

Securing Widows' Sepulchral Rights Through the Nigerian Constitution

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INTRODUCTION

The mistreatment of widows in Sub-Saharan Africa is both widespread and well-documented.¹ Notorious forms of abuse include the disinheritance of widows, degrading and cruel mortuary practices, and compulsory levirate marriages.² Among these pernicious practices, however, little attention has been directed at the frequent denial of a widow's right of sepulchre, including, in particular, her right to control the time, place, and manner of her husband's burial.³ The normative description of sepulchral

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1. The literature on the general treatment of widows in Africa is legion. See generally Andrew U. Iwobi, *No Cause for Merriment: The Position of Widows under Nigerian Law*, 20 CAN. J. WOMEN & L. 37 (2008); Uche U. Ewelukwa, *Post-Colonialism, Gender, Customary Injustice: Widows in African Societies*, 24 HUM. RTS. Q. 424 (2002); Patricia Stamp, *Burying Otiemo: The Politics of Gender and Ethnicity in Kenya*, 16 SIGNS 808 (1991); Anthony L. Kafumbe, *Women's Property Rights and the Laws of Succession in Uganda: Reform Propositions*, 12 E. AFR. J. PEACE & HUM. RTS. 65 (2006); Jill Zimmerman, *The Reconstitution of Customary Law in South Africa: Method and Discourse*, 17 HARV. BLACKLETTER L.J. 197 (2001); Victoria Bronstein, *Reconceptualising the Customary Law Debate in South Africa*, 14 S. AFR. J. ON HUM. RTS. 388 (1998); WIDOWS IN AFRICAN SOCIETIES: CHOICES AND CONSTRAINTS (Betty Potash ed. 1986); Margaret Owen, *Human Rights of Widows in Developing Countries*, 3 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Kelly D. Askin & Dorean M. Koenig eds., Transnational Publishers, 2001); Simon Coldham, *The Status of Women in Zimbabwe: Veneria Magaya v. Nakayi Shonhiwa Magaya (SC210/98)*, 43 J. AFR. L. 248 (1999); David M. Bigge & Amelie von Briesen, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in Magaya v. Magaya*, 13 HARV. HUM. RTS. J. 289 (2000).

2. A "levirate marriage" is a marriage between a man and his deceased brother's widow. For documented accounts of the referenced abuses given by widows or widow organisations, see sources cited *supra* note 1. Other examples may be found in Esther Pabou Mbaki, *Downtrodden Widows Break Centuries-Long Silence*, INTERPRESS SERVICE, Oct. 28, 1998, <http://www.hartford-hwp.com/archives/35/071.html>, and Widows' Rights International, <http://www.widowsrights.org/articles.htm> (last visited Oct. 15, 2009).

3. Sepulchral rights describe a coterie of rights that characterize six overlapping categories of cases in which disputes over the control of a dead human body might arise. The other categories (not discussed in this paper) are worth mentioning, so that the reader understands the full scope of sepulchral rights. The first category of sepulchral rights is exhumation rights; these rights are implicated in cases relating to the unlawful opening of graves or grave-robbing. The second category of sepulchral rights is possessory rights; these rights protect the holder against unlawful dispossession of a corpse. The third category of sepulchral rights is the right to receive the deceased in the way it was when life left the

rights underestimates their emotional and socio-spiritual importance.⁴ In order to begin to cope with her loss, a widow needs control over the burial of her deceased husband. The significance of these dimensions for widows in Africa can be seen in recent cases in which African widows have fought fiercely for their right to control the disposition of their husbands' remains.⁵

In contrast to that of most common law countries in Africa, the United States does protect the sepulchral rights of widows. A widow in the United States enjoys sepulchral priority, unless her husband had made a clear, definite, and provable expression of interest as to the manner of his burial prior to his death.⁶ In African countries, customary law often prevents widows from exercising their sepulchral rights. While customary law is to blame for most violations, it is not the only villain—statutes and common law inherited from England are also complicit.

One remedy to prevent sepulchral rights violations would be to repeal or amend existing laws and to enact new laws that address widows' concerns. In Nigeria, the Enugu state employed this remedy in 2001 when its House of Assembly enacted The Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law ("Enugu State Law").⁷ The Widow's Fundamental Rights Law makes it a criminal offence to subject a widow to humiliating and dehumanising mortuary practices and includes prohibitions against forcing a widow to sleep alone in the same room with her deceased husband, compulsorily shaving her head, compelling her to remarry a male relative of her deceased husband, and unlawfully evicting her from her marital home.⁸ While this law represents progress for the protection of widows, it has some clear shortcomings: it fails to explicitly guarantee widows' sepulchral rights and lacks a provision creating civil remedies.

body. The fourth category of sepulchral rights is the holder's right to notification of the decedent's death. The fifth category of sepulchral rights is the right of repose, which means that once the dead are buried they should be allowed to rest permanently in peace. The sixth category is the one discussed in this paper: the right to determine the time, place, and manner of burial. This is an important right for living relatives and its exercise often creates conflicts between family members. For instance, disagreements over the place, time, and manner of burial might arise between foster parents and natural parents, between adoptive parents and biological parents, between a son and his step-mother, and between a widow and her deceased husband's relatives.

4. In a refugee context, some suggest that burial may even catalyze repatriation decisions. Craig E. Pollack, *Returning to a Safe Area? The Importance of Burial for Return to Srebrenica*, 16 J. REFUGEE STUD. 186 (2003).

