

In search of philosophical justifications and suitable models for the horizontal application of human rights

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Summary

This article critiques the dominant view that human rights do not bind non-state actors. It ties the dominant discourse to the natural rights theory and, to a lesser extent, the positivist school of thought. A critique of these traditions reveals that there are no insurmountable philosophical barriers to recognising the application of human rights to non-state actors and the private sphere. Drawing on Marxist and feminist philosophical schools, as well as African conceptions of human rights, it argues that the view that non-state actors should be bound by human rights can be defended philosophically. The article ends with an analysis of the various options through which human rights obligations of non-state actors may be enforced within a domestic constitutional framework.

1 Introduction

The question whether non-state actors should be bound by human rights is one of the most current issues in comparative international and constitutional law. Interest in this issue has been heightened in the context of globalisation, which has witnessed the rise of new actors (such as transnational corporations (TNCs), international financial institutions and multilateral organisations) on the international and domestic scenes with powers akin to, and in some cases dwarfing,

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those of states.¹ Nowadays these actors influence government policies concerning the provision of social services and goods and political process, and have increasingly also participated in the provision of basic services through privatisation.² Furthermore, non-state actors, like states, often violate human rights severally or in complicity with states.³

However, the human rights doctrine has thus far not helped much in resolving the human rights challenges posed by non-state actors. Very few constitutions recognise the application of the Bill of Rights to non-state actors,⁴ and progress towards the adoption of human rights standards for TNCs and other business enterprises⁵ hit a snag in 2005 following the dissolution of the mandate of the Sub-Commission on the Promotion and Protection of Human Rights in this area and the appointment in the same year of a nominal position of Special Representative for the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises.

Central to the reluctance to recognise the obligations of non-state actors in relation to human rights is the age-old notion that human rights bind states only, not non-state actors. This article attributes this thinking mainly to the natural rights theory and, to some extent, the positivist school. It will therefore critique these theories with a view to providing a theoretical basis for recognising the applicability of human rights to non-state actors and the private sphere. In doing so, it will draw on the Marxist and feminist jurisprudential schools as well as African conceptions of rights. The final section of the article explores the emerging models for extending the application of human rights to non-state actors and the private sphere, which reflect a departure from the strictures of the natural rights and positivist schools.

¹ For the impact of globalisation on state sovereignty, see P Alston 'The myopia of the handmaidens: International lawyers and globalization' (1997) 8 *European Journal of International Law* 435; M Reisman 'Designing and managing the future of the state' (1997) 8 *European Journal of International Law* 409 412; S Sur 'The state between fragmentation and globalization' (1997) 8 *European Journal of International Law* 421 422.

² In Southern Africa, eg, a number of TNCs have been involved in the provision of such important basic services as water and electricity. See generally D McDonald & G Ruiters (eds) *The age of commodity: Water privatization in Southern Africa* (2005); DM Chirwa 'Privatisation of water in Southern Africa: A human rights perspective' (2004) 4 *African Human Rights Law Journal* 218.

³ See, eg, D Orentlicher & T Gelatt 'Public law, private actors: The impact of human rights on business investors in China' (1993) 14 *Northwest Journal of International Law and Business* 1 66; L Saunders 'Rich and rare are the gems they war: Holding De Beers accountable for trading conflict diamonds' (2001) 24 *Fordham International Law Journal* 1402.

⁴ The exceptions in Africa are Cape Verde, The Gambia, Ghana, Malawi and South Africa.

⁵ See UN Norms on the Responsibilities of Transnational Corporations and Other Business Organisations with Regard to Human Rights, UN ESCOR, 55th session, Agenda Item 4, UN Doc E/CN.4/Sub2/2003/12/Rev.2.

2 Philosophical approaches supporting vertical application

2.1 Natural rights theory

The natural rights theory is the tradition most intricately linked to the state-centric application of human rights.⁶ Developed in the seventeenth to eighteenth centuries, this theory was premised on the belief that the state formed part of 'a divine strategy' and was therefore 'natural'.⁷ However, the concern about individual security and freedom in a stateless society prompted theorists of the time to design a theoretical justification for the institution of the state whose primary purpose was to provide security and protect individual freedom.⁸ This was achieved by conceptualising the relationship between the state and the individual in terms of a social contract. To avoid the chaos that would implode under the weight of unlimited individual freedom, John Locke theorised that individuals has to submit to the body politic while retaining their civil rights of life, liberty and property.⁹ The exercise of political power by a government was in turn contingent upon the discharge of the obligation to respect these natural rights of individuals. In so doing, this theory produced two spheres — the public sphere involving the relationship between the state and the individual and the private sphere involving individuals *inter se*.

