion on the importance of such duties led the InterAction Council to draft a *Universal Declaration of Human Responsibilities (UDHRe)* in 1997.⁶⁰ This document was followed by the (Valencia) *Declaration of Human Duties and Responsibilities (VDHDR)* in 1998, drafted under the aegis of UNESCO.⁶¹ This declaration stipulates that “[m]embers of the global community have collective, as well

⁵⁷ The New Zealand government conferred the rights of a legal person on the Whanganui River through the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ). Similarly, the Uttarakhand High Court in India recognized the rights of a legal person in the Ganga and Yamuna Rivers in its decision *Mohd Salim v State of Uttarakhand*, (2017) Supreme Court Cases OnLine Uttarakhand 367. In a similar vein, *Ley 21/2010, 21 de diciembre de 2010, de Derechos de la Madre Tierra* (Law on the Rights of Mother Nature), art 1 (BO) recognizes the rights of Earth and imposes obligations on State and society to respect these rights. The *Constitution of the Republic of Ecuador*, 2008, art 71 also recognizes the right of nature to “integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”: online: Public Database of the America’s, Georgetown University <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>>.

⁵⁸ Boot, *supra* note 41 at 4.

⁵⁹ Andrew Clapman, *Human Rights Obligations for Non State Actors* (Oxford: Oxford University Press, 2006) at 28.

⁶⁰ Boot, *supra* note 41 at 13.

⁶¹ *Declaration of Human Duties and Responsibilities 1998*, online: International Consortium for Alternative Academic Publication <<http://globalization.icaap.org/content/v2.2/declare.html>>.

as individual duties and responsibilities, to promote universal respect for and observance of human rights and fundamental freedoms”.⁶²

These developments were preceded by a *Declaration Toward a Global Ethic* (DTGE) (by the Parliament of the Worlds in 1993), which proposed four irrevocable directives: “(1) commitment to a culture of non-violence and respect for life, (2) commitment to a culture of solidarity and a just economic order, (3) commitment to a culture of tolerance and a life of truthfulness and (4) commitment to a culture of equal rights and partnership between men and women.”⁶³

The DTGE was a call to moral consciousness and one of the first documents to formally acknowledge the discussion on individual obligations that was starting in the international community. The VDHDR, on the other hand, tried to formulate both moral and legal obligations. Terminologically, the former has been referred to using the word duty and the latter, the word responsibility.

The VDHDR paved the way for further discussion on the idea of amalgamating duties into rights discussions. Consequently, the Sub-Commission on the Promotion and Protection of Human Rights of the United Nations Human Rights Commission (UNHRC) issued a *Report of the Sub Commission on the Promotion and Protection of Human Rights* on its Fifty-Sixth Session.⁶⁴ This report acknowledged that though human responsibilities were an integral part of the UDHR deliberations, they had not been given due importance since then. Accordingly, it requested the Sub-Commission on the Promotion and Protection of Human Rights to examine the link between human rights and responsibilities.

The Sub-Commission submitted its *Report* in 2003. Drafted by special Rapporteur Miguel Alfonso Martínez, this report observed that the major objection against establishing a formal relation between rights and responsibilities was the fear that governments may use social duties and responsibilities to curtail individual liberty.⁶⁵

The *Report*, however, acknowledged the link between rights and responsibilities. It remarked that “the idea that there can be rights without ethical duties or responsibilities, or rights not based on equity and human solidarity, constitutes a patent breach of logic, as well as a social impossibility”.⁶⁶ The report was expected to serve as a fresh start for discussion on giving form and substance to the vague idea of human duties under international law.

Further to this report, several documents reiterating the relation between rights

⁶² *Ibid*, art 2(1).

⁶³ *Declaration towards a Global Ethic* (1993), online: Parliament of the World’s Religion <https://parliamentofreligions.org/pwr_resources/_includes/FCKcontent/File/TowardsAGlobalEthic.pdf>.

⁶⁴ United Nations Commission on Human Rights (UNCHR), “Report on the Fifty-Sixth Session”, Res 2000/63, 276–7, UN Doc. E/CN.4/2000.167. (October 2000).