5. See, e.g. Otieno v. Ougo, [1982 – 87] 1 K.A.R. 1049 (C.A.) (Kenya).

6. For a more detailed analysis, see Remigius N. Nwabueze, *The Concept of Sepulchral Rights in Canada and the U.S. in the Age of Genomics: Hints from Iceland*, RUTGERS COMPUTER & TECH. L. J., 217, 269–72 (2005). See also Frances H. Foster, *Individualised Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351 (2008) (discussing the difficulties in resolving disputes among a decedent's survivors given the outdated family paradigm of inheritance law).

7. The Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law, E.S.N., Law No. 3, 2001 (Enugu State, Nigeria).

8. *Id.* §§ 4 – 6.

In Nigeria, however, widows need not wait for further legislative intervention to secure their sepulchral rights because the Nigerian Constitution already guarantees them these rights. The Nigerian Constitution, like the constitutions of most African countries, contains a bill of rights that protects citizens from cruel and degrading treatment, punishment, loss of privacy, and loss of property.⁹ This article demonstrates that horizontal application of the Nigerian Constitution would provide a Nigerian widow many of the rights that currently elude her, specifically the right to determine the time, place, and manner of burial of her husband. To further this goal, the next section describes widows' sepulchral rights in the U.S. legal system and then provides the contrasting position of widows under customary law in Nigeria. The following section discusses the recent Kenyan case of *Otieno v. Ougo*, which extended customary sepulchral law to statutory marriages in Kenya and may signal a dangerous trend towards further limiting widows' rights. The penultimate section examines the application of constitutional provisions on fundamental human rights to purely private actions brought by widows to enforce their sepulchral rights. The final section argues that the Nigerian Constitution could operate horizontally to protect widows' sepulchral rights.

I. SEPULCHRAL RIGHTS OF WOMEN IN WESTERN LEGAL SYSTEMS

Several western legal systems recognize the right of the surviving wife to control the disposition of the remains of her deceased husband.¹⁰ For example, in the United States, the surviving spouse is entitled to determine the time, place, and manner of burial of the deceased spouse.¹¹ This prioritization of a widow's right to bury her deceased husband reinforces her formal status as, legally speaking, the closest person to the deceased, while also expressing the binding character of marriage. A widow's priority to make burial decisions is second only to the deceased's clear wishes to the contrary.¹² Burial wishes of the deceased may be determined by reference to parol evidence,¹³ revoked informally,¹⁴ or ascertained from a will that is otherwise invalid and unenforceable.¹⁵ Even burial wishes expressed in relevant funeral home forms are enforceable.¹⁶ In addition to possibly being

9. See CONSTITUTION, Ch. 4 (1999) (Nigeria) (incorporating the Bill of Rights).

10. See Nwabueze, *supra* note 6; Remigius N. Nwabueze, *Legal Approaches to the Burial Rights of a Surviving Wife*, 73 AMICUS CURIAE 12, 12 (2008).

11. *Swits v. Swits*, 71 A. 782 (Conn. 1909). Although the following apply to either spouse upon the death of the other, reference will be made to the "widow" and "deceased husband" since this is the paradigm relevant to the article.

12. *Booth v. Huff*, 708 N.Y.S.2d 757, 759 (App. Div. 2000); *In re Estate of Moyer*, 577 P.2d 108, 110 (Utah, 1978).

13. *Bruning v. Eckman Funeral Home*, 693 A.2d 164, 165 (N.J. Super. Ct. App. Div. 1997).

14. See, e.g., *Fidelity Union Trust Co. v. Heller*, 84 A.2d 485, 488 (N.J. 1951).

15. See, e.g., *Estate of Jimenz*, 65 Cal. Rptr. 710, 713 (Ct. App. 1997).

16. See, e.g., *id.*; *Eckman Funeral Home*, 693 A.2d at 165.

overridden by the deceased's wishes, a U.S. widow loses her sepulchral priority if she is divorced from the deceased at the time of his death.¹⁷ In some states, judicial separation or evidence of a bad relationship between the deceased and the surviving wife may engender loss of priority.¹⁸ Aside from these two scenarios, in the United States, the decisional authority regarding burial of a deceased spouse is the prerogative of a single person, typically the surviving spouse. As the next section explains, this position contrasts sharply with the position of widows under the customary laws practiced in Nigeria.

II. SEPULCHRAL RIGHTS OF WIDOWS UNDER CUSTOMARY LAW IN NIGERIA

Whether or not a Nigerian widow is able to control the disposition of her husband's remains depends on a combination of customary, statutory, and received English common law.¹⁹ In most systems of Nigerian customary law, burial decisions are meant to be group-based; in theory, no individual can claim the sole right to determine the time, place, and manner of burial of a deceased family member.²⁰ The right of burial belongs to the family as a whole. However, the head of a family is charged with coordinating and managing the funeral arrangements for the burial of a deceased member.²¹ In some respects, the head of a family is like a trustee; he or she is responsible for exercising the right of burial for the benefit of every family member. If a woman can become the head of a family under customary law, she is thereby empowered to control the disposition of her husband's remains in accordance with her and her family's wishes. The Yoruba of Western Nigeria do allow for the selection of women as heads of the family.²² More typical, however, is the customary law of the Ibo of South-Eastern Nigeria, which prohibits women from the position of head of the family.²³ Although customary law envisions that burial decisions should be made after consultations with all family members, including the widow, it does not

17. See, e.g., *Rekosh v. Parks*, 735 N.E.2d 765, 775 (Ill. App. Ct. 2000).

18. See, e.g., 22 AM. JUR. 2D *Dead Bodies* § 23 (2008).

19. See Kafumbe, *supra* note 1. Kafumbe argues that legal pluralism is the bane of widows in Africa and that it should be replaced (in succession matters) with a monistic secular law of succession based on the model operating in most western legal systems.