The twin principles of state sovereignty and liberalism, which were both gaining ground at the time the natural rights theory was formulated, influenced the development of the distinction between the public and the private within the natural rights theory.¹⁰ According to Steiner and Alston:¹¹

It is partly the prominence of the rights related to notions of individual liberty, autonomy and choice and the right related to property protection that produces the sharp divisions in much liberal thought between the state and the individual, between the government and nongovernmental sectors, between what are often referred to as the public and private realms or spheres of action.

⁶ GE Frug 'The city as a legal concept' (1980) 93 *Harvard Law Review* 1059 1099-1100.

⁷ S Avineri *Hegel's theory of the modern state* (1972) 177; A Gillespie 'Ideas of human rights in antiquity' (1999) 17 *Netherlands Quarterly of Human Rights* 233 251.

⁸ H Steiner & P Alston 'Comment on some characteristics of the liberal political tradition' in H Steiner & P Alston (eds) *International human rights in context: Law, politics and morals* (2000) 361 363.

⁹ See M Freeman 'Is a political science of human rights possible?' (2001) 19 *Netherlands Quarterly of Human Rights* 123 125.

¹⁰ See Frug (n 6 above) 1088. See also A Pollis 'Towards a new universalism: Reconstruction and dialogue' (1998) 16 *Netherlands Quarterly of Human Rights* 5 12.

¹¹ Steiner & Alston (n 8 above) 363.

Thus, the social contract provided a legitimate basis for the rule of the nation-state, which was then considered the best means of protecting the individual from various groups contending for power, while liberalism promoted individualism, economic freedom, formal autonomy and abstract equality. The inviolability of privacy was promoted because natural rights rested on the belief that individuals were autonomous beings capable of making rational choices.¹² Consequently, the conduct of private actors in the private sphere fell outside the concern of natural rights.¹³

It is immediately apparent from this discussion that the natural rights theory was based on the wrong assumption that people are born equal and free. This is a point that is well illustrated by feminist writers and the Marxist theory discussed later in this article. These theories converge on the point that the natural rights theory's conception of equality ignored the impact of systemic factors that impede the full exercise by individuals of their freedom and make them vulnerable to victimisation by others in both the private or public spheres. Consequently, the natural rights theory failed to provide protection to individuals from such serious human rights abuses committed in the private realm as slavery and violence against women.¹⁴ As was noted in the introductory section, non-state actors (especially TNCs) now exert increasing influence on international and domestic state policies with both a direct and indirect impact on the enjoyment of human rights than was the case when this theory was being formulated. This development has undercut the assumption that the private sphere is made up of equal parties and thus bolstered the argument for extending the application of human rights to this sphere.

The natural rights theory also wrongly assumed that human beings are entirely autonomous, self-interested and egoistic individuals. Again, this is a point that is well illustrated by the Marxist critique, which posits that private relations consist of structural socio-economic inequalities. Furthermore, Pollis has argued that, even during the Age of the Enlightenment, 'men and women were', at a minimum, 'in a complex web of interpersonal relationships which included reciprocal rights and obligations'.¹⁵ African conceptions of society, as will be shown below, support a conception of human rights which pays homage to the notion of individual duties to one another.

The view that individuals are not egocentric but that they live in a society where they depend on and owe obligations to one another can be said to be consistent with the rationale behind the social contract

¹² D Sidorsky 'Contemporary reinterpretations of the concept of human rights' in D Sidorsky (ed) *Essays on human rights: Contemporary rights and Jewish perspectives* (1979) 89.

¹³ Steiner & Alston (n 8 above) 363.

¹⁴ See R Gaete *Human rights and the limits of critical reason* (1993) 114.

¹⁵ Pollis (n 10 above) 10.

itself. As originally conceived, the natural rights theory held that natural rights existed independently from the state since they predate the state. The formation of a limited government can therefore be seen as an implicit acknowledgment of the duty of individuals to exercise rights responsibly in order to avoid inflicting harm on each other. While the natural rights theory regards the state as the natural means of protecting rights, the social contract can be regarded as having tacitly endorsed the fundamental obligation on the part of every individual not to interfere with the freedom of another. This is a fundamental obligation on the part of everyone, which, if observed universally, would render the state's duty to protect rights irrelevant.¹⁶ The argument for the application of human rights in the private sphere therefore reinforces the recognition of duties that private actors owe one another for them to coexist in harmony and peace, which arguably necessitate the conclusion of the social contract in the first place.

It can therefore be argued that the public/private distinction in the application of human rights not only arose at a time when it was contextually required, but that it was also based on wrong assumptions about the nature of human beings and how they relate to each other. The realisation that private relations are not constituted by equal parties and the fact that non-state actors possess enormous powers in contemporary times demand a rethink of this divide.

