

**HORIZONTAL APPLICATION OF THE FREEDOM FROM DISCRIMINATION IN
KENYA, NIGERIA, AND SOUTH AFRICA**

by Oluwatimilehin Ayobola Opabola

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
ABSTRACT.....	iv
CHAPTER ONE	1
GENERAL INTRODUCTION AND CONCEPTUAL FRAMEWORK	1
1.1 INTRODUCTION.....	1
1.2 FREEDOM FROM DISCRIMINATION	5
1.3 HORIZONTAL APPLICATION OF HUMAN RIGHTS	6
1.4 HORIZONTAL APPLICATION VERSUS VERTICAL APPLICATION	8
CHAPTER TWO	10
THE HORIZONTAL APPLICATION OF THE FREEDOM FROM DISCRIMINATION IN KENYA, NIGERIA, AND SOUTH AFRICA.....	10
2.1. FREEDOM FROM DISCRIMINATION IN KENYA, NIGERIA, AND, SOUTH AFRICA.....	10
2.2. THE HORIZONTAL APPLICATION OF THE FREEDOM FROM DISCRIMINATION IN THE CONSTITUTIONS OF KENYA, NIGERIA, AND SOUTH AFRICA.....	14
2.3. ARGUMENTS FOR AND AGAINST THE HORIZONTAL APPLICATION OF HUMAN RIGHTS.....	18
CHAPTER THREE	21
THE PRACTICE OF THE HORIZONTAL APPLICATION OF THE FREEDOM FROM DISCRIMINATION IN SOUTH AFRICA, KENYA AND NIGERIA	21
3.1 CASE STUDIES FROM KENYA, SOUTH AFRICA AND NIGERIA	21

3.1.1 PRACTICE IN KENYA AND SOUTH AFRICA BEFORE THE EXISTING CONSTITUTIONS	22
3.1.2 PRACTICE IN KENYA AND SOUTH AFRICA UNDER THE EXISTING CONSTITUTIONS	24
3.1.3 THE PRACTICE IN NIGERIA	27
3.2 SUITABILITY OF THE FREEDOM FROM DISCRIMINATION FOR HORIZONTAL APPLICATION	32
CHAPTER FOUR.....	35
CONCLUSION	35
4.1 CONCLUSION.....	35
BIBLIOGRAPHY	38
TABLE OF CASES.....	38
TABLE OF LAWS AND STATUTES	39
TABLE OF BOOKS, JOURNALS AND ARTICLES	40

ABSTRACT

As a fundamental right, freedom from discrimination is protected by Constitutions around the world. An issue has been whether or not private persons are capable of being held liable for the violation of human rights. This is hinged on the belief that human rights are the duties of the state to fulfill. Just like other rights, it is possible for the freedom from discrimination to be infringed upon not just by state actors but by non-state actors as well. Countries adopt the method which is believed to work best for them either by stating it expressly in the Constitution or by judicial decisions. In fact, for countries that have it expressly stated in the Constitution, it is still in doubt whether the requirements of the Constitution have been followed. This thesis examines, by way of comparative analysis, the doctrine of horizontal application of the right to freedom from discrimination in the contexts of the South African, Kenyan, and Nigerian Constitutions. The thesis highlights the extent to which the doctrine has been applied using case laws. It argues that the inclusion of a horizontal application in the Constitution does not guarantee its application. Instead, judges have a huge role to play in ensuring an adequate application of human rights.

CHAPTER ONE

GENERAL INTRODUCTION AND CONCEPTUAL FRAMEWORK

1.1 INTRODUCTION

In recent years, the extent to which human rights should be applied to private relationships has received the utmost attention among legal scholars, especially from a comparative perspective.¹ There has been a huge challenge to the notion that human rights protections are only expected to be borne by the State, making only the state liable for any form of violation.² New centers of power such as multinational corporations in addition to the state have led to a need for varying perspectives of the elements of the public sphere.³ The concern has now been the impacts their actions may have on the enjoyment of the human rights of other individuals.⁴ With this switch of gradual transfer of function from states to private organizations, these private enterprises possess powers that the states traditionally had.⁵ These multinationals now have the power to dictate the working condition of the employees. Employers in particular can discriminate amongst employees in the workplace for having a different belief, culture, or even gender.

Though in the African context, the states still remain the main providers of services nevertheless, considering the daily change and attempts to fit into the global sphere, African countries are beginning to look into privatizing social providers. This is also due to the low

¹ Phillipson, G. (1999). *The Human Rights Act, horizontal effect and the common law: a bang or a whimper*. Mod. L. Rev., 62, 824.

² Rivera-Perez, W. (2012). *What the Constitution Got to Do with It: Expanding the Scope of Constitutional Rights into the Private Sphere*. Creighton International and Comparative Law Journal, 3(1), 189-214.

³ Clapham A. (1993). *Human Rights in the Private Sphere*. Oxford University Press, Oxford. 137.

⁴ Nolan A (2014). *Holding non-state actors to account for Constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland*. 12(1) International Journal of Constitutional Law. 62.

⁵ Mensch N. (2006). *Codes, lawsuits or international law: How should the multinational corporation be regulated with respect to human rights?* 14(2) University of Miami International and Comparative Lay Review. 249.

performance of government-owned enterprises.⁶ For instance, the Nigerian government has been in the process of privatizing its electricity sector.⁷ A further example is Lagos, the country's commercial city. Most of the companies that offer employment in this city are privately owned.⁸ With the possibility of an increase in the switch of providers of goods and services in the world from state to non-state actors, the power and influence of multinationals and non-governmental organizations seem to be on the increase.

Protection against discrimination is not a new phenomenon. The South African⁹ Constitution makes provision for this right under its equality section. The Nigerian Constitution¹⁰ adopts the use of the "Right to freedom from Discrimination". The Kenyan Constitution¹¹ does something interesting by combining both phrases used by the South African and Nigerian Constitutions –"Equality and Freedom from Discrimination". Discrimination against race, gender, and religion is on the increase among private individuals especially because of diverse belief systems.¹² Unlike the right to freedom from discrimination, there is a possibility to resort to criminal law and the law of torts in most human rights protection. For instance, the right to life could be instituted under murder or manslaughter. Also, the right to personal liberty under Section 35 Nigerian Constitution may also be instituted in torts under false imprisonment. The list is endless, but certain rights may not find a replacement in criminal or tort law. One of which is freedom from discrimination.

⁶ Salako, H. A. (1996). *An overview of Privatisation in Nigeria and options for its efficient implementation*. CBN Economic & Financial Review, 37(2), 17-30.

⁷ Salman, B. (2017). *An evaluation of the Nigeria electricity sector post privatization*. Journal of Energy and Environment, 9(1).

⁸ Zeng, D.Z. (2008). *Knowledge, Technology and Cluster-Based Growth in Africa*. World Bank Institute. 66.

⁹ Section 9, Constitution of the Republic of South Africa, 1996 (hereinafter referred to as South African Constitution).

¹⁰ Section 42, Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as Nigerian Constitution).

¹¹ Article 27, Constitution of Kenya 2010 (Hereinafter referred to as Kenyan Constitution).

¹² Goosby, B. J., & Heidbrink, C. (2013). *The Transgenerational Consequences of Discrimination on African-American Health Outcomes*. Sociology compass, 7(8), 630-643.

For Constitutions without an express provision for the horizontal application doctrine, courts have had mixed reactions to the liability of private individuals for human rights violations. There have been several arguments for and against the horizontal application doctrine. It is generally believed that relationships between individuals are strictly within the private scope and should not be decided as a Constitutional law matter. This position is in furtherance of the vertical application of human rights which imposes duties on the States only. Over the years, this model of Constitutionalism has been heavily criticized as it seems to ignore disparities of power within the private sphere.¹³ Discrimination comes to play in several relationships among private individuals. In recognition of this, several Constitutional systems like South Africa and Kenya have extended the protection of freedom from discrimination to private relationships. It is a mystery that these two countries had previous Constitutions which did not provide for this doctrine. It then becomes a huge concern as to the reason the drafters of the current Constitutions had to entrench the doctrine in the Constitution.