20. See Remigius N. Nwabueze, *Dead Bodies in Nigerian Jurisprudence*, 51 J. AFR. L. 117, 133 (2007).

21. *Id.*

22. *Taiwo v. Sarumi*, [1913] 2 N.L.R. 103; TOSLIM O. ELIAS, *NIGERIAN LAND LAW* 104, 104–5 (1971). However, where a Yoruba widow is not the head of the family, her situation may well be even more precarious than under other customary law regimes, as she is deemed a mere chattel to be distributed as part of her husband's estate. See *infra* n.29.

23. In *Mojekwu v. Iwuchukwu*, [2004] 11 N.W.L.R. 196, 217, Justice Uwaifo made reference to this customary law rule when he referred to “the custom and tradition of some communities which do not permit women to be natural rulers or family heads.”

provide her with any remedy if she is not consulted or when her views are disregarded.

A widow's position is even more precarious where customary law regards her as chattel to be distributed along with her husband's estate. The Nigerian case *Obusez v. Obusez*²⁴ illustrates this point. In *Obusez*, the brothers of the deceased argued that they were entitled to administer the deceased's estate against his widow and infant children. They based their argument on Agbor customary law,²⁵ which deemed the widow to be chattel to be inherited and therefore, they claimed, unqualified for letters of administration.²⁶ The widow had been married under the Marriage Act²⁷ rather than customary law. The trial court held that a widow who had been married under statute is not a chattel and is entitled to letters of administration. In affirming this decision, the Court of Appeal suggested that the opposite would be true of a widow in the same position who had been married under customary law, in which case Agbor customary law would apply.²⁸

In *Akinnubi v. Akinnubi*²⁹ the Nigerian widow-claimant and her deceased husband were married under Yoruba customary law.³⁰ She sought relief from the court to entitle her, together with her children, to the estate of her deceased husband and to appoint her as the administratrix of his estate, a position that the deceased's brothers opposed.³¹ She made her claim not in her capacity as a widow but rather as her children's *guardian ad litem*.³² In response, her brothers-in-law relied on a rule of Ikale customary law under which, upon the death of their brother, the widow-claimant "became part of the deceased's estate, [and] was allotted or bequeathed according to Ikale Customary Law to one of the deceased's brother [sic]."³³ Both the Nigerian Supreme Court and Court of Appeal agreed that a widow of a Yoruba customary law marriage could not maintain an action to be one of the administrators of her deceased husband's estate; and the Court found the current action to be proper only because of the capacity in which the widow had sued: as next friend of her children.³⁴ Justice Onu made this point clear when he observed that "under Yoruba customary law, a widow under an intestacy is regarded as part of the estate of her deceased husband to be administered or inherited by the deceased's family; she could neither be

24. *Obusez v. Obusez*, [2001] 15 N.W.L.R. 377.

25. Agbor is a locality in Delta State of Nigeria.

26. "Letters of Administration" is the legal document evidencing a person's authority to act as a deceased person's legal representative; thus, it is an authority to administer the estate of a deceased person. *Obusez v. Obusez*, [2001] 15 N.W.L.R. 377.

27. See Marriage Act, ch. 218, Laws of the Federation of Nigeria (1990).

28. *Obusez v. Obusez*, [2001] 15 N.W.L.R. 377.

29. *Akinnubi v. Akinnubi*, [1997] 2 N.W.L.R. 145 (Nigeria).

30. The Yoruba people of Nigeria live mainly in the western states of Nigeria.

31. *Akinnubi*, [1997] 2 N.W.L.R. at 152 – 56.

32. *Id.* at 159.

33. *Id.* at 153.

34. *Id.* at 155 – 58.

entitled to apply for a grant of letters of administration nor to be appointed as co-administratrix.”³⁵ With the denial of her right to administer her husband’s estate when he dies intestate, a Nigerian widow who was married under customary law will face great difficulties in asserting her sepulchral rights.

In many African countries, when the deceased dies intestate, the surviving spouse is preferred in the grant of letters of administration under the succession or administration of estate laws.³⁶ As an administratrix, the law gives her custody of her husband’s remains for burial. A surviving wife in Africa who wishes to exclude the application of customary mortuary rules is therefore well-advised to acquire letters of administration. But the grant of letters of administration may not come soon enough for a widow to control her deceased husband’s burial, especially if her application for letters of administration is opposed by her husband’s relative, as in the above cases or in the Kenyan case *Otieno v. Ougo*.³⁷ In *Otieno*, the Kenyan Court of Appeal held that while the widow-claimant would be preferred in the grant of letters of administration, she could not claim any right under the grant since the grant had not yet been made at the time of the action.³⁸ In such circumstances, customary law fills the gap between death and the grant of letters of administration, to the detriment of the surviving wife. The application of customary law can be avoided, however, by the making of a will.³⁹ In that case, the will’s executor would become the appropriate person to take charge of the deceased’s burial. Where the surviving wife is also the executrix, customary mortuary law will pose no problem for her. She may simply use her right as an executrix to realize her own personal burial wishes. The presence of a will that names the spouse as executrix is therefore the surest protection for a widow’s sepulchral rights; however, a legal remedy must still be available to protect the rights of widows whose husbands die intestate and for widows who are not the executrices of their husbands’ wills.