2.2 Positivism

Positivism endorses the public/private divide in its application of human rights because of the prominence it gives to the state in the protection of rights. Although the definition of positivism varies from one theorist to another,¹⁷ the central theme is simple: Law is what it is and not what it ought to be. In other words, the law is what can be ascertained through a state's legal processes. Bentham, for one, considered law as '[a]n assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning conduct to be observed by a certain person or class of persons, who are supposed to be subject to his power'.¹⁸ Likewise, Austin stated that the science of jurisprudence 'is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness'.¹⁹ In demonstrating that law was equivalent to a legal system, Kelsen also brought the positivists school firmly within the state machinery.²⁰

¹⁶ H Shue *Subsistence, affluence, and US foreign policy* (1980) 55.

¹⁷ HLA Hart 'Positivism and the separation of law and morals' (1958) 71 *Harvard Law Review* 601 n 25.

¹⁸ J Bentham 'An introduction to the principles of morals and legislation' in C Morris (ed) *The great legal philosophers: Selected readings in jurisprudence* (1959) 262 278.

¹⁹ J Austin *The province of jurisprudence determined* (HLA Hart ed) (1954) 126.

²⁰ See generally H Kelsen *Introduction to the problems of legal theory* (trans BL Paulson & SL Paulson) (1992).

It is from positive laws that legal rights emanate according to the positivist school. Thus, on the basis that natural rights originated from imaginary law, Bentham ridiculed them categorically as 'nonsense upon stilts'.²¹ To underscore the inseparable connection between the state and human rights, Hart, a more contemporary positivist, stated that '[g]overnment among men exists not because men have rights prior to government which government is to preserve, but because without government and law men have no rights and can have none'.²² The positivist school, therefore, defines human rights as those that the state has recognised through positive law. One cannot look beyond state law to discover human rights.

It can therefore be seen that the positivist tradition associates the source of human rights closely with the state. This theory reinforces the role of the state in protecting human rights. To this extent, the positivist doctrine joins paths with the natural rights theory in that they both tacitly and expressly consider the state as the principal mechanism of protecting rights. Since the state confers rights, those rights must bind it.

However, it must be noted that while positivism provides a basis for determining rights, it does not provide any further theoretical framework to determine the content of rights and how they must apply. This is so because of its insistence on the distinction between law and morality.²³ This distinction enables the positivist theory to hold that human rights are only those rights granted by the state. Morality has no relevance in the determination of what human rights are. It can play a role in informing law reform or which new rights to recognise, but it does not assist in the determination of what is law.

Without such a basis, it is possible for the state to grant rights to individuals or groups in both the private and public domains as long as such application is authorised by positive law. For example, the South African Constitution, as noted earlier, expressly recognises the horizontal application of human rights. The validity of such a provision can only be based on the enactment of such a provision in compliance with the state processes of enacting law and not on some moral or other basis. Since this provision was adopted within a legitimate and legal process, this theory would consider it to be valid. At the same time, the positivist tradition would also validate the constitutional position in Canada, which restricts the application of human rights to state action and allows a very limited application to conduct of non-state

²¹ Quoted in AJ Sebok *Legal positivism in American jurisprudence* (1998) 30.

²² HLA Hart 'Utilitarianism and natural rights' in HLA Hart (ed) *Essays in jurisprudence and philosophy* (1983) 182.

²³ Modern adherents to the positivist school at least concede that inner morality is essential to every legal system, but they do not agree on what constitutes that inner morality. See JP Maniscalco 'The new positivism: An analysis of the role of morality in jurisprudence' (1995) 68 *Southern California Law Review* 989.

actors.²⁴ There is therefore a danger implicit in this theory's reliance on procedures of law making and the lack of the recognition of the role of morality in determining the validity of law. It is that this theory can act as a great resource to justify the *status quo*.²⁵

In short, the positivist theory provides the criteria for determining the source of rights but it does not provide a benchmark to determine what the content of rights should be and how they should apply. While it clearly supports the position that the state is the primary bearer of the obligation to protect human rights, it does not provide a basis to restrict their application to states only.

3 Theories that support horizontal application

3.1 The Marxist critique

One of the enduring contributions of Marxism lies in its critique of the public/private dichotomy in the application of human rights. This theory advocated a contextual analysis of law, human rights and society. Rights, according to Marx, could not be eternal or immutable because they took shape within a particular historical context.²⁶ He contended that rights 'can never be higher than the economic structure of society and its cultural development conditioned thereby'.²⁷ He argued that '[n]one of the supposed rights of man goes beyond the egoistic man ... an individual withdrawn behind his private interests and whims and separate from the community'.²⁸

Marxists also held that the state was a reflection of unequal conditions.²⁹ The state in a capitalist environment, Marxists argued, was an institution of compulsion, oppression and exploitation by the bourgeoisie of the working majority. In essence, the Marxist critique highlighted the fact that the concept of human rights and the institution of the state can serve the interests of those that are powerful in society or legitimise systemic and other economic inequalities in the private sphere. This is a concern that is raised precisely by the question of the non-state actors' responsibility for human rights currently.