Though Nigerian courts have made efforts to apply Constitutional rights horizontally as will be discussed in chapter three of this thesis, the term itself is not pronounced. Previous authors have attempted to analyze the presence and application of the doctrine of horizontality of human rights generally in South Africa and Kenya. Bedi¹⁴ analyzed the importance of nondiscrimination on the ground of race in terms of employment for a horizontal application and how a Constitution must constrain the acts of both state and non-state actors. He however does not give an extensive analysis of the provision dealing with nondiscrimination to show the intention of the drafters. Chirwa¹⁵ did an extensive comparison of five jurisdictions in relation to the horizontal application of fundamental rights and concludes by restating the

¹³ Tushnet, M. (2003). *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*. 1 Int'lJ. Consti. L. 79.

¹⁴ Bedi, S. (2014). *The scope of formal equality of opportunity: the horizontal effect of rights in liberal Constitution*. *Political Theory*, 42(6), 716-738.

¹⁵ Chirwa, D. M. (2006). *The horizontal application of Constitutional rights in a comparative perspective*. *Law, Democracy & Development*, 10(2), 21-48.

differences between them. He fails to draw lessons from each jurisdiction for the adoption of better practices by others. Other scholars like Matu¹⁶ and Sang¹⁷ have examined the horizontal application of human rights as a whole in Kenya using case laws. Nwabueze¹⁸ in his work also opined that the supremacy clause in section 1 of the Nigerian Constitution suggests a horizontal application of the Constitution. This thesis will draw experiences from other jurisdictions to identify whether this kind of interpretation should be inferred in the Nigerian context. Also, it will analyze the extent to which the concept has been applied in the comparators' countries using recent case laws as a buildup on what previous scholars have done. It further states the suitability of the freedom from discrimination for a horizontal application.

This comparative study of South Africa, Kenya, and Nigeria aims to impact the traditional ideas about the functions and application of freedom from discrimination. It adds a new dimension to the analysis of the horizontal effect doctrine to the freedom from discrimination and sheds light with regard to the changes happening in the area of traditional Constitutionalism. The three countries have been selected because they share some common features. They are pluralistic in nature. They are characterized by a practice of diverse tribes in their system making them prone to different grounds of discrimination. It is also imperative as the study will represent the Eastern, Western, and Southern Regions of Africa.

In discussing the horizontal application of the right to freedom from discrimination in South Africa, Kenya, and Nigeria, this thesis will be divided into four chapters. The first chapter encapsulates the whole idea of the thesis by discussing the key concepts of the thesis. The second chapter analyses the Constitutional protection of freedom from discrimination as well as Constitutional provisions for the horizontal application of human rights and the freedom

¹⁶ Matu, D. (2017). *Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review*. *Strathmore Law Review*, 2(1), 63-84.

¹⁷ Sang Y. K., B. (2018). *Horizontal application of Constitutional rights in Kenya: comparative critique of the emerging jurisprudence*. *African Journal of International and Comparative Law*, 26(1), 1-27.

¹⁸ Nwabueze, R. N. (2010). *Securing widows' sepulchral rights through the Nigerian Constitution*. *Harvard Human Rights Journal*, 23(1), 141-156.

from discrimination where applicable. The third chapter examines the current status of the doctrine using case studies and the suitability of the freedom from discrimination for horizontal application. The fourth chapter makes a conclusion on the research with adequate recommendations. The following subheadings shall examine the concepts of this thesis so as to have a general overview of what the research entails.

1.2 FREEDOM FROM DISCRIMINATION

“No one is born hating another person because of the color of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite.”

- Nelson Mandela (1994)¹⁹

In a general sense, to discriminate means to “choose or make some type of variation between options.” It has been revealed that the word “discrimination” has two meanings based on language and tone. It could be a positive one similar to making a “distinction” or “differentiation” which is in favor or against a person, a thing, or a quality. In this instance, one could say: “It is essential to discriminate between good or bad” or “She is a woman of discriminatory taste”. The other is a negative kind which equates to discrimination against a person. This is usually based on prejudice.²⁰ When it is said that “South Africa discriminates in its dealings in relation to black people,” a possible interpretation could be that black people in South Africa are exposed to a treatment that is not only different but worse than one shown towards the other parts of the population. When used in this sense, discrimination cannot be said to be a distinction in favor of the affected individual. For the purpose of this research, it is a distinction based on negative and antagonistic feelings and intentions.²¹

¹⁹Mandela, N. (2009). *Long Walk To Freedom*. Vol 2: 1962-1994. Hachette UK.

²⁰Bamforth N. (2007). *Prohibited Grounds of Discrimination under the EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap*. Cambridge Year Book of European Legal Studies, Ch 1.

²¹Lerner, N. (2021). *Group Rights and Discrimination in International Law*. Leiden, the Netherlands: Brill.

The concern of discrimination law is not to prohibit all of these distinctions because it is in fact not possible. Rather, it aims to counter the ones that could be seen as furthering resentment or hurt- negative distinctions made on the basis of race, sex, disability, or religion.²² Equality is a chief essential in the kind of society which we all desire.²³ There have been several attempts to transcribe this right into reality ranging from international and domestic human rights documents in diverse jurisdictions. Notwithstanding, discrimination in diverse forms such as religious, gender, ethnic, and race still exist.²⁴ As would be discussed in the next chapter, the comparator countries have been obliged by the provision of their Constitutions to abide by the human rights principles of some international laws. Hence the need to have background knowledge of what the term “to discriminate” entails. According to the court in *Prinsloo v Van der Linde and Another*,²⁵ unfair discrimination means the act of treating people in a different way which threatens their dignity as humans.

1.3 HORIZONTAL APPLICATION OF HUMAN RIGHTS

The horizontal application of Constitutional rights is regarded as one of the most basic, yet disputed issues in the field of comparative Constitutional law.²⁶ The horizontal application of human rights has been defined as the “concept of Constitutional law that determines the regulation of relations between private individuals.”²⁷ As it has been noted, companies and other non-state actors have the capacity to violate human rights.

²² Ibid.

²³ KC, S. F. F. (2022). *Discrimination Law*. Oxford University Press.

²⁴ Ibid.

²⁵ (1997) 3 SA 101 (CC).

²⁶ Black, Jr. C. (1967). *Foreword: "State Action," Equal Protection, and California's Proposition*. 81 Harvard LR 69, 95.

²⁷ Gardbaum, S. (2003). *The "Horizontal Effect" of Constitutional Rights*. Michigan Law Review, 102(3). 387-459.

Authors have classified the horizontal application of human rights to be direct or indirect.²⁸ It is direct when it is initiated by a private individual against another private person. By so doing, the private individual is able to claim remedies for the violation of these human rights. This was clearly exhibited in an Irish Supreme Court decision, *Lovett v Grogan*²⁹ where the plaintiff, a holder of an occasional passenger license under the Road Transport Act, 1932, carried out his transport business between Dublin and County Clare. The defendant, a principal shareholder in one of the other defendant companies also carried out the same business without the said license. The plaintiff instituted proceedings in the High Court seeking an injunction against the defendants for operating such a business without a license. The plaintiff further claimed that this was against his Constitutional right to earn a living. The trial judge ruled in favor of the plaintiff and granted the injunction. The defendants appealed to the Supreme Court. The appeal was dismissed. The Supreme Court further held that on the evidence produced, the defendants' activities were an actual threat and interference to the plaintiff's Constitutional rights to earn a living by lawful means. This projects the application of a Constitutional right between private individuals.

The horizontal application is indirect when the "values that form the basis of the institution of the rights are adhered to when interpreting laws."³⁰ For instance, in a situation whereby a private law matter is determined in accordance with the fundamental rights instead of bringing a direct Constitutional right issue. In this instance, where a private law obligation is owed to another private party, such obligation's content should be determined in tandem with the applicable fundamental rights as opposed to bringing a direct Constitutional right

²⁸ Lubano, C.N. (2013). *The application of fundamental rights to private relations in Kenya: Striking a balance between fundamental rights and the freedom of contract* Published LLM Thesis, University of Cape Town, Cape Town. 33.

²⁹ (1995) 3 IR 132, 133.