35. *Id.* at 159.

36. For example, in Nigeria, the Court of Appeals in *Obusez v. Obusez*, [2001] 15 N.W.L.R. 377, held that the surviving spouse who is a lawful widow and children of an intestate deceased get first priority to a grant of Letters of Administration of the estate. In Zambia, Section 15(2) of The Intestate Succession Act of 1989 provides that letters of administration should be given to the person with greatest degree of consanguinity and interest in the estate. In Kenya, the Law of Succession Act requires courts to give the surviving spouse priority when granting letters of administration. Law of Succession Act, ch. 160 § 166 (2008) (Ken.). However, note that the Kenyan courts have held that the Law of Succession Act does not apply to widows who were married under customary law. See *Otieno v. Ougo*, [1982 – 87] 1 K.A.R. 1049, 1059 (C.A.) (Kenya).

37. *Otieno v. Ougo*, [1982 – 87] 1 K.A.R. 1049, 1059 (C.A.) (Kenya).

38. *Id.*

39. Remigius N. Nwabueze, *The Dynamics and Genius of Nigeria’s Indigenous Legal Order*, 1 INDIGENOUS L.J. 153, 154 (2002).

III. THE CONSTITUTIONAL REMEDY

A Nigerian widow whose husband died intestate could contest the application of customary mortuary law on constitutional grounds.⁴⁰ A widow could argue that her exclusion by customary burial law discriminates against her as a woman. She could further argue that not being allowed to bury her husband according to her wishes is an instance of deprivation of property. These rights are guaranteed by some African states' constitutions, including the 1999 Constitution of Nigeria,⁴¹ and are expressed in the African Charter on Human and Peoples' Rights.⁴² The property argument, however, is likely to fail in light of the common law rule that there is no property right in a dead person's body.⁴³ The success of a gender discrimination argument would depend to a great extent on the constitutional framework of the relevant nation. The Kenyan widow-claimant in *Otieno* raised a gender equality argument, but the Court of Appeal held that the Kenyan Constitution expressly permits discriminatory burial rules.⁴⁴ In contrast, the Nigerian constitutional Equality Guarantee only permits gender restrictions on appointments to State Offices or to the Nigerian police and armed forces.⁴⁵ Thus, the Equality Guarantee is available to a Nigerian widow seeking to enforce her sepulchral rights. The type of constitutional exemption for discrimination found in the Kenyan Constitution is likely to pose problems for African States like Kenya that ratified the 1979 U.N. Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW");⁴⁶ it is possible that stricter enforcement of CEDAW will lead to constitutional reform in such nations.

A. Horizontal Application of the Nigerian Constitution

Even under a framework such as that provided in the Nigerian Constitution, a surviving wife may still have problems in challenging customary law in an action against her deceased husband's relatives. The widow's in-laws

40. See T.W. Bennett, *The Compatibility of African Customary Law and Human Rights*, 1991 ACTA JURIDICA 18, 18 – 35 (1991) (discussing the potential areas of conflict between customary law and a Bill of Rights).

41. CONSTITUTION, §§ 33, 37, 42 – 44 (1999) (Nigeria).

42. African Charter on Human and Peoples' Rights art. 14, June 27, 1981, 21 I.L.M. 58 (*entered into force* Oct. 21, 1986).

43. See *Yearworth v. N. Bristol NHS Trust*, (2009) All E.R. 33 (C.A.) (U.K.); *Williams v. Williams*, (1882) 20 W.L.R. 659, 662 – 63 (Ch.D.) (U.K.); *R v. Sharpe*, (1857) 169 Eng. Rep. 959 (L.R.C.C.R.). See also REMIGIUS NWABUEZE, *BIOTECHNOLOGY AND THE CHALLENGE OF PROPERTY* (2007) (arguing that there is a limited property right in the human body).

44. *Otieno v. Ougo*, [1982 – 87] 1 K.A.R. 1049, 1060 (C.A.) (Kenya).

45. CONSTITUTION, § 42 (1999) (Nigeria).

46. Convention on the Elimination of All Forms of Discrimination against Women art. 2(f), Dec. 18, 1979, 1249 U.N.T.S. 13 (*entered into force* Sept. 3, 1981). Article 2(f) of the Convention imposes an obligation on signatory States to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. Both Kenya and Nigeria are signatories to the Convention.

could argue that fundamental rights guaranteed by the Nigerian Constitution are only capable of vertical operation; that is, that they apply only in actions brought by individuals against the state and not to actions between private persons. Unlike some constitutions, such as the South African Constitution,⁴⁷ the Nigerian Constitution does not contain an express provision addressing horizontal application for the entire document. Nonetheless, the Nigerian Constitution implies, and case law supports, the proposition that the Equality Guarantee applies equally to actions between private parties.