The Marxist school expressly embraced the notion of duties of individuals to the community. Unger has observed that 'the interests of the individual' in a socialist conception of rights 'are subordinate to

²⁴ See *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573 595.

²⁵ IG Shivji *The concept of human rights in Africa* (1989) 48.

²⁶ C Sypnowich *The concept of socialist law* (1990) 88.

²⁷ K Marx 'Critique of the Gotha programme' in R Tucker (ed) *The Marx-Engels reader* (1978) 528.

²⁸ K Marx 'On the Jewish question' in D McLellan (ed) *Karl Marx: Selected writings* (1971) 54.

²⁹ RWM Dias *Jurisprudence* (1985) 398.

those of society and, in particular, to the collective enterprise of building socialism ... and that the rights of the individual are inseparably linked to his duties'.³⁰ Bloch has stated similarly that '[t]he solidarity of socialism ... signifies that the "human" in "human rights" no longer represents the egoistic individual, but the socialist individual who, according to Marx's prophecy, has transformed his *forces propres* into a social and political force'.³¹ Natural rights, argued Marx, concerned themselves exclusively with political emancipation as opposed to human emancipation.³² As a result, man was reduced on the one hand to 'a member of civil society, an egoistic and independent individual' and to 'a citizen, a moral person' on the other hand.³³ While in the public (political) sphere individuals were treated as communal beings, argued Marx, the private sphere became the arena for degrading others.³⁴ This prompted him to remark that '[t]he *recognition of the rights of man by the modern state* has only the same significance as the *recognition of slavery by the state in antiquity*'.³⁵ He therefore submitted that the distinction between private law and public law was misconceived, arguing that 'man must recognise his own forces as social forces, organise them, and thus no longer separate social forces from himself in the form of political forces'.³⁶

However, it must be mentioned that Marxists did not call for the horizontal application of human rights. They instead envisaged the emergence of a strong state, after the revolution by the working class, which would control the distribution of resources in the transition (socialism) to a classless society (communism).³⁷ During the transition, the state would determine what rights to guarantee with a strong emphasis on individual duties to the community.³⁸ The state would therefore regulate private conduct for the benefit of everyone. Thus, it can be seen that Marxism did not envisage a situation where non-state actors would have had as much influence as they do currently because freedom and formal equality in the private sphere would be curtailed to give effect to the notion that every individual has duties to the community in which he or she lives.

Nevertheless, as a theory, the Marxist school directly challenged the distinction between the 'public' and the 'private', arguing that such

³⁰ AL Unger *Constitutional development in the USSR: A guide to the Soviet constitutions* (1984) 274.

³¹ E Bloch *Natural law and human dignity* (trans DJ Schmidt) (1986) 178.

³² Marx (n 28 above) 57.

³³ As above.

³⁴ See K Marx 'The holy family' in TB Bottomore & M Rubel (eds) *Karl Marx: Selected writings in sociology and social philosophy* (1963) 224.

³⁵ As above.

³⁶ Marx (n 28 above) 57.

³⁷ As above.

³⁸ Unger (n 30 above) 274.

distinctions helped to blur the structural socio-economic inequalities in society. Although it was premised on the ideal of a strong socialist state to regulate private and public conduct before a classless society could be achieved, it expressly conceded that individuals were not as equal and autonomous as made out by the natural rights theory.

3.2 The feminist critique

Feminism has been at the forefront in critiquing the public/private distinction in the application of human rights and the law generally.³⁹ Feminist theorists argue that this distinction is ‘aggressively male’ and masks the subordination of women to men in the so-called private sphere.⁴⁰ Pateman succinctly contends:⁴¹

The separation of the ‘paternal’ from political rule, or the family from the public sphere, is also the separation of women from men through the subjection of women to men. The fraternal social contract creates a new modern patriarchal order that is presented as divided into two spheres: civil society or the universal sphere of freedom, equality, individualism, reason, contract and impartial law — the realm of men or ‘individuals’; and the private world of particularity, natural subjection, ties of blood, emotion, love and sexual passion — the world of women in which men also rule.

Feminists contend that infractions in the private sphere affect women more than men, who are in most cases the oppressors.⁴² Consequently, the public/private divide serves the interests of men who dominate the public sphere and fear oppression from the state, but it does not benefit women who do not participate much in the public sphere and suffer oppression in both the private and public domains.⁴³ According to Charlesworth, the law has been used to exclude women from the public sphere — from professions, from the market place, from the vote — but it has not regulated the areas of social, economic and moral life, which encompass the family, home and sexuality, and are associated with women.⁴⁴ As a result, such abuses as domestic violence and rape committed in the home, for example, are rarely the subject of state intervention or legal regulation while the same acts when committed

³⁹ C Pateman ‘Feminist critiques of the public/private dichotomy’ in SI Benn & GF Gaus (eds) *Public and private in social life* (1983) 281.