⁶⁵ United Nations Commission on Human Rights (UNCHR), *Promotion and Protection of Human Rights: Human Rights and Human Responsibilities*, UN Doc E/CN.4/2003/105 (17 March 2003) at 8 [UNCHR Report].

⁶⁶ *Ibid* at 12.

and duties and the need to develop a sound framework for individual obligations have emerged.⁶⁷ However, none of these documents has been able to overcome initial hurdle of the reluctance of the international community to incorporate this approach in rights discourse.

The underlying reason can be found in a pertinent observation made in a UNCHR report. This report noted a glaring divide in the response to the query regarding the formal establishment of a relation between rights and responsibilities.⁶⁸ The Asian and African countries emphatically supported the establishment of a relation between rights and responsibilities and called for the development of these responsibilities domestically and internationally. They argued that such a framework would bring advantages to both the governing and the governed.⁶⁹ However, other countries did not seem comfortable with such an idea.

The reason that this divide exists in international community's understanding of rights may be changes in world dynamics, since the adoption of *International Bill of Rights*. For example, the *UDHR* was adopted by the international community at a time when only 57 countries were members of United Nations, which currently numbers 193 member States. The *UNCHR Report* also attributes the lack of pluralist tradition in human rights treaties to such factors. The prevalent idea of rights has often been criticized for being a Western conception and for failing to account for plural values within the rights structure.⁷⁰ The growing challenges to the rights approach calls for concerted action on part of the international community to explore and adopt a pluralistic approach and incorporate cultural specificities into our understanding.⁷¹

V. Is There a Need to Strengthen Individual Obligations?

Developments in municipal and international law suggest that the State-centric approach to rights needs to be revisited. It is a well-established fact that today, rights are threatened not only by the State, but also by private actors. Globalization and privatization have changed the manner States function internally.⁷² We have seen traditional State functions, influenced by this phenomenon, being assumed by private actors or non-State entities. This change creates a problem of human-rights enforcement, since these entities are not as accountable as the State, given the State-centrism in human-rights dialogue.

⁶⁷ See e.g. *Fundamental Rights and Responsibilities*, Doc 12777 (24 October 2011), online: Parliamentary Assembly, Council of Europe (PACE) <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12965&lang=EN>>; *Rights and Responsibilities: Developing Our Constitutional Framework* (March 2009), online: UK <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228938/7577.pdf>. For detailed discussion, see Boot, *supra* note 41, ch I.

⁶⁸ Boot, *supra* note 41 at 8.

⁶⁹ *Ibid* at 11.

⁷⁰ See e.g. M W Matua, "The Ideology of Rights" (1996) 36 *Va J Intl L* 589; see also Mahendra P Singh, "Human Rights in the Indian Tradition: An Alternative Model" (2009) 2:2 *National University of Juridical Sciences L Rev* 145.

⁷¹ *Ibid* at 12.

⁷² See Clapman, *supra* note 59 at 4-12.

The realization that such actors can also be the source of denial of human rights is not new. It was highlighted by Lauterpacht while the drafting of the *UDHR* was in progress. He remarked:

Discrimination and segregation, in denial of elementary human rights, on account of race, creed, colour or national origin, may occur not only as the result of acts or omissions of the central authority of the State. In the economic and social sphere, the denial of or attack upon elementary human rights may take place through actions of autonomous subordinate bodies, of private organizations and institutions and even of private persons. Historically, Bills of Rights were enacted as a measure of protection against the arbitrariness or the injustice of governments. In modern times, this is not the only source of oppression or denial of human rights.⁷³