Nigeria's Presidential Constitution is largely patterned after the U.S. Constitution,⁴⁸ although Chapter Two of the Nigerian Constitution also incorporates features from the Indian Constitution,⁴⁹ such as the Fundamental Objectives and Directive Principles of State Policy.⁵⁰ These provisions are declarations of objectives to be pursued by the government and policies that should help in the realization of those objectives.⁵¹ In other words, Chapter Two of the Nigerian Constitution constitutes a guide to governmental actions. These include provisions on what are generally regarded in international law as social, economic, and cultural rights.⁵² Because Chapter Two of the Nigerian Constitution is only intended to be aspirational, it is rendered non-justiciable by Section 6(6)(c) of the constitution. However, the Fundamental Objectives and Directive Principles of State Policy serve as useful aids in the interpretation of the constitution and could help to resolve ambiguous provisions in favor of individual rights.⁵³ For instance, in relation to horizontal application of individual rights, Chapter Four of the Nigerian Constitution incorporates a bill of rights that guarantees certain fundamental human rights, including the Section 42 Equality Guarantee. The Fundamental Objectives and Directive Principles of State Policy impose a duty on citizens to obey the constitution and to respect the rights of other persons,⁵⁴ which presumably include those rights established in Chapter Four. Taken together, these provisions indicate an intention for the fundamental right to equality to be protected against both violations by the state and violations by private parties.

No Nigerian court has directly decided whether the Equality Guarantee applies to a widow's sepulchral rights claim against her in-laws, and recent

47. S. AFR. CONST. 1996 §§ 8(1 - 4), 9(3 - 4).

48. For detailed analysis, see B.O. NWABUEZE, *THE PRESIDENTIAL CONSTITUTION OF NIGERIA* (C. Hurst & Co.) (1982), and B.O. NWABUEZE, *CONSTITUTIONAL DEMOCRACY IN AFRICA*, VOL. 1 (Spectrum Books Ltd.) (2003).

49. INDIA CONST. (1950).

50. CONSTITUTION, Ch. 2 (1999) (Nigeria).

51. For an excellent analysis of this issue, see B.O. Okere, *Fundamental Objectives and Directive Principles of State Policy Under the Nigerian Constitution*, 3 NIG. JURID. REV. 74 (1978 - 1988).

52. See Obiajulu Nnamuchi, *Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria*, 52 J. AFR. L. 1, 1 - 42 (2008) (analyzing Chapter Two of the Nigerian Constitution in the context of the right to health).

53. Okere, *supra* note 51, at 82 - 84.

54. CONSTITUTION, § 24 (1999) (Nigeria).

cases have revealed the Nigerian Supreme Court's desire to avoid addressing the potential horizontal application of the constitution even where the opportunity is presented. For instance, in *Mojekwu v. Mojekwu* the Nigerian Supreme Court declined to rule on the validity of the lower court's alternative holding on the constitutional protection from gender discrimination.⁵⁵ *Mojekwu* involved a dispute over a deceased husband's land, pitting his two surviving wives and children (all female) against his nephew. The nephew based his claim on the primogeniture rule of Nnewi customary law, the personal law of the parties. In Onitsha, where the land was situated, a different customary law applied that permitted women to inherit land. Applying the *lex situs*, the Court of Appeal held that the deceased's daughters were the rightful successors-in-title to their deceased father's land.⁵⁶ Despite the sufficiency of that holding, Justice of the Court of Appeal Tobi added that the Nnewi customary law of primogeniture was repugnant to natural justice, equity, and good conscience and equally unenforceable on that basis.⁵⁷ More importantly, he opined that if Nnewi customary law had been the applicable law, he would have, nonetheless, refused to apply it, as it was unconstitutionally discriminatory.⁵⁸ As *Mojekwu* involved purely private parties, Justice Tobi's alternative constitutional ruling implies horizontal operation of the Nigerian Constitution's Equality Guarantee. The Supreme Court declined to address the validity of Justice Tobi's alternative constitutional rationale and instead held that the *lex situs* was sufficiently dispositive of the case.⁵⁹

In another case involving the same customary law primogeniture rule, *Muojekwu v. Ejikeme*, Justice Tobi even more explicitly noted that the Equality Guarantee applied to cases between private parties, observing that, "such a custom has clearly discriminated against Virginia, the daughter of Reuben, and [is] therefore unconstitutional."⁶⁰ Yet, Justice Tobi's judgment included neither a discussion of whether the constitution generally operates horizontally nor a discussion of his rationale for concluding that the Equality Guarantee appears to operate horizontally. These questions will have to be addressed more explicitly by future Nigerian courts.

As the remainder of this section will show, the Nigerian Constitution provides ample support for the view that the constitution operates horizontally. Section 1 (Supremacy Clause), Section 6(6)(b) (Judicial Powers), and Section 46 (Special Jurisdiction of High Courts) all militate in favor of horizontal application of the constitution as a whole. In addition, Nigerian courts have already analyzed certain fundamental rights provisions individ-

55. *Mojekwu v. Mojekwu*, [1997] 7 N.W.L.R. 283 (C.A.).

56. *Id.* at 303 – 04.

57. *Id.* at 305.

58. *Id.* at 304 – 05.

59. *Mojekwu v. Iwuchukwu*, [2004] 11 N.W.L.R. 196 (Nigeria).

60. *Muojekwu v. Ejikeme*, [2000] 5 N.W.L.R. 402, 436 (C.A.).

ually and found that certain provisions of the Nigerian Constitution apply horizontally.⁶¹

The horizontal dimension of the Nigerian Constitution is anchored in the Supremacy Clause, which states: “This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.”⁶² Since the Supremacy Clause is binding on all *persons* without distinction as to whether or not they are state actors, it supports an interpretation of the Nigerian Constitution as operating both vertically and horizontally.⁶³

The Judicial Powers clause also supports a horizontal application of the Nigerian Constitution. This clause provides that the constitution “shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any questions as to the civil rights and obligations of that person.”⁶⁴ The Judicial Powers clause extends the constitution to suits involving private parties by explicit reference to its application between *persons*. Justice of the Court of Appeal Ejiwunmi took this approach in *Onwo v. Oko*, in which he observed that “the provisions of section 6 subsection 6 [of the constitution] . . . [do] not preclude a person from suing another person who is alleged to be in breach of fundamental human rights of the person who commenced the action.”⁶⁵ This application of the Judicial Powers clause explicitly provides for the possibility of civil suits enforcing fundamental constitutional rights.