³⁰ Matu, D. (2017). *Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review*. 2 Strathmore L. REV. 63. Bluebook 21st Ed.

violation claim.³¹ Therefore, the Bill of Rights would not “outweigh ordinary law or generate its own remedies rather, it operates indirectly through the ordinary laws’ furtherance of its values.”³²

1.4 HORIZONTAL APPLICATION VERSUS VERTICAL APPLICATION

Most liberal democratic Constitutions recognize that the exercise of state power poses a threat to individual rights and freedoms. For this reason, human rights are generally deemed to be enforceable against the state.³³ In contrast, relationships between individuals are strictly considered to be in the ambit of the private sphere and therefore should be outside the purview of Constitutional law.³⁴ This position represents the vertical approach where Constitutional rights bind and impose duties on state actors only. The term “horizontal” is used to denote the relations among private individuals in contrast to a vertical relation which is between the state and an individual. A vertical relation is believed to evoke the concept of subordination. This made it necessary to create norms that can be used to oppose those who have the power to “create, execute and interpret norms.”³⁵ As opposed to this, the concept of horizontality proposes relations between equally positioned parties.

The South African Constitutional Court per Kentridge AJ explained the terms “vertical” and “horizontal” application of the Bill of Rights in *Du Plessis v De Klerk* as follows:

“The term “vertical application” is used to indicate that the rights concerned on persons by a Bill of Rights are intended only as a protection against the legislative and executive

³¹ Collins, H. (2012). *On the (in) compatibility of human rights discourse and private law*. LSE Law Society and Economy Working Papers. London School of Economics and Political Science Law Department. 16.

³² Currie, I., & De Waal, J. (2001). *The New Constitutional and Administrative Law: Constitutional Law* (Vol. 1). Juta.

³³ Tushnet, M. (2003). *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*. 1 Int'l J. Consti. L. 79.

³⁴ Boyd, S. B. (Ed.). (1997). *Challenging the Public/Private Divide: Feminism, Law, and Public Policy*. University of Toronto Press.

³⁵ Ibid.

*powers of the State in its various manifestations. The term “horizontal application” on the other hand indicates that those rights also govern the relationships between individuals, and may be invoked by them in their private law disputes.”*³⁶

Over the years, the vertical concept has been heavily criticized for ignoring inequalities of power within the private sphere just like it is present in the public domain.³⁷ It has therefore been argued that individual rights can also be imperiled by extremely powerful private actors both within economic and social spheres.³⁸ According to Reddy,³⁹ “the Bill of Rights would be reduced to an ineffectual statement of ideals if its application were limited to the vertical sphere”. The vertical approach envisages a Constitution that primarily constrains the power of the state within the public domain while the private domain is free of Constitutional regulation.⁴⁰ This gives access to private individuals to constantly violate human rights without the fear of being punished. The next chapter examines the Constitutional protection from discrimination as well as its horizontal application to see how the comparator countries have attempted to give effect to the right.

³⁶ (1996) 3 SA 850 (CC).

³⁷ Gardbaum S. (n27).

³⁸ Tushnet (n 13).

³⁹ Reddy, K. K. (2006). *The horizontal application of the equality guarantees and race discrimination by the business sector*. Journal of South African Law, 2006(4), 783-802.

⁴⁰ Bose, S., & Paul, R. (2021). *Horizontal Enforcement of Queer Rights in India: Constitutional Solution*. De Lege Ferenda, 4(2), 66-93.

CHAPTER TWO

THE HORIZONTAL APPLICATION OF THE FREEDOM FROM DISCRIMINATION IN KENYA, NIGERIA, AND SOUTH AFRICA

2.1. FREEDOM FROM DISCRIMINATION IN KENYA, NIGERIA, AND, SOUTH AFRICA

In several countries of the world without an exception to the case studies – South Africa, Kenya, and Nigeria, protections against unpleasant forms of discrimination are addressed primarily through Constitutional law.⁴¹ The Constitutions of South Africa, Kenya, and Nigeria prohibit all forms of discrimination.⁴² These countries have also ratified international and regional human rights agreements prohibiting the same.⁴³ Particularly, the three countries have national legislations which address the issues of discrimination. Unlike Kenya and Nigeria, South Africa has an Anti-Discrimination Act – Promotion of Equality and Prevention of Unfair Discrimination Act⁴⁴ which lists prohibited grounds of discrimination in its Definition section.⁴⁵ Section 2 of the Act provides for its object which is to give effect to section 9 of the South African Constitution which provides that legislation should be enacted for the enforcement of the equality section. The Act does not provide for discrimination at the place of employment because the Employment Equity Act of 1998 specifically provides for this.⁴⁶ Apart from the Kenyan Constitution, the country's Employment Act 2007 prohibits

⁴¹ Nicholas B., et al, (2008). *Discrimination Law: Theory and Context (Text and Materials)*. 1st Ed. Sweet and Maxwell (London).

⁴² Ibid.

⁴³ Article 2(5) Kenyan Constitution; Section 12 Nigerian Constitution; Section 39 South African Constitution.

⁴⁴ Act 4 of 2000.

⁴⁵ Ibid, Section 1.

⁴⁶ Chapter II, Employment Equity Act, No. 5 of 1998.

discrimination in employment on several grounds in its.⁴⁷ Nigeria prohibits discrimination against persons diagnosed with HIV and AIDS using the HIV and AIDS (Anti-Discrimination) Act of 2014. The country also enacted the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018. There is no general anti-discrimination law in Kenya and Nigeria besides from the Constitution like in South Africa.

With the history of apartheid in South Africa, it is glaring that the issues of equality and non-discrimination are an important feature of the country. The post-apartheid South African Constitution is one whose protection against discrimination can be said to be hinged on the apartheid history of the country.⁴⁸ A Constitution that is committed to eradicating all forms of discrimination is proof that South Africa won its battle against the apartheid system. From the human rights perspective, any practice which impedes the dignity of the human person is not to be treated with levity. South Africa had a significant history that could have informed its Constitutional rights provision against discrimination.⁴⁹ The Apartheid system was characterized by discrimination against black people in every aspect. O'Regan noted in *S v Makwanyane and another* that “equality has a special place in the South African Constitution which is an emphatic renunciation of our past in which inequality was systematically entrenched.”⁵⁰ It is recorded that the black people in the country were hindered from owning properties or residing in some particular areas which constituted about 90 percent of the land mass of South Africa because such areas were classified as “White”. More discriminatory acts include barring Blacks from senior jobs and access to good schools, and civic amenities such as transport systems, public parks, and libraries, among others. To make matters worse, the Blacks had separate and inferior facilities.⁵¹ South Africa addressed its non-discrimination rule

⁴⁷ Section 5, Employment Act, Laws of Kenya, Chapter 226.

⁴⁸ Cheadle, H., & Davis, D. (1997). *The application of the 1996 Constitution in the private sphere*. South African Journal on Human Rights, 13(1), 44-66.

⁴⁹ Ibid.

⁵⁰ (1995) 3 SA 391 (CC).

⁵¹ Reddy (n39)

from the interim Constitution and this in fact formed the basis upon which several decisions have been made in the Constitutional court. In *President of the Republic of South Africa and Another v Hugo*, the court held:

*‘At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new Constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular group.’*⁵²

South Africa is committed to getting rid of traces of discrimination in its system. To enforce the right to property in section 25 of the South African Constitution, the drafters made provision for legislative measures that may be taken to “redress the results of past racial discrimination”. Further on this is the fact that the provision for equality under the Constitution is classified as a “non-derogable right” which means it cannot be suspended temporarily by a state in a time of public emergency.⁵³ By virtue of section 9 of the South African Constitution, everyone is equal before the law and no one may be subjected to any form of discrimination on grounds such as race, gender, or sex among others. This section also made it known that it is possible to have fair and unfair discrimination which buttresses the point made in the first chapter that there could be positive discriminatory instances. It has been observed that the drafters of the South African Constitution may have adopted Section 9 because of the recognition of the fact that discrimination against a disenfranchised group of people may lead to disadvantage and harm which further promotes inequalities.⁵⁴ It is in fact the first right to be listed in the chapter that embodies the Bill of Rights.