⁴⁰ See eg R Lister *Citizenship: Feminist perspectives* (1997). See also C Romany ‘Women as aliens: A feminist critique of the public/private distinction in international human rights law’ (1993) 6 *Harvard Human Rights Journal* 87 100-103.

⁴¹ C Pateman *The disorder of women: Democracy, feminism and political theory* (1989) 43.

⁴² See AX Fellmeth ‘Feminism and international law: Theory, methodology, and substantive reform’ (2000) 22 *Human Rights Quarterly* 658 668.

⁴³ As above.

⁴⁴ H Charlesworth ‘Worlds apart: Public/private distinctions in international law’ in M Thornton (ed) *Public and private: Feminist legal debates* (1995) 243 245-246. See also P Hunt *Reclaiming social rights: International and comparative perspectives* (1996) 86.

by state actors attract legal responsibility.⁴⁵ In view of these arguments, feminists argue that the public/private distinction in the application of human rights and the law generally is undesirable.

In conclusion, the feminist critique challenges the characterisation of the private sphere as involving equal and free parties by showing that women have been treated historically as second-rate citizens and have suffered a wide range of abuses in the private sphere. The feminist critique cogently supports the recognition of the horizontal application of human rights.

3.3 African conceptions

African conceptions of human rights lend support to the idea of human rights obligations for non-state actors.⁴⁶ Studies of certain ethnic groups in Africa reveal that these societies afforded limited protection of what are now called human rights. The concept of human rights in Africa was communitarian in the sense that it provided protection based on ascribed status and membership of the community,⁴⁷ and sought a vindication of communal well-being.⁴⁸ However, individual rights were also recognised.⁴⁹

Significantly, African societies conceived of guarantees of human rights as embodying individual obligations. The basis of the right/duty dialectic lay in the African notion that an individual formed an integral part of the community.⁵⁰ According to Ibhawoh:⁵¹

For every right to which a member of society was entitled, there was a corresponding communal duty. Expressed differently, 'the right of one kinship member was the duty of the other and the duty of the other kinship

⁴⁵ See C Bunch 'Women's rights as human rights: Toward a revision of human rights' (1990) 12 *Human Rights Quarterly* 486 489-491; DQ Thomas & ME Beasley 'Domestic violence as a human rights issue' (1993) *Human Rights Quarterly* 36 40; UA O'Hare 'Realising human rights for women' (1999) 21 *Human Rights Quarterly* 364 369.

⁴⁶ Some have argued that African societies did not know human rights before colonialism. See eg RE Howard & J Donnelly 'Human dignity, human rights, and political regimes' in J Donnelly (ed) *Universal human rights in theory and practice* (1989) 89. For a contrary view, see M Mutua 'The Banjul Charter: The case for an African cultural fingerprint' in AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 68 78; T Fernyhough 'Human rights and pre-colonial Africa' in R Cohen *et al* (eds) *Human rights and governance in Africa* (1993) 40; CC Mojekwu 'International human rights: The African perspective' in JL Nelson & VM Green (eds) *International human rights: Contemporary issues* (1980) 85 86.

⁴⁷ Mojekwu (n 46 above) 86.

⁴⁸ JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309 321.

⁴⁹ Eg the rights to life, land, marriage, personal freedom, fair trial, welfare, conscience and association See K Gyekye *An essay on African philosophical thought: The Akan conceptual scheme* (1987) 154; Fernyhough (n 46 above) 39 76.

⁵⁰ J Mbiti *African religions and philosophy* (1970) 141.

⁵¹ B Ibhawoh 'Cultural relativism and human rights: Reconsidering the Africanist discourse' (2001) 19 *Netherlands Quarterly of Human Rights* 43 53-54.

member was the right of another'. Although certain rights attached to the individual by virtue of birth and membership to the community, there were also corresponding communal duties and obligations.

Julius Nyerere also observed that common obligations among African societies of individuals to others, their families, and the communities included: deference to age because a long life was generally associated with wisdom and knowledge; solidarity with fellow human beings, especially in times of need; and reciprocity in labour issues and for generosity.⁵²

Rights and duties in Africa were inseparable. They served to highlight the reciprocal relationship between the individual and the community to which he or she belonged. A combination of rights and duties was necessary to achieve and maintain unity, cohesion and viability.⁵³ These rights and obligations were not framed as legal entitlements because African societies did not make clear-cut distinctions between morality, religious values and laws, which all formed part of a 'homogenous cosmology'.⁵⁴ However, they were enforceable within the existing procedures of societies.⁵⁵

The notion of individual duties has been integrated in both the African Charter on Human and Peoples' Rights (African Charter) and the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁵⁶ While the extent to which emphasis can be placed on these duties relative to rights will remain a topic of debate,⁵⁷ it is clear that human rights conceptions in Africa lend credence to the call for the obliteration of the public/private divide in the application of human rights.