The horizontal dimension of the Nigerian Constitution is further supported by the Special Jurisdiction of High Courts, which states that “[a]ny person who alleges that any of the provisions of this chapter [Chapter Four relating to the Bill of Rights] has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.”⁶⁶ Notably, this statement does not limit jurisdiction to violations *by* the state but rather limits the geographic jurisdiction of the court. If the drafters had intended to allow only vertical actions, they would not have utilized this unrestrictive language.

61. *See, e.g.*, *Abdulahamid v. Akbar*, [2006] 13 N.W.L.R. 127, 149; *Onwo v. Oko*, [1996] 6 N.W.L.R. 584 (C.A.); *Sea Trucks (Nig.) Ltd. v. Anigboro*, [2001] 2 N.W.L.R. 159, 175; *Uzoukwu v. Ezeonu*, [1991] 6 N.W.L.R. 708, 764 (C.A.); *Aniekwe v. Okereke*, [1996] 6 N.W.L.R. 60 (C.A.); *Peterside v. I.M.B. (Nig.) Ltd.*, [1993] 2 N.W.L.R. 712, 728–29 (C.A.).

62. CONSTITUTION, § 1(1) (1999) (Nigeria).

63. Compare with the Supremacy Clause of the U.S. Constitution, which links its binding force to legal institutions: “This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.” U.S. CONST., Art. VI, cl. 2.

64. CONSTITUTION, § 6(6)b (1999) (Nigeria).

65. *Onwo v. Oko*, [1996] 6 N.W.L.R. 584, 612 (C.A.).

66. CONSTITUTION, § 46(1) (1999) (Nigeria).

Finally, Nigerian courts have already applied the Constitution horizontally in some cases through an interpretive framework that approaches the fundamental rights guarantees individually.⁶⁷ Examination of the individual provisions of the Nigerian Bill of Rights shows that some of the guarantees lend themselves to both vertical and horizontal application.⁶⁸ This is due to the varying semantic formulation of the individual provisions in the Nigerian Bill of Rights. For instance, while the right of dignity is declared without limitations (“Every individual is entitled to respect for the dignity of his person. . . .”⁶⁹), the right to a fair hearing is limited to vertical claims because it guarantees a fair hearing within a reasonable time to any person whose civil rights and obligations are determined by any government or authority.⁷⁰ The Nigerian courts have used this individualized approach to anchoring the horizontal operation of rights in the Nigerian Constitution to apply the right of dignity to widows’ rights.⁷¹ For example, in *Onwo v. Oko*, the widow-claimant asserted, and the Court of Appeal agreed, that the forceful shaving of her hair by her neighbors, in-laws, and relatives in obedience to a mortuary custom violated her constitutionally protected right to human dignity.⁷²

The right of dignity therefore protects widows against some mortuary customs, but the Equality Guarantee⁷³ is the lynchpin guarantee for Nigerian widows’ sepulchral rights. In *Uzoukwu v. Ezeonu*, the Court of Appeal

67. See, e.g., *Abdulahamid v. Akbar*, [2006] 13 N.W.L.R. 127, 149; *Onwo v. Oko*, [1996] 6 N.W.L.R. 584 (C.A.); *Sea Trucks (Nig.) Ltd. v. Anigboro*, [2001] 2 N.W.L.R. 159, 175; *Uzoukwu v. Ezeonu*, [1991] 6 N.W.L.R. 708, 764 (C.A.); *Aniekwe v. Okereke*, [1996] 6 N.W.L.R. 60 (C.A.); *Peterside v. I.M.B. (Nig.) Ltd.*, [1993] 2 N.W.L.R. 712, 728–29 (C.A.).

68. See Dale Gibson, *The Charter of Rights and the Private Sector*, 12 MAN. L.J. 213, 216–17 (1982) (suggesting a similar approach for Canada, which is of analogical relevance for Nigeria).

69. CONSTITUTION, § 34(1) (1999) (Nigeria).

70. *But see Peterside v. I.M.B. (Nig.) Ltd.*, [1993] 2 N.W.L.R. 712, 727–30 (C.A.). Based on statutory rules of construction and the inclusive definition of “authority” as used in the Nigerian Constitution, Justice of the Court of Appeal Niki Tobi observed in *Peterside* that the term “authority” includes private persons and that the constitutional provisions are therefore capable of horizontal application. Subsections specific to the Right to Fair Hearing, however, direct prohibitions against legislative, executive, and judicial acts, thereby indicating that only state actions are covered by the Right to Fair Hearing.

71. On the protection of dignity, see *Uzoukwu v. Ezeonu*, [1991] 6 N.W.L.R. 708 (C.A.), and *Onwo v. Oko*, [1996] 6 N.W.L.R. 584 (C.A.). On the protection of property, see *Aniekwe v. Okereke*, [1996] 6 N.W.L.R. 60 (C.A.).

72. *Onwo v. Oko*, [1996] 6 N.W.L.R. 584, 595–605 (C.A.).