The Kenyan Constitution also provides for rights that may not be limited in its article but unlike the South African Constitution, it does not provide for unlimited protection for the

⁵² (1997) 4 SA 1 (CC).

⁵³ Section 37, South African Constitution.

⁵⁴ *Brink v Kitshoff* (1996) 6 BCLR 752 (cc) 769 B-C.

freedom from discrimination. Article 27 of the 2010 Kenyan Constitution provides for equality and freedom from discrimination. This section recognizes that every person is equal before the law and protects persons from being subjected to discriminatory acts on the grounds of race, sex, pregnancy, belief, culture, etc. Subsection 6 permits the taking of certain legislative actions to ensure that past discrimination against individuals or groups is redressed. In the protection of the freedom of expression in Article 33, the Kenyan Constitution provides that free speech does not allow for an “advocacy of hatred that is based on any ground of discrimination” which is provided for in Article 27(4). Just like the South African case, the Kenyan Constitution also ensures that discriminatory acts are avoided in situations like access to land⁵⁵ and the procurement of public goods and services.⁵⁶ The Kenyan Constitution in its interpretation section also referred to what is called a “marginalized group” as a group of people who had been disadvantaged by discrimination on one of the grounds listed in Article 27(4). Equality, equity, non-discrimination, and the protection of the marginalized remain core national values and principles of governance in the nation.⁵⁷

The 1999 Constitution of the Federal Republic of Nigeria has quite a number of sections that recognizes protection from discrimination. While addressing the political objectives of the state, Nigeria pledges in section 15(2) of its Constitution to actively encourage national integration and thereby prohibit discrimination on the grounds of place of origin, religion, sex, and ethnicity, among others. In achieving its social objectives, all citizens are to have the opportunity of securing adequate means of livelihood and opportunities to secure suitable employment without any form of discrimination.⁵⁸ The right to freedom from discrimination itself is provided for in section 42 of the Constitution. This provision prohibits the subjection of any citizen of Nigeria to restrictions to which other citizens are not made subject primarily

⁵⁵ Article 60(1)(f) Kenyan Constitution.

⁵⁶ Ibid, Article 227 (2) (b).

⁵⁷ Ibid, Article 10.

⁵⁸ Section 17 (3) (a) Nigerian Constitution.

because of their ethnic affiliation, place of origin, sex, or religion. A limitation to this is found in subsection 3 which provides that “the right shall not invalidate any law which imposes a restriction on the appointment of any person to an office under the state or as a member of the armed forces in Nigeria.”⁵⁹

The doctrines of equality and non-discrimination are also provided for in Articles 7 and 26 of the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966) respectively. Quite interesting to note that asides from the Constitutions of these three countries, South Africa, Kenya, and Nigeria have provisions in their Constitution where the courts are to have regard to international law when interpreting the rights in the Constitution.⁶⁰ This evidences the importance of this right and how the enforcement of other rights could be dependent on it. With the establishment of how the Constitutions in this country have exhibited the importance of the entrenchment of freedom from discrimination, it is pertinent to examine how and to whom this right is to be applied.

2.2. THE HORIZONTAL APPLICATION OF THE FREEDOM FROM DISCRIMINATION IN THE CONSTITUTIONS OF KENYA, NIGERIA, AND SOUTH AFRICA

The deep scars of the practice of discrimination are still evident in our everyday lives. It has been noted that private individuals now get to be the primary actors of this propaganda.⁶¹ As a reservoir of fundamental rights, the Constitution makes provisions for the application of these rights.⁶² It does this by stating the rights holders and the duty bearers of the fundamental rights and other circumstances surrounding them. This section analyses the Constitutional

⁵⁹ Section 42(3) Nigerian Constitution.

⁶⁰ (n 9, 10, 11).

⁶¹ Tushnet (n13).

⁶² Ibid.

provision for the application of freedom from discrimination to private individuals for a better examination of the purport of each Constitution.

Section 8 of the South African Constitution provides for the application of the Bill of Rights contained in chapter two of the Constitution. Subsection 2 states that the Bill of Rights would be binding on both natural and juristic persons but the nature of rights and duties imposed by such rights must be taken into account. It further provides for conditions to make the Bill of rights applicable to natural and juristic persons. It would be applied by developing common law where no legislation gives effect to the enforcement of the violation of that particular right.⁶³ Further in the equality provision itself, subsection 4 of section 9 states that “no person may unfairly discriminate directly or indirectly against anyone” on the grounds that have been listed in the section. Beyond the general provision on the application of the Bill of Rights in South Africa, the Constitution still makes it clear that the equality provision is to be applied horizontally.⁶⁴ Surprisingly, the freedom and security of the person also has an additional horizontal applicability in the South African Constitution as section 12(1)(c) states that everyone is free from all forms of violence from either “public or private persons”. It may be said that the South African Constitution is unambiguous in its wordings and should probably not encounter issues in its application. The approach adopted towards the doctrine of horizontal application of human rights in the South African Constitution of 1996 is different from that under the interim Constitution of 1993. In the interim Constitution, there was no express provision for horizontal application.⁶⁵ The drafters of the South African Constitution had to settle the debate on the horizontal application of human rights with the adoption of the final Constitution in 1996. By virtue of Section 8 of the 1996 Constitution, therefore, both the state and private persons are bound by the Constitutional protection of human rights. This would be

⁶³ Section 8(3)(a) South African Constitution.

⁶⁴ Section 9(4). It further states that National Legislation must be enacted to protect this right. This is why the Equality Act was enacted in 2000.

⁶⁵ Chapter 3 (Bill of Rights) of the 1993 Constitution of South Africa.

of no much surprise as the backdrop of South Africa's past may have demanded horizontality. This in essence is to rebuild the ethical relations that had been shattered during apartheid.⁶⁶ Under the South African Interim Constitution, the non-discrimination clause only applied directly against the state. It should be noted that section 8(2) is a general horizontal application provision while section 9(4) is a special one that applies to the horizontal application of the freedom from discrimination.

The 1996 Constitution shifted the whole narrative of the vertical application of human rights. Between the enactment of the interim Constitution and the drafting of the final Constitution, discrimination (in the instance of South Africa, racial discrimination) was still persistent among private individuals. The country had in time past been faced with instances of inequalities resulting from unjust legislations which were made by past political eras and it therefore suggested that the responsibility was initially set to be borne by the state as the unjust legislations had to be removed to prevent inequalities in the future.⁶⁷

The Kenyan Constitution provides for the application of the Bill of Rights in Article 20. Subsection 1 provides that the Bill of Rights binds all state organs and all persons. The Constitution in subsection 3 also permits the court to "develop the law to the extent that it does not give effect to a right or fundamental freedom." It further gives discretion to the court to adopt the interpretation which favors the enforcement of the respective right. Article 27(5) provides for the application of the equality and freedom from discrimination right to private individuals by stating that "a person shall not discriminate directly or indirectly against another person." Just as in the case of the South African Constitution, the only right apart from the freedom from discrimination which is specifically stated to apply horizontally is the freedom and security of the person.⁶⁸ Prior to the 2010 Constitution, most courts subscribed to a vertical

⁶⁶ Friedman N, (2014). *The South African Common Law and the Constitution: Revisiting Horizontality*. South African Journal on Human Rights, 30(1), 2014. 63–88.

⁶⁷ Ibid.

⁶⁸ Article 29(c).

application mode which holds that rights could only be enforced against the State. The 2010 Constitution repealed the 1963 Constitution in Kenya. The repealed Constitution never made express provision for the horizontal application of human rights, unlike the 2010 Constitution. The fundamental rights chapter of the Nigerian Constitution could be said to be focused on rights holders only. It is also opined to be silent on the horizontal application of not just the freedom from discrimination but every other right. Nowhere in the sections under the chapter which embodies the fundamental rights was the state referred to. Therefore, in the interpretation of the intention of the drafters, section 42 (a) and (b) points to “executive and administrative action” which should not tamper with the freedom of discrimination of the citizens of Nigeria. It is a well-known fact that the executive is an arm of government. Defining who possesses the powers to perform “administrative action” may seem difficult since both the public and private sectors carry out administrative duties. Section 42 of the Nigerian Constitution seems to be unclear as it does not direct anyone as the duty-bearer, not even the state. A contested stand by Nwabueze is that Section 1 of the Constitution dealing with the supremacy of the Constitution implies the intention of the drafters for a horizontal application of the Constitution.⁶⁹ This section provides that the Nigerian Constitution is supreme and “its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.”⁷⁰ Such an interpretation could be quite misleading. The difference between the rule of law and the applicability of the provisions of the Constitution is pertinent. The most possible interpretation of this provision is to establish the approval that the nation is willing to have the Constitution guide its affairs and not for it to enforce horizontality.