4 Horizontal application in practice

Having thus far provided the philosophical justification for the horizontal application of human rights, this article will now provide an overview of the emerging constitutional practices regarding the application of human rights to non-state actors and in the private sphere.

⁵² Mutua (n 46 above) 75.

⁵³ Mutua (n 46 above) 81.

⁵⁴ Ibhawoh (n 51 above) 46.

⁵⁵ As above. The communitarian conception of rights is not exclusive to pre-colonial African societies. Pollis notes that the values of human dignity and humanity also existed in Confucianism and Buddhism. In these societies, a community was responsible for ensuring 'the survival and security needs both of its members and those outside the communal group', 'for without this there was no human dignity'. See Pollis (n 10 above) 16.

⁵⁶ See arts 27-29 and 20 & 31 respectively.

⁵⁷ See eg HWO Okoth-Ogendo 'Human rights and peoples' rights: What point is Africa trying to make?' in Cohen *et al* (n 46 above) 74 79.

The aim is to find practical methods of enforcing human rights against non-state actors.

4.1 The doctrine of state responsibility

Constitutions that adhere strictly to the traditional view that non-state actors cannot be bound by human rights do not recognise that the state has positive obligations in relation to human rights. The Constitution of the United States of America is a case in point. Under this Constitution, a state can only be held responsible for a human rights violation where the conduct leading to the violation can be classified as 'state action'.⁵⁸ This viewpoint reflects an extreme strand of natural law, which considers human rights obligations as negative injunctions against the state — all that is required of the state is to refrain from interfering with individual freedom.

The doctrine of state responsibility constitutes an acknowledgment that non-interference is not enough to ensure the protection of human rights, more especially because human rights may be violated by non-state actors. To curb such violations, the state must take positive measures. This idea has its origin in international law. Originally intended to protect the rights of aliens, it has been developed to impose state responsibility for internationally wrongful acts generally, committed by state and non-state actors.⁵⁹

In international human rights law, this doctrine has metastasised into the duty to protect, which posits that the state has the obligation to take positive steps to protect citizens and other people within its jurisdiction from violations that may be perpetrated by private actors.⁶⁰ It entails that the state should prevent violations, regulate non-state actors or investigate violations when they occur, prosecute the perpetrators and provide redress to victims.⁶¹

This duty is not absolute because states cannot be found liable for every human rights violation that occurs in private. The state will only be found responsible where it fails to exercise *due diligence* to

⁵⁸ See HC Strickland 'The state action doctrine and the Rehnquist Court' (1991) 18 *Hastings Constitutional Law Quarterly* 587 645, noting that '[t]he state generally has no constitutional obligation to intervene in private disputes either to protect individuals from harm inflicted by other private entities or to force the wrongful private entities to compensate the victims of their wrongdoing'.

⁵⁹ I Brownlie *System of the law of nations: State responsibility: Part 1* (1983) 9; *Phosphates in Morocco (Italy v France) (Preliminary Objections)* [1938] PCIJ (Ser A/B) No 74 28; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3.

⁶⁰ H Shue *Basic rights: Subsistence, affluence, and US foreign policy* (1980) 55; A Eide 'Economic, social and cultural rights as legal rights' in A Eide et al (eds) *Economic, social cultural rights: A textbook* (1995) 21 37.

⁶¹ DM Chirwa 'The doctrine of state responsibility as a potential means of making private actors accountable for human rights' (2004) 5 *Melbourne Journal of International Law* 1 13-14.

prevent the violation or react to it. This test was developed by the Inter-American Court of Human Rights in *Velásquez Rodríguez v Honduras*,⁶² where the state was found responsible for the disappearances of more than 100 persons in Honduras. In finding the government liable, the Court stated that a human rights violation which is initially not directly imputable to a state can lead to international responsibility of the state 'not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it'.⁶³

The due diligence test was applied in the *SERAC* case⁶⁴ by the African Commission on Human and Peoples' Rights (African Commission), in which Nigeria was found responsible for violations of a range of rights recognised in the African Charter committed by the state itself and oil companies in Ogoniland.

At the domestic level, South Africa offers an example where state responsibility has been invoked to address human rights wrongs perpetrated by non-state actors. In *Camichele v Minister of Safety and Security and Another*,⁶⁵ the Constitutional Court held that a recommendation by the police to release a person accused of rape, who had a history of assaults, on bail could give rise to state responsibility for the assault committed by the accused person while on bail. It stated that South Africa had a duty 'to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights'.⁶⁶

Essentially, the doctrine of state responsibility reinforces the role of the state as the primary duty-bearer in relation to human rights. However, it has redefined that role from a non-interventionist one to an interventionist one as required by the Marxist and feminist schools of thought. In holding the state responsible, the state is compelled to take measures such as the enactment of legislation and the establishment of regulatory and monitoring mechanisms aimed at preventing occurrences of human rights violations in the private sphere. In the end, non-state actors assume indirect obligations regarding human rights.