73. “A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person – (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or (b) be accorded either expressly by, or in the practice of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions. (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth. (3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or a member of the Nigerian Police Force or to an office in the service of

held that the Equality Guarantee operates only vertically.⁷⁴ However, for the reasons stated below, which the court's opinion failed to address, the court was wrong to limit the Equality Guarantee to vertical actions, and its interpretation will likely be overturned by the Nigerian Supreme Court. Two principal arguments support the view that the Equality Guarantee applies horizontally. First, although subsections (1)(a) and (b) of the Equality Guarantee require that the alleged discrimination involve state action by focusing on discrimination authorized by law, the protection in subsection (2) does not have these restrictions. It states: "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."⁷⁵ If the Equality Guarantee were intended to apply only vertically, the unrestrictive language of subsection (2) would be odd. Rather, a combined reading of subsections (1) and (2) of the Equality Guarantee shows that it has both vertical and horizontal applications.

Second, the horizontal dimension of the Equality Guarantee is strongly supported by the constitutional duties imposed on citizens in Section 24 (Citizen Duties) of the Fundamental Objectives and Directive Principles of State Policy: "It shall be the duty of every citizen to – (a) abide by this Constitution, respect its ideals and its institutions . . . [and] (c) respect the dignity of other citizens and rights and legitimate interests of others."⁷⁶ Thus, private persons are obliged to respect the fundamental human rights of others and have a duty to desist from discriminatory actions. While these constitutional duties of private persons are declaratory, not justiciable, as earlier noted, they nevertheless support the notion that the Equality Guarantee extends to purely private actions.⁷⁷

In light of the above analysis, the Supreme Court of Nigeria is unlikely to endorse the Court of Appeal's reasoning in *Uzoukwu v. Ezeonu*. Accordingly, the Equality Guarantee retains potential as a powerful weapon for a widow seeking to enforce her sepulchral rights against private persons.

B. Vertical Application of Nigerian Constitution

In addition to anchoring her claims on the Equality Guarantee's horizontal application, a widow could make an argument for the constitution's vertical application in her private suit. Customary law is one of the recog-

a body corporate established directly by any law in force in Nigeria." CONSTITUTION, § 42 (1999) (Nigeria).

74. *Uzoukwu v. Ezeonu*, [1991] 6 N.W.L.R. 708, 764 (C.A.).

75. CONSTITUTION, § 42(2) (1999) (Nigeria).

76. CONSTITUTION, § 24 (1999) (Nigeria).

77. Okere, *supra* note 51, at 82 – 84 (suggesting that provisions, like the Citizens Duties, under the Fundamental Objectives and Directive Principles of State Policy in Chapter Two of the Nigerian Constitution could be used to interpret ambiguous sections of the Constitution). As a general matter, the Preamble to the Nigerian Constitution declares its commitment to the "principles of Freedom, Equality and Justice." This provides a useful aid to the interpretation of the Equality Guarantee. If the Equality Guarantee were restricted to vertical actions, the ideals of the preamble would not be fully realizable since discriminations in private relations would go without a constitutional remedy.

nized systems of law in Nigeria and is therefore subject to the regime of the Nigerian Constitution, including the Supremacy Clause and the Bill of Rights. It therefore follows that customary law, just like statutory law, may not infringe upon the constitutional Equality Guarantee when the two conflict. If a Nigerian court were to enforce such a customary law, the state action inherent in the judicial enforcement would satisfy the requirements for the vertical application of constitutional protections. That is, an otherwise reluctant Nigerian court may choose not to enforce a discriminatory customary law between private parties because such a decision would be tantamount to a governmental violation of the Equality Guarantee.

The U.S. case, *Shelley v. Kraemer*, provides a useful analogy on this point.⁷⁸ In *Shelley*, a racially restrictive covenant prevented the transfer of property to the defendants, who were black. In a private action to enforce the covenant, the defendants argued that the covenant infringed upon the equal protection of law guaranteed to them by the Fourteenth Amendment of the U.S. Constitution, which protects "the rights to acquire, enjoy, own and dispose of property."⁷⁹ This factor weighed heavily in the mind of the *Shelley* Court when it considered the appellees' contention that the case did not involve state action.⁸⁰ Accordingly, the Court observed that while the principle that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States"⁸¹ remained sacrosanct, the case nevertheless involved state action because the plaintiffs had employed judicial assistance to enforce a discriminatory private agreement.⁸² The *Shelley* Court observed that "it has been the consistent ruling of this court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials."⁸³

Shelley shows strong parallels to customary law in the sense that, like the racially restrictive agreements, customary law operates within the realm of private relations.⁸⁴ As in *Shelley*, a party could voluntarily adhere to discriminatory rules of customary law. However, problems arise when judicial assistance is sought to enforce discriminatory customary law rules, such as those that inhibit the exercise of a widow's sepulchral right. Judicial enforcement of the discriminatory customary rule would amount to state action such that a Nigerian court should, based on analogy to *Shelley*, refuse to enforce the constitutionally offensive customary law rule as a matter of vertical application of the Equality Guarantee.

78. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

79. *Id.* at 10.

80. *Id.* at 14, 23.

81. *Id.* at 13.

82. *Id.* at 13 – 14.

83. *Id.* at 18 – 19.