While the horizontality concept has been embraced by the Constitutions of South Africa and Kenya, Nigeria is yet to follow suit in expressly providing for horizontality in her

⁶⁹ Nwabueze (n18)

⁷⁰ Section 1(1) Nigerian Constitution.

Constitution. After a review of how the Constitution have provided for the applicability of the freedom from discrimination, the next chapter will look into how courts have applied the provision of the Constitution to cases initiated before it.

2.3. ARGUMENTS FOR AND AGAINST THE HORIZONTAL APPLICATION OF HUMAN RIGHTS

There have been several arguments for and against the application of human rights between private individuals. A key argument is an acknowledgement that “new centers of power in addition to the state have emerged which has led to the need for a divergent view of the dimensions of what is called the “public sphere”.”⁷¹ To support this notion, Joel Barkan noted that in the global economy, “there has been less display of political authority which has led to growing concerns that the doctrine of Constitutionalism could not be an adequate check on political power if it only focuses on the roles of states.”⁷² Furthermore, it should be noted that private entities are just as capable as states to cause oppression.⁷³ One of the reasons to justify the necessity for the application of Constitutional rights between private actors is precisely the acknowledgement that private individuals or institutions can exert power similar to that of the state.

It is also pertinent to speak of the previous functions of states which are now vested in exercised by multinationals and are prevalent in key areas of the economy like energy, telecommunications, transport, water, and sanitation.⁷⁴ These multinationals are increasingly controlling and dictating the working conditions of the employees in the countries where they

⁷¹ Clapham A. (n3)

⁷² Bakan, J. (2004). *BOOK EXCERPT The Corporation: The Pathological Pursuit of Profit and Power How companies extract money from young children, and more.* DOLLARS AND SENSE, 21-23.

⁷³ Ibid.

⁷⁴ Nandakumar S.M. (2013). *The shortcomings of corporate ethics and corporate social responsibility in the protection of human rights.* 1(2) International Journal of Research and-Analysis. 454.

are situated.⁷⁵ A vertical application of human rights would then make it difficult to hold them accountable for improper treatment of their customers according to domestic laws.⁷⁶

Notwithstanding the sound arguments for the imposition of liability on private enterprises, there have been counter-arguments as well. One of which is the fact that private entities are in business and the major reason for their existence is to make a profit and promote the interest of their respective shareholder. Therefore, they should not be made to go out of their way to protect human rights as their only obligation is to obey the law.⁷⁷ It has further been argued on behalf of private actors that a ‘‘morally conscious company may be disadvantaged competitively when it spends time and effort on observing human rights while its disobedient counterparts do not even bother to comply with the human rights standards.’’⁷⁸ Gerstenberg stated the effects of extending fundamental rights to private actors. According to him, ‘‘holding private actors accountable to that which is applied to public bodies threatens the autonomy of the private parties.’’⁷⁹ He also argues that the extension of human rights to private person shifts authority from commercial or civil law courts to Constitutional courts rendering private redundant.⁸⁰ Reddy posits that in order to achieve a society free of discrimination, it is wise to make the application of the Constitutional right to the private sector. He states that the horizontal application of equality and non-discrimination is quite important to attain an equitable society.⁸¹

⁷⁵ Sethi, S. P. (2002). *Corporate codes of conduct and the success of globalization*. Ethics & International Affairs, 16(1), 89-106.

⁷⁶ Murphy, S. D. (2004). *Taking multinational corporate codes of conduct to the next level*. Colum. J. Transnat'l L., 43, 389.

⁷⁷ Muchlinski P. (2001). *Human rights and multinationals: Is there a problem?* 77(1) International Affairs. 35.

⁷⁸ Vernon R (1999) 'Business and Human Rights' Harvard Law School Human Rights Program. 49. < <http://hrp.law.harvard.edu/wp-content/uploads/2013/08/BusinessandHumanRights.pdf> > accessed on 26th February, 2023.; Lindenberg, S. (2010). *Fundamental rights in private law: Anchors or goals in a globalizing legal order?* In Globalization and Private Law. Edward Elgar Publishing.

⁷⁹ Gerstenberg O. (2004). *Private law and the new European Constitutional settlement*. European Law Journal 10(6). 769.

⁸⁰ Ibid.

⁸¹ Reddy (n 39).

Human rights should be flexible so as to cater for violations which are not made by the state. Even where states are seen as the duty bearers, it should be its responsibility to ensure that private individuals do not encroach on each other's' rights. Human beings exist within a society and should therefore be responsible for acts done against other individuals. The proponents for the vertical application of human rights in South Africa relied on the premise that the primary function of the Constitution is to limit public power and where private power is abused, it should be taken care of by legislation.⁸² A vertical approach was accepted especially among lawyers because it displayed great willingness for a firm separation between private and public law in any given legal system.⁸³

⁸² Ibid.

⁸³ Van der Walt, A. J. (1995). *Marginal notes on powerful (l) legends: critical perspectives on property theory*. *THRHR*, 58, 396.

CHAPTER THREE

THE PRACTICE OF THE HORIZONTAL APPLICATION OF THE FREEDOM FROM DISCRIMINATION IN SOUTH AFRICA, KENYA AND NIGERIA

3.1 CASE STUDIES FROM KENYA, SOUTH AFRICA AND NIGERIA

The status of the horizontal application of Constitutional rights has been likened to that of a “neglected but gifted child with huge potential seeking to be released.”⁸⁴ Being aware of the commitment to protecting freedom from discrimination and how the comparators’ countries have sought to apply these rights in their Constitutions, it is pertinent to examine how real this has been using decided cases. To achieve this, reference will be made to decisions of general human rights as well as the freedom of discrimination where available. Inference would also be drawn from these decisions to determine the suitability of the freedom from discrimination for a horizontal application.

Chapter two of this thesis has revealed the position of previous Constitutions of Kenya and South Africa on the horizontal application concept. This made most courts follow the vertical application mode where human rights violations could only be enforced against the State. In Nigeria, though not present in the Constitution, research shows that while some judicial officers have been reluctant to apply human rights violations between private individuals, others have followed the doctrine.

⁸⁴Banda, S. (2009). *Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance*. 31 Dublin University Law Journal. 263-97, at 263.

3.1.1 PRACTICE IN KENYA AND SOUTH AFRICA BEFORE THE EXISTING CONSTITUTIONS

In *Kenya Bus Services Limited & 2 others v Attorney General & 2 others*, Nyamu J stated that:

*“Moreover, fundamental rights and freedoms are contained in the Constitution and are principally available against the State because the Constitution's function is to define what constitutes Government and it regulates the relationship between the Government and the governed. On the other hand, the rights of individual interests are taken care of in the province of private law and are invariably redressed as such.”*⁸⁵

Interestingly, in *Richard Nduati Kariuki v Leonald Nduati Kariuki and another*⁸⁶ where the court had ruled that the repealed Constitution only recognized vertical application of human rights, the judge went a step further to state that there is a need for a paradigm shift to make for development in the interpretation of Constitutional provisions to cater for private actors who were increasingly carrying out public duties and had accumulated powers capable of abusing others.⁸⁷ According to him, the courts should not refuse to horizontally apply the Constitution whenever the facts of the case called for it.

As an institution vested with the power to determine the scope and also enforce rights, an issue the Constitutional Court of South Africa faced prior to the promulgation of the 1996 Constitution was the question of the horizontal application of human rights.⁸⁸ Prior to the enactment of the 1996 Constitution, it was highly contested whether the interim Constitution should be applied horizontally. This issue came up in *Du Plessis v De Klerk* where the court stated that:

⁸⁵ (2005) eKLR.