Private actors range from transnational corporations to individuals. Several arguments have been made against extending human-rights obligations to such actors. Clapman has classified these objections under five categories, namely: (a) trivialization, (b) legal impossibility, (c) policy tactical, (d) legitimization of violence and (e) human rights as barriers to social justice.⁷⁴ The critics of ‘trivialization’ argue that extending human rights obligations to the private sphere would undermine the reason that human rights have been accorded such importance by the international community: that is, they are rights against ‘serious abuses of State power’. This argument differentiates human rights from other rights as those specifically designed to operate vertically. The ‘legal impossibility’ objection revolves around the incapacity of private actors to be the subjects of international law. It argues that since it is the States who sign, ratify and accede to the treaties and since it is their conduct that results in the development of customary international law, international law cannot bind non-State actors. The ‘policy tactical’ objection holds that imposing obligations on non-State actors would allow governments to ‘deflect criticism’ by pointing to violation committed by such actors. The ‘rights as barriers to social justice’ argument is that imposing human rights obligations on an entity legitimizes its intervention within society. Therefore, obliging private actors to comply with human rights may validate these actors’ control over human-rights implementation. This, according to these critics, would “erode, rather than enhance, human freedom and autonomy”.⁷⁵

Clapman counters these objections by arguing that the reason that human rights have been used as a guard against public power is not that this is a use essential to the nature of human rights. According to him, by “setting up a particular apparatus to examine human rights we are precluding the chance to observe human rights in action under other experimental conditions”.⁷⁶

The argument for a need to reconceptualize our human rights perspectives is strong. The inefficacy of law to respond to the new age of human rights as a result of this State-centric, individualist conception of rights reinforces the call of *UNCHR*

⁷³ Hersch Lauterpacht, “Report to the Int’l Law Ass’n, Human Rights, the Charter of the United Nations and the International Bill of the Rights of Man”, UN Doc E/CN.4/89 (12 May 1948) at 10.

⁷⁴ Clapman, *supra* note 59 at 33-56.

⁷⁵ *Ibid* at 53.

⁷⁶ Clapman, *supra* note 59 at 57.

Report to explore plural traditions to reinforce and strengthen the conception of human rights.

While municipal laws are witnessing an emerging jurisprudence on the imposition of human-rights obligations on private actors (either on the basis of these actors performing public function or through the horizontal application of rights), international law is also discussing the need to do away with the State-oriented vision of human rights.

The call for the horizontal application of rights (as well as the need to accord rights to non-living entities) has emerged as a result of the inefficacy of legal systems to actualize rights. The reason that there remains a considerable gap between rights on paper and rights in action is that there are several situations where the rights model fails “unless the people are taught to perform their duties”.⁷⁷

Individual obligations, both moral (duties) and legal (responsibilities), can provide a theoretical foundation to further the actualization of human rights. It would be wrong to geographically limit the idea of duties since until the French Revolution, the Western societal order was also based on the notion of duties.⁷⁸ It is the socio-political experiences of the West that laid the philosophical foundation for the modern liberal theory of rights. Since these developments did not occur outside the Western world, the idea of human duties and responsibilities still informs the understanding of rights of countries that are not a part of the west, even if it is not sufficiently translated into legal principles.⁷⁹

Duties are generally other-regarding, while rights are self-regarding. While individuals are the basic unit of a society, the functionality of a society is determined by relations among individuals. A sense of obligation towards others has the potential to strengthen the relation between individuals. The duty-centric approach in many ways balances the progress of the individual with the progress of society. This emphasis on rightful conduct through fulfilment of obligations towards others ensures that every individual is responsible for the protection of the rights of other individuals.

Chattrapati Singh, in his treatise on the idea of law, considers rights merely as an instrument for the purposes of actualizing legal duties.⁸⁰ He argues that:

[...] all rights are derived on the grounds of the transcendental duty and the teleology of law, hence the notion of duty is conceptually prior to the notion of right. The duty is unconditional, the existence of right is conditional on the fulfilment of the duty.⁸¹

He observes that the only way in which rights may become actual and not just possible is through the fulfilment of one’s duty towards the “community of end”.⁸² This

⁷⁷ See Singh, *supra* note 70.

⁷⁸ Singh, *supra* note 70 at 166, n 95.

⁷⁹ *Ibid* at 172.

⁸⁰ Chhatrapati Singh, *Law from Anarchy to Utopia* (Oxford: Oxford University Press, 1986) at 234.

⁸¹ *Ibid*.