84. See generally Nwabueze, *supra* note 39.

C. Addressing Criticisms of Constitutional Protection

The main argument against giving horizontal effects to the Nigerian Constitution is that it would unnecessarily set up an alternative or parallel system of constitutional torts. While this is a significant concern,⁸⁵ Nigerian courts have already devised an adequate interpretive solution to the problem. In *Peterside v. I.M.B. (Nig.) Ltd.*, Justice of the Court of Appeal Niki Tobi observed that “it is not my understanding of the law that the expression ‘civil rights and obligations’ under [Section 33(1) of the 1979 Constitution] covers all civil actions available to a plaintiff, whether they are founded on tort, contract, property law, commercial or mercantile law, admiralty law and what have you.”⁸⁶ Under Justice Tobi’s understanding, the horizontal dimension of the Nigerian Constitution would not be allowed to engender a parallel system of tort.

In *Onwo v. Oko*, the Nigerian Court of Appeal observed that where an infringement of a guaranteed right “also amounts to a tortious act, the victim of the infraction has a right of election to make in respect of the *procedure* to be adopted by him for obtaining a redress In other words, the victim of the action can initiate an ordinary civil claim under the relevant rules of court or may evoke the constitutional procedure.”⁸⁷ However, in *Abdulhamid v. Akar*, the Nigerian Supreme Court implicitly rejected this election, which would potentially constitutionalize tort claims.⁸⁸ The Court disallowed a constitutional procedure for common law tort claims. As Justice Kutigi observed, “the learned trial judge himself realised that the reliefs sought by the applicant are *tortious* in nature. In other words, these are common law reliefs. These could only have been claimed strictly by following the common law procedure.”⁸⁹ Thus, the criticism that horizontal application of the Nigerian Constitution would spiral into an alternative constitutional tort system is not defensible.

Furthermore, Nigerian courts have insisted upon a conservative understanding of the guaranteed rights, so that only claims that come within the traditional meaning of the constitutional provisions would be protected.⁹⁰ Thus, a tort claim would not be accorded constitutional status unless it fell within the core meaning of a constitutional guarantee. Similarly, the Su-

85. Plaintiffs in several Nigerian cases have sought to enforce even contractual claims through a horizontal application of constitutional rights. Attempts to enforce employment contracts in *Sea Trucks (Nig.) Ltd. v. Anigboro*, [2001] 2 N.W.L.R. 159 and *Peterside v. I.M.B. (Nig.) Ltd.*, [1993] 2 N.W.L.R. 712 (C.A.), and credit sales in *Ndigwe v. Ibekendu*, [1998] 7 N.W.L.R. 486 (C.A.), furnish good examples of this trend.

86. *Peterside v. I.M.B. (Nig.) Ltd.*, [1993] 2 N.W.L.R. 712, 730 (C.A.).

87. *Onwo v. Oko*, [1996] 6 N.W.L.R. 584, 603–04 (C.A.).

88. *Abdulhamid v. Akbar*, [2006] 13 N.W.L.R. 127.

89. *Id.* at 145 – 46. See also *Inah v. Ukoi*, [2002] 9 N.W.L.R. 563 (C.A.).

90. See, e.g., *Abdulhamid v. Akbar*, [2006] 13 N.W.L.R. 127; *Sea Trucks (Nig.) Ltd. v. Anigboro*, [2001] 2 N.W.L.R. 159, 175; *Uzoukwu v. Ezeonu*, [1991] 6 N.W.L.R. 708, 764 (C.A.); *Aniekwe v. Okereke*, [1996] 6 N.W.L.R. 60 (C.A.); *Peterside v. I.M.B. (Nig.) Ltd.*, [1993] 2 N.W.L.R. 712, 730 (C.A.).

preme Court has held that only a claimant's main claims determine the availability of a constitutional procedure.⁹¹ This approach further limits the potential emergence of a parallel constitutional tort system under horizontal applicability.

The above analysis shows that the Nigerian Constitution in general, and the Equality Guarantee in particular, apply horizontally, and can thus be relied upon to vindicate a widow's sepulchral rights claim against her in-laws. The Supremacy Clause, Judicial Powers, Special Jurisdiction of High Courts and the horizontal approach to the Bill of Rights used by Nigerian courts combine to provide a strong foundation for the horizontal operation of the Nigerian Constitution. Criticism of the horizontal operation of the Nigerian Constitution based on fear of a parallel constitutional tort system does not withstand scrutiny.

CONCLUSION

While many scholars have written about the disinheritance of widows and their involuntary observance of disgraceful customary mortuary practices, few have focused on widows' sepulchral rights, especially the right to determine the time, place, and manner of burial of her deceased husband. A Nigerian widow's position in this regard contrasts sharply with that of her counterparts under U.S. law. Because of the group-based approach to burial rights, under which the head of the family is in charge of affairs, a Nigerian widow will rarely determine the time, place, and manner of burial of her deceased husband under Nigerian customary law.

The lot of a Nigerian widow can be ameliorated by the promulgation of new laws or the repeal or amendment of existing laws; but she need not wait for legislative intervention because the Nigerian Constitution already guarantees her certain fundamental human rights. The Equality Guarantee can protect a widow's sepulchral rights against invasion by her in-laws, either through a horizontal application applied to private actions or a vertical application that recognizes judicial enforcement of customary law as state action. The horizontal application of the Nigerian Constitution finds support in the Supremacy Clause, Judicial Powers, Special Jurisdiction of High Courts and Nigerian courts' interpretations of the Nigerian Bill of Rights favoring horizontal application. These sources would provide a willing court with the legal foundation on which to enforce widows' sepulchral rights.

91. *Abdulhamid v. Akbar*, [2006] 13 N.W.L.R. 127, 146.