⁸⁶ (2006) eKLR, 7.

⁸⁷ Balkan J. (2004). *The Corporation: The Pathological Pursuit of Profit and Power*. New York, Free Press 2004.

⁸⁸ Basson, D. (1996). *South Africa's interim Constitution*. JS Afr. L., 411.

*“The provisions of Chapter 3 of the Constitution are not, in general, capable of application to any relationship other than that between persons and legislative organs of State at all levels of government...”*⁸⁹

The approach of the court in Du Plessis was perhaps the most surprising because it was delivered at a time when the Constitutional assembly was making preparations towards taking a different turn with the application of Constitutional rights to private individuals. In *Holomisa v Argus Newspaper*, Cameron J while writing in the context of the equality clause called for an acknowledgement of an “unqualified horizontal application” of the interim Constitution.⁹⁰ According to him:

“These provisions seem to make it incontestably plain that the Constitution envisages that certain bodies and persons would, without further legislative provision or further development of the common law, be bound by the fundamental rights chapter. An instructive test of this conclusion may be derived from section 8(2): In terms of that provision 'no person shall be unfairly discriminated against, directly or indirectly' ... If the chapter on fundamental rights really had unqualified 'horizontal' application, section 8(2) would operate to impose duties on parties between whom the law at present recognizes no prior legal relationship (and as between whom it is not alleged that one has committed an unlawful act). Thus, 'horizontal' applied, section 8(2) would impose an immediate duty on employers to cease unfair discrimination against job applicants, particularly on the 14 grounds specifically mentioned. Equally, it would oblige insurance companies to stop discriminating unfairly against applicants for life insurance. No one, to my knowledge, has suggested that the chapter on fundamental

⁸⁹ (1996) 3 SA 850 (CC).

⁹⁰ Dafel, M. (2015). *The directly enforceable Constitution: political parties and the horizontal application of the bill of rights: political rights since 1994 focus*. South African Journal on Human Rights, 31(1), 56-85.

rights at present applies in this way to two legal strangers. Our Courts may, of course, in time interpret the chapter to impose such duties.”⁹¹

3.1.2 PRACTICE IN KENYA AND SOUTH AFRICA UNDER THE EXISTING CONSTITUTIONS

After the new Constitution of Kenya came into force in 2010, it seemed that some officers of the court were still stuck in the old order. Gradually, the courts began to change their tune and now are more accommodating of horizontal application in cases where it is possible to do so.

The court in Kenya seemed to continue with the reasoning that had prevailed under the previous Constitution in some cases like *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited*.⁹² Here, Lenaola J relied on the *Kenya Bus Service* case by holding that Constitutional obligations were not to be fulfilled by individuals and that private law is the only platform that could address matters between individual persons. He also quoted Article 21 of the Constitution which states that it is the obligation of the state and every state organ to observe, protect, promote, and fulfill the rights in the Bill of Rights. He further stated that the obligation of the state had in no way been extended to the individual and therefore could not find the respondent liable for any violations. It is appalling because this case was decided in 2013 when the current Constitution which makes for a horizontal application had been enacted. Before this enactment, courts showed the willingness to apply the Constitution between private individuals where the Constitution provides for it.⁹³

⁹¹ (1996) 2 SA 588 (W) 596G-597C.

⁹² (2013) eKLR.

⁹³ *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* (2011) eKLR, 17-18. Although this case was set aside by the Court of Appeal.

In *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others*,⁹⁴ the petitioners (female golfers of the golf) were prevented from casting their votes after a majority of the Board of Directors who are the respondents passed a by-law that prevented the female golfers of the club from voting. The by-law only permitted female members to attend the meeting as mere attendees but it excluded them from casting their votes. According to the petitioners, this was a violation of the Constitutional right of freedom from discrimination. The petition was contested by the respondents on the ground that Limuru Country Club was a private entity, can only be governed by its own rules, and must be exempted from being constitutionally liable due to its private status. In dismissing this line of reasoning, the court stated as follows:

“...It cannot be safe, in a progressive democratic society to arrive at a finding that allows private entities to hide behind the cloak of privacy to escape Constitutional accountability. We think that it would be to accord a narrow, constricted interpretation to our Supreme Law, contrary to the canons of Constitutional interpretation that have for ages, infused our judicial system and which now find Constitutional sanction under Article 259 to accede to such a proposition. To accede to the respondents' proposition that private entities are insulated from the Constitutional duty to respect and uphold fundamental rights, to hold that private entities are completely shrouded by their private cloak from this Court's scrutiny is, we believe, to reverse the intention of the framers of the Constitution. It is to stop individual Kenyans of the very Constitutional protection that the Constitution of Kenya 2010 meant to jealously guard and leave them exposed and vulnerable in private dealings. This would effectively render the Constitutional protections to be of little or no practical value to the very persons

⁹⁴(2014) eKLR.

*designed to enjoy its protections and would, in our view, amount to abdication of this Court's primary responsibility conferred upon it by the people of Kenya.*⁹⁵

Even after the enactment of the Kenyan Constitution in 2010, courts still struggled with applying the Constitution to private matter.⁹⁶ The confusion in Kenya's application of this doctrine shows that the system is a weak one and the lack of clarity as to the circumstances of Article 20.

In cases like *Anne Nyokabi Muguiyi v NIC Bank*,⁹⁷ *Amy Kagendo Mate v Prime Bank Limited*⁹⁸ and *Jemimah Wambui Ikere v Standard Group Limited and Another*,⁹⁹ the Kenyan courts have subsequently affirmed that the 2010 Constitution was intended to apply Constitutional rights to relationships between private individuals. Specifically, in *Duncan Muriuki Kaguuru and Another v Baobab Beach Resort and Spa Ltd*,¹⁰⁰ the petitioner claimed that his right to equality and freedom from discrimination was violated by the respondent. The respondent in support of his case relied on the decision in *Kenya Bus Service* to disallow the application of Constitutional rights. Ngugi J held that *Kenya Bus Service* was decided before the enactment of the 2010 Constitution and was therefore excluded in the decision of the court. The court subsequently upheld the horizontal application doctrine.

Following the enactment of the final Constitution of South Africa in 1996, the Constitutional court in *Khumalo v Holomisa*¹⁰¹ held the right to freedom of expression can have a direct horizontal application effect relying on section 8(3) of the Constitution. Here, the court ruled on the effect of the section on the horizontal application of human rights by disregarding

⁹⁵ Ibid.

⁹⁶ *Isaac Ngugi v Nairobi Hospital & 3 others* (2013) eKLR; *C.O.M. v The Standard Group Ltd and another* HCK (Nairobi Law Courts) Petition No. 192 of 2011, reported in [2013] eKLR

⁹⁷ Petition No. 202 of 2011 [2012] eKLR.

⁹⁸ Petition No. 17 of 2013 [2013] eKLR.

⁹⁹ Petition No. 466 of 2012 as consolidated with Petition No. 416 of 2012 [2013] eKLR.

¹⁰⁰ HCK Constitutional and Human Rights Division Petition No. 223 of 2012.

¹⁰¹ (2002) ZACC 12.

the applicants' claim that section 8(1) which binds the judiciary is the applicable provision for a horizontal application. This, the court held will render section 8(3) which binds both natural and juristic persons redundant.¹⁰² Further, in *Hassam v Jacobs No and others*,¹⁰³ the applicant relied on section 9 of the Constitution for being excluded as a spouse of the deceased in polygamous Muslim marriage from the intestate succession. The court applied the sections of the Constitution without more and ruled in favor of the applicant. Also, in *Daniels v Scribante and another*,¹⁰⁴ the court agreed that the bill of Rights is capable of being enforced either horizontally or vertically as contained in section 8(2) of the Constitution but that not all rights are capable of being enforced horizontally. The court gave an example of administrative justice rights in section 33 of the Bill of Rights as one which can only operate vertically because of its nature and the duty it imposes. He also gave effect to the horizontality of the equality guarantee under section 9 as to be enforced both vertically and horizontally. In *MEC for Education, KwaZulu-Natal and others v Pillay*,¹⁰⁵ and *South African National Defence Union v Minister of Defence and others*¹⁰⁶, the court held that in cases concerning the horizontality of the right to equality, the Equality Act should apply and not section 9(4) of the Constitution which prohibits discrimination. South African has indeed proven not to be stuck in the old order and its willingness to adapt to change.