However, this doctrine does not solve all the problems posed by non-state actors in relation to human rights. As noted earlier, certain non-state actors, especially MNCs, have become as powerful as, or more powerful than states, while many states, especially those in the developing world, have increasingly lost the capacity to control or regulate these actors due to a range of reasons, including resource constraints, dependency on corporations, corruption and the fluidity

⁶² [1988] Inter-Am Court HR (Ser C) No 4.

⁶³ n 62 above, para 172.

⁶⁴ *Social and Economic Rights Action Centre (SERAC) & Another* (2001) AHRLR 60 (ACHPR 2001).

⁶⁵ 2001 10 BCLR 995 (CC).

⁶⁶ n 65 above, para 63.

of certain non-state actors.⁶⁷ Where a non-state actor has the capacity to redress the violation itself, it does not make sense to hold the state alone responsible. This is particularly the case where the non-state actor derives a financial or other benefit from the violation. More importantly, the doctrine of state responsibility does not hold the state responsible for every human rights violation committed by non-state actors. The state will be exonerated from responsibility if it establishes that it exercised due diligence to prevent the violation and to respond to them. This means that many violations of human rights may not be accounted for by the state.

It is therefore critical that state responsibility should be regarded as a minimum means of holding non-state actors accountable for human rights and should be complemented with other devices.

4.2 Indirect application through private law

Human rights can be enforced against private actors through private law. This idea is best exemplified by the so-called *Drittwirkung* doctrine developed by German courts, which literally means ‘third party effect’. German courts have held that basic rights under the German Constitution establish an objective order of values, which must influence the development of private law. It dictates that ‘[e]very provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit’.⁶⁸ In German practice, these rights influence the development of private law through the provisions of that law which contain mandatory rules of law forming part of the *ordre public*.⁶⁹ These are rules which ‘for reasons of the general welfare also are binding on private legal relationships and are removed from the dominion of private intent’.⁷⁰ They include such general phrases as ‘good faith’, ‘public good’, ‘good morals’, and ‘reasonableness’.

The landmark *Lüth* case⁷¹ illustrates the application of the *Drittwirkung* doctrine. A firm director had been granted an injunction restraining an activist from urging the German public not to see a movie produced by a former producer of anti-Semitic films during the Nazi regime and asking theatre owners and distributors not to show or distribute the film. The injunction was granted by the lower court on the ground that the actions of the activist amounted to actionable incitement under article 826 of the German Civil Code. The injunction was quashed by the Federal Constitutional Court on the ground that the lower court had failed to consider the basic right to freedom of opinion when granting

⁶⁷ See Chirwa (n 61 above) 26-28 33-35.

⁶⁸ *Lüth* case (1958), 7 BVerfGE 198. The facts and holding as discussed herein are based on the English translation of the case in DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1997) 361-368.

⁶⁹ n 68 above, 363.

⁷⁰ As above.

⁷¹ As above.

the injunction in favour of the film director. It stated that 'where the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual interests must, in principle, yield'.⁷² In essence, the German Civil Code was interpreted against the backdrop of the right to freedom of opinion.

The *Drittwirkung* doctrine has been adopted by courts in Italy, Spain, Switzerland and Japan,⁷³ and by the European Court of Human Rights.⁷⁴ It has also been codified in the South African Constitution in sections 8(3) and 39(2).⁷⁵

The *Drittwirkung* doctrine constitutes a significant departure from the traditional view that human rights do not bind non-state actors. It proceeds from the assumption that private relations, which have traditionally been regulated by private law, often involve parties who have unequal bargaining powers and whose freedom is affected by wide-ranging systemic factors. It is therefore important for human rights to infiltrate into this arena so that the weak, vulnerable and disadvantaged can be given effective protection. Its greatest advantage is that it recognises the importance of private law (both statutory and common law) as a means of redressing human rights violations. Many common law actions closely approximate the claims that could be based on human rights provisions. For example, the common law actions of defamation, false imprisonment, nuisance, negligence, assault and battery can adequately address violations concerning the rights to dignity, liberty, privacy, and security of the person. Statutes are also often enacted to give effect to specific rights. However, it must also be acknowledged that not all private law principles, including legislation, give full effect to human rights. It is therefore important to empower courts to develop or interpret private law in accordance with the Bill of Rights so that rights are not undermined in the private sphere. By so doing, non-state actors become constrained by human rights and can be considered to be bound by them.

⁷² n 68 above, 367.

⁷³ A Barak 'Constitutional human rights and private law' in D Friedmann & D Barak-Erez (eds) *Human rights in private law* (2001) 13 22; MJ Horan 'Contemporary constitutionalism and legal relationships between individuals' (1976) 25 *International and Comparative Law Quarterly* 848 864-866.