⁸² Singh bases his idea of ‘community of ends’ on Kant’s theory of ‘kingdom of ends’. Community of ends has been defined by Singh as a “system in which choices are made by free decision and not by force or fiat”: Singh, *supra* note 70 at 171-78.

argument is inspired by the dharma⁸³ tradition of ancient India. This tradition subjects every human action to the idea of dharma or duty.⁸⁴ Even the king is subject to dharma, as “Dharma is the king of kings and there is nothing beyond it as it enables the weak to prevail over the mighty.”⁸⁵ By ensuring that each individual performs his/her obligations, the rights of others are guaranteed. While individuals are the basic unit of a society, the functionality of a society is determined by relations among individuals. A sense of obligation towards another strengthens relations among individuals, while a sense of right makes society subservient to the individual. The duty-centric approach in many ways balances the progress of individual with the progress of society.

Fuller remarked that the aim of law is to locate the pointer between morality of aspiration and morality of duty.⁸⁶ While too many obligations may suffocate liberty, aspirations without a correlative responsibility may infringe the freedoms of other. The challenge is to find the pointer that balances both.

Law is as good as the people who inhabit it. Therefore, to actualize the full potential of human rights, the ethos underpinning these rights must not just be institutionalized, but also internalized. Horizontal application of rights imposes a constitutional obligation on individuals, so that private conduct is also governed by a constitutional ethos. Similarly, the call for making responsibilities an integral part of rights jurisprudence also aims to suffuse society with the ethos of rights. The argument

⁸³ *Dharma* is a Sanskrit word derived from root *dhr*, which means to hold. The notion of dharma informed every form of conduct (karma) of human life. Robert Lingat explains dharma as “what is firm and durable, what sustains and maintains, what hinders fainting and falling”: Robert Lingat, “Dharma and Royal Ordinance in the Classical Law of India” (1973) at 3, online: Internet Archive <<https://ia600100.us.archive.org/14/items/ClassicalLawOfIndiaRobertLingat/Classical%20Law%20of%20India%20%20Robert%20Lingat%20.pdf>>. Indian philosophical thought holds that there are four goals of human life, namely dharma (moral norms grounded in human nature), artha (attainment of worldly and material prosperity), kaam (attainment of pleasures related to the emotional and sensuous aspect of the human being) and moksha (salvation). This philosophy suggests that all activities related to attainment of artha and kaam should be guided by Dharma.

⁸⁴ Lingat remarks that “[h]uman activity may be summed up in that triad: dharma, artha, and kāma. A rule founded on dharma has an authority superior to that founded on artha, just as the latter has an authority superior to one motivated by kāma. But all three points of view are equally legitimate, and man is made in such a way that he is bound to consider all three of them as he functions in life. Side by side with the science of dharma (dharma-sāstra) there is, therefore, a science of artha (artha-sāstra), set out in treatises on politics as the practice of princes, just as there is a science of pleasure codified in the Kāmasūtra. For Manu (II.224), wisdom is to be found in a harmonious combination of the three prime motives of human nature. ‘There are those who declare’, says he, ‘that the highest good, here below, consists in virtue (dharma) and in wealth (artha); [others say it consists in] pleasure (kāma) and wealth, or in virtue alone, or in wealth alone; but the true opinion [is that it consists in] the conjunction of all three’: *ibid* at 5.

⁸⁵ “Tadetat Kshatrasya Kshatram Yaddharmastasmaddharmatparamnastyatho Abaliyaanbaliyansamashanshte”, Bihadaranyaica Upanishad, 1-4-14 cited in B N Srikrishna, “Pre British Human Rights Jurisprudence” (2010) 3 National University of Juridical Sciences L Rev 129.

⁸⁶ Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1984), ch I.

for shifting the focus of human rights away from the State is essentially a call for making private actors responsible and obligated to protect rights. However, our verbiage of rights prevents us from looking at human rights from a different perspective. Despite realizing the need to experiment with our vocabulary, at present the discussion on rights boils down to finding an answer within the State-centric, individualist framework. To what extent and through what means can law impose obligations on private actors can only be determined once the obscurity regarding the role of individual obligations in the theory of rights is satisfactorily remedied. In the absence of such clarity, the challenge to current rights framework will continue to lead to a muddled theory of rights.