3.1.3 THE PRACTICE IN NIGERIA

The uncertainty of the horizontal application of human rights in Nigeria and West African nations, in general, could have been a result of previous decisions of the Economic

¹⁰² Woolman, S., & Davis, D. (1996). *The Last Laugh: Du Plessis v De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions*. South African Journal on Human Rights, 12(3), 361-404.

¹⁰³ (2009) ZACC 19

¹⁰⁴ (2017) ZACC 13.

¹⁰⁵ (2007) ZACC 21.

¹⁰⁶ (2007) ZACC 10

Community of West African States (ECOWAS) court refusing to apply Constitutional rights between individuals. Nevertheless, this should not be the belief as the ECOWAS court is of the opinion that domestic courts should take care of the concept of horizontality in the respective countries. For instance, in *Peter David v Ambassador Ralph Uwechue*¹⁰⁷ and *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The President of the Federal Republic of Nigeria*,¹⁰⁸ the ECOWAS Community Court of Justice held that where a dispute arises between private persons with respect to a violation of human rights which is provided in the African Charter on Human and Peoples' Right (African Charter), victims may only seek redress before the ECCJ when there is no effective forum at the national level. And while bringing this action, it may not be brought against private persons but an ECOWAS member state for its failure to protect the human rights of such citizens. In Uwechue's case, a Nigerian Police officer instituted an action against a former special representative of the Executive Secretary of ECOWAS. He claimed among other things that his right to respect and freedom from discrimination had been violated with respect to Article 28 of the African Charter. The ECCJ refused that it had a jurisdiction to adjudicate over the private persons who had been sued as defendants for violation of human rights. The reasons given for this decision by the court were that the assumption of such a jurisdiction will amount to ECCJ replacing domestic courts in human rights cases causing it to be overwhelmed by so many cases. This should mean that the ECCJ recognizes that West African domestic courts should apply human rights horizontally.

Some doubts exist as to whether there is a horizontal application of human rights in Nigeria. It is also uncertain as to the extent to which this doctrine applies in the country. For instance, the right to a fair hearing has constantly been held by the Nigerian courts not to be

¹⁰⁷ (ECW/CCJ/RUL/03/10).

¹⁰⁸ (ECW/CCJ/APP/07/10).

accessible to employees in private employment.¹⁰⁹ The Nigerian case between *Georgina Ahamefule v Imperial Hospital & anor*¹¹⁰ has been criticized for lacking comprehensive scrutiny by failing to address critical matters as it related to the non-discrimination in this instance, of people living with HIV. Durojaye¹¹¹ describes this situation as a “sweet victory” which left a “sour taste” in our mouths because it did not “advance the rights of the people living with HIV in the country”. Discrimination against people living with HIV in Nigeria in relation to access to employment and other social services is on the increase. In Ahamefule’s case, the plaintiff’s employment was terminated due to the discovery of her HIV status. By the time this was discovered, the plaintiff who was a nurse at the defendant’s hospital was pregnant. As a result of the humiliation, she lost the pregnancy because of the emotional trauma. She experienced all sorts of humiliation from the defendant especially the failure of the hospital to carry out a recommended clean-up on her following the miscarriage. This refusal was due to her HIV status as well. The court based its judgment on the African Charter on Human and People’s Rights and the International Covenant on Economic, Social and Cultural Rights. Ebenezer asserts that the provisions of the Constitution of the fundamental right to dignity and privacy “impose obligations on the government and individuals not to interfere with a person’s dignity and privacy.” He further opined that the obligations under human rights instruments and national Constitutions are to be enforced against the state but it should not be prevented from being applied to private individuals. The court held that the termination was malicious and therefore, unlawful.

It’s been revealed that in Nigerian courts, even where the opportunity presents itself, judges have found a way to stay away from addressing the issue of horizontality. This does not

¹⁰⁹ Chianu, E. (2007). *Towards fair hearing for all Nigerian Employees*. Review of Nigerian Law and Practice, 1(1), 29-43.

¹¹⁰ Unreported suit ID/1627/2000, judgment delivered by the Lagos High Court on 27 September 2012.

¹¹¹ Durojaye, E. (2013). *So sweet, so sour: A commentary on the Nigerian High Court's decision in Georgina Ahamefule v Imperial Hospital & Another relating to the rights of persons living with HIV*. African Human Rights Law Journal, 13(2), 464-480.

happen every time though as some would be inevitable.¹¹² *Mojekwu v Mojekwu* is a foremost case whose appeal at the Supreme Court in Nigeria was heard six years after the enactment of the 1999 Constitution of the federal republic of Nigeria. In that case, the lower court held that the defendant had violated the Constitutional protection of gender discrimination. While the Supreme Court upheld the decision, it refused to rule on the Constitutional rationale of the lower court.¹¹³ A year after, Justice Tobi ruled that the equal protection clause in the Constitution would be applicable to private persons while he held that a custom violated the freedom from discrimination guarantee against an applicant.¹¹⁴ There was no rationale nor further discussion on this notion by the court.

The silence in the Nigerian Constitution and the differing opinions of the courts has made the interpretation of the application of human rights ambiguous. The court held in *Abdulhamid v Akar & anor*¹¹⁵ that where fundamental rights have been violated by ordinary individuals and not government agencies, the victims are entitled to enforce the rights against private perpetrators just like they would have done against the state. The court further ruled that where there is no express prohibition of enforcing fundamental rights horizontally, victims can maintain actions against another individual for a fundamental right violation. The court also opined that the victims of such violations are at the discretion to either pursue remedies under the fundamental rights provisions or the various rules of court under common law.

In *Rapu v Ikuiegbowo & ors*,¹¹⁶ the court interestingly stated that it was “enthused by the appellant’s contention that a private individual cannot be found liable for the violation of the fundamental rights.” The learned justice calls it strange learning which has no backing in law. The court further relied on section 46 of the Constitution which does not stipulate that

¹¹² Nwabueze, R. N. (2010). *Securing widows' sepulchral rights through the Nigerian Constitution*. Harv. Hum. Rts. J., 23, 141.

¹¹³ *Mojekwu v. Mojekwu*, (1997) 7 N.W.L.R. 283 (C.A.); *Mojekwu v. Iwuchukwu*, (2004) 11 N.W.L.R. 196 (S.C.)

¹¹⁴ *Mojekwu v. Ejikeme*, (2005) 5 N.W.L.R. 402, 436 (C.A.).

¹¹⁵ (2006) LPELR-24 (SC)

¹¹⁶ (2018) LPELR-45253 (CA).

rights can only be enforced against the state. In *Akwa Savings & Loans Ltd v Udoumana & ors*,¹¹⁷ the issue was whether a limited liability company could be held liable for infringement of the fundamental rights violations by virtue of chapter IV of the Constitution. The court agreed with the respondent that the position of the Nigerian Constitution is that the chapter embodying the fundamental rights provisions are enforceable against both state and artificial persons. The court relied on the wording of the Constitution which states that “every individual is entitled to respect for the dignity of his person” by observing that the right extends to actions of both the state and private individuals.

Long before now, the Court of Appeal had been of the view that fundamental rights could be enforced against private persons but this is dependent on the kind of right involved as well as the circumstances of the situation.¹¹⁸ This is because section 46 of the Constitution which provides for the enforcement of fundamental rights empowers the aggrieved persons to institute action in court but does not state that such can only be brought against the state. It could therefore be said that the Nigerian Constitution is silent as to the horizontal application of fundamental rights. The court further stated that not all rights can be applied to private persons giving an instance of the right to personal liberty of Section 35 of the Constitution.