⁷⁴ A Clapham 'The "*Drittwirkung*" of the Convention' in R MacDonald *et al* (eds) *The European system for the protection of human rights* (1993) 163.

⁷⁵ The former provides that when applying a provision of the Bill of Rights to a natural or juristic person, a court 'must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'. The latter provides that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

4.3 Direct application

The concept of direct responsibility is a manifestation of the full horizontal application of human rights. It gives full expression to the argument advanced in this paper that non-state actors have human rights obligations which can be enforced against them. Direct application means that a victim of a human rights violation can bring a claim based directly on a provision in the Bill of Rights against a non-state actor or mount a defence to a private action based directly on a human right. Many factors would have to be considered before a non-state actor could be held directly responsible for a given human right. These include the nature of the right, the nature of the duty, the extent of the violation, the nature of the non-state actor, and the relationship between the non-state actor and the victim.

The notion of direct responsibility of non-state actors has significant procedural advantages as it presents an opportunity to the claimant to bring alternative claims in one action — one based on the common law and another on the Constitution. It is particularly ideal where no private law action exists to remedy the violation alleged and have been allowed in Ireland. In *Meskeil v CIÉ*, Walsh J stated that:⁷⁶

[a] right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries with it its own right to a remedy or for the enforcement of it.

The question that immediately arises is this: Does the claimant have to exhaust private law remedies before he or she can rely directly on a constitutional right? In *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*,⁷⁷ Henchy J addressed this question thus:⁷⁸

So far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the state and the courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question. In many torts — for example, negligence, defamation, trespass to a person or property — a plaintiff may give evidence of what he claims to be a breach of a constitutional right, but he may fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence. A person may of course, in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskeil v CIÉ IR 121*); but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional rights.

⁷⁶ [1973] 1 IR 121 134.

⁷⁷ [1988] 1 LRM 629.

⁷⁸ As above.

The Irish jurisprudence shows that a constitutional claim may be brought against a non-state actor where no private law remedy exists to rectify the violation or where such a remedy exists but it is ineffective. It must be noted, however, that courts in Ireland do not have the mandate to develop the common law to give effect to a provision in the Bill of Rights. This can be contrasted with South Africa, where courts have been given express powers in this regard. Nevertheless, it is not clear even under the South African Constitution whether the duty to develop the common law is broad enough to allow courts to create new causes of action in private law aimed at giving effect to rights.

The ideal model of the horizontal application of a bill of rights would therefore seem to be one that combines both the indirect approach — which permits a consideration of these rights when interpreting and applying private law — and the direct approach — which allows victims of rights to bring constitutional claims against non-state actors where private law remedies are inadequate to address the claim or are non-existent. To allow for the harmonious development of private law and constitutional law, the claimant must shoulder the burden of proving that a particular human rights wrong cannot be dealt with through private law (and the indirect application of the common law). This approach does not deny that human rights apply to non-state actors, but it rather is a pragmatic approach to effectuating the idea of the horizontal application of human rights.

5 Conclusion

In conclusion, this article has argued that the state-centric application of human rights is an outdated concept attributable to the natural rights theory. The separation of the public from the private, which informed the manner in which rights were conceptualised within this doctrine, was influenced by conditions of the time which demanded the pursuit of liberalism and formal equality in the private sphere and a mechanism for restricting state interference in the private realm. To some extent positivist thinking lent support to the vertical application of human rights by defining rights as those recognised by the state. A critique of both these schools has revealed that they both do not present insurmountable obstacles to redefining the application of human rights.

This article has demonstrated that a number of jurisprudential schools support the horizontal application of human rights. The first is the Marxist school, which exposed the potential of the natural rights school as a tool for powerful actors to oppress poor and often defenceless people and also advocated for the collapsing of the distinction between public and private law. The second is the feminist critique, which has demonstrated that the public/private divide operates to serve the interests of men and shield non-state actors from human

rights responsibility for abuses committed by them against women in the private sphere. African conceptions of human rights also lend credence to the recognition of binding human rights obligations of private actors.

This does not mean that states will now cede their responsibilities or have diminished responsibilities in relation to human rights. Of course, states are and will remain the principal duty bearer. It is consistent with the ideal of the horizontal application of human rights to hold states responsible for failing to take measures to prevent violations of human rights or to respond to them. In the process, non-state actors become indirectly responsible for human rights. However, horizontal application demands that human rights should be considered when determining private disputes, whenever necessary. This requires that the private law should be subject to the Bill of Rights. Parties to private litigation should be allowed to call in aid human rights provisions to buttress their positions. Where private law remedies are non-existent, inadequate or ineffectual, it should be possible for claimants to bring direct constitutional claims, where applicable, against non-state actors. A combination of direct and indirect application would help to cure any inconsistencies between private law and human rights, narrow down the imaginary and illusory divide between public law and private law, and ultimately give full effect to the notion of the horizontal application of human rights.