There have been situations where the court willingly applied freedom from discrimination between private individuals without objection from the opposing party. For instance, in *Wejinya & anor v Wordu & anor*¹¹⁹, the parties being private persons, the court of appeal held that the continuous assertion by the appellants that the respondents had an inferior membership in the family is a violation of Section 42 of the Nigerian Constitution. Also, in *Okafor & ors v Ntoka & ors*,¹²⁰ the applicants had claimed the violation of several rights under the Nigerian Constitution including the freedom from discrimination. The claim was denied

¹¹⁷ (2009) LPELR-8861 (CA)

¹¹⁸ *Kelvin Peterside v International Merchant Bank (Nigeria) Limited* (1993) 2 NWLR (Pt. 278) 712

¹¹⁹ (2021) LPELR-55774 (CA)

¹²⁰ (2017) LPELR-42794 (CA)

for procedural error and not once did the court mention that the fundamental rights violation could not be instituted against private persons. Relying on Kelvin Peterside's case, the respondent in *Agbeniha v Adejimiroye & anor*¹²¹ argued that certain provisions of the fundamental rights chapter of the Nigerian Constitution can only be enforced vertically that is, against the state. He further argued that section 33 of the Constitution cannot be enforced horizontally because the sanction for a right to life is already provided for in the criminal code. The court agreed with this notion without more.

3.2 SUITABILITY OF THE FREEDOM FROM DISCRIMINATION FOR HORIZONTAL APPLICATION

“Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relation”

- Madladla J in *Du Plessis v De Klerk*.¹²²

Usually, one could say that not all rights would be suitable to be applied horizontally. Determining when rights may be applied horizontally is a question that must be answered. While deciding whether Constitutional rights should be applied to private individuals, Gacheche J stated that courts should address it using a case-by-case basis to examine the circumstances of each case before determining the application of the doctrine.¹²³ Courts have had to attach conditions to be considered before they impose liability to a private person for the violation of human rights.¹²⁴

¹²¹ (2016) LPELR-40138 (CA)

¹²² (1996) 5 BCLR 658 (CC) 732 E-F.

¹²³ Ibid.

¹²⁴ Nwabweze (n112).

According to Sachs, “Any right to equality that does not extend obligations to private and juristic persons would be an empty one.”¹²⁵ Sachs was an active proponent of the horizontal school of thought and noted that where the Constitution regulates private relationships, especially in relation to discrimination, it would “ensure Constitutional protection for privatized apartheid.”¹²⁶ Anti-discrimination laws are not difficult to find in democratic societies. This right should be and is often applied horizontally except otherwise stated. This gives a clue that the freedom from discrimination is suitable for a horizontal application.¹²⁷ The comparators’ countries are multi-cultural societies that are prone to discriminatory situations by states and non-state actors. This makes the freedom from discrimination suitable for a horizontal application

It is safe to rely on Section 8(2) of the South African Constitution which highlights two conditions for applying human rights horizontally – the nature of the right and the duty the rights impose.¹²⁸ As stated above, discrimination is an important feature of a multicultural society and the protection the right should be paramount. The duty that the freedom from discrimination imposes also ensures that discriminatory acts are avoided. This thesis has examined how powers are being shifted from the public to the private spheres. This has made it possible to have private entities as duty bearers for protection from discrimination.

Mhlantla J’s also posited in *King N.O. and others v De Jager and others*¹²⁹ on circumstances where horizontal application may be endorsed. He court remarked that:

*“In subjecting private power to Constitutional control, section 8(2) recognizes that private interactions have the potential to violate human rights and to perpetuate inequality and disadvantage.”*¹³⁰

¹²⁵ Sachs, A. (1991) *Protecting Human Rights In A New South Africa*. Oxford University Press.

¹²⁶ Ibid. p157.

¹²⁷ Cheadle, H. (n48)

¹²⁸ Ibid.

¹²⁹ (2021) ZACC 4.

¹³⁰ Ibid. para 131.

He further held that direct horizontal application is of necessity because of the following reasons:

1. ‘‘The intensity, history and nature of the right to equality and what it seeks to achieve. This makes it evident that the right should be applied in private relationships.
2. There is a danger that not reaching into the private sphere could perpetuate inequality and disadvantage
3. Letting private persons off the net in a circumstance as this would negate the essential content of the right by undermining the Constitutional goal of achieving substantive equality.’’¹³¹

Certain rights are obviously not suitable for a horizontal application. Examples of this are the rights of the arrested, detained or accused persons by virtue of section 35 of the South African Constitution. This is because the officers of the law are acting within the duties of the offices they hold.¹³² From all indications, it is revealed that the nature of freedom from discrimination allows for it to be applied horizontally.

¹³¹ Sachs (n125).

¹³² Ibid.

CHAPTER FOUR

CONCLUSION

4.1 CONCLUSION

The development of the horizontal application doctrine has been informed by the fact that human beings, just like the state are capable of violating human rights. Moreover, the gradual privatization of responsibilities that had initially been performed by the states has brought about the need to take a turn from the vertical application of rights to a horizontal application. Specifically analyzing this concept from the freedom from discrimination perspective, this thesis advocated for the suitability of this right for a horizontal application. It gave a general overview of the horizontal application of freedom from discrimination using three African countries which have been stated to represent the Eastern, Western, and Southern parts of the continent. These countries appear to mirror an idea of what may be obtainable in other countries on the continent. The research also examined the extent of the application of freedom from discrimination to private relationships by diving into the texts of the Constitution itself. It went further to analyze whether this has in fact been effectively practiced.

In the course of this research, it was observed that the inclusion of the concept in the Constitution is not the most important but the understanding of the judges. The South African Constitution has been a forerunner of the horizontal application doctrine and had done so well by enacting the Equality Act in order to bring into effect the intention of the Constitution. Further, case studies have also proven the dedication of the country to applying freedom from discrimination between private parties. This right is seen to have been very essential to the making and development of the society which South Africa can boast of today. It was also traced to the apartheid history of the nation which had informed the respect for the right to its commitment to eradicate all of forms of discrimination. The Kenyan system on the other should be praised for its commitment to ensuring that human rights are applied to private individuals

owing to the fact that it took several years before the old Constitution was repealed to give effect to the doctrine. Notwithstanding the changes made to the Constitution, the courts still held on to the diverse interpretations each had before the 2010 Constitution. This is quite surprising because the provision of a horizontal application of human rights and particularly, the freedom from discrimination is well spelled out in the Constitution. Not applying it is tantamount to an inconsistent application of the Constitution and not also bringing into effect the intention of the drafters of the Constitution. Talking about inconsistency, the position in Nigeria seems to have a sweet-sour taste. While it is good that courts are receptive to the application of human rights to private individuals though it is not expressly provided for in the Constitution, it gives the court the liberty to interpret other provisions as they, please. This could be to the detriment of a just and democratic society going forward.

From this study, therefore, it is revealed that it is not enough to have this doctrine entrenched in the Constitution. The courts need to be aware of these changes and how it tends to affect society, especially in accessing justice. A Constitutional system that makes it strict that human rights will not be applicable to relationships between private individuals only does more harm than good. It gives private individuals the liberty to continually violate human rights because they do not get to be punished for it.

Human rights are a very important aspect of a democratic society. Human beings are exposed to diverse interactions with one another every day and therefore they have a duty to protect certain aspects of each other's life. This thesis, therefore, recommends the recognition of the likelihood of the violation of human rights by individuals. In this light, victims should not be rendered remediless because the Constitution does not allow for a horizontal application of rights. Though the silence in the Nigerian Constitution seems to have worked for it, it may not work for other countries like it has been examined in South Africa and Kenya. It is a safe measure to ensure that this doctrine is entrenched in the Constitution. While this is being

considered, judges should be carried along so as to avoid getting different decisions in similar cases. It would also be a good idea to educate the public on the turn the Constitution has taken in the application of human rights so they can be aware and make use of the remedies available to them. In fact, in the Nigerian situation, the system should not be relaxed because this research shows that there were times courts avoided ruling on the application of human rights between private individuals even when applicants raised it. It could be a source of concern in the near future. For this reason, the Nigerian system may consider expressly providing for the doctrine in its constitution. The recognition of human rights by several international laws as examined in the body of the thesis reflects its importance. Therefore, its protection should not be limited by a vertical application where it is glaring that a private person is a violator. If individuals have the right to institute actions for the protection of their human rights, it is just that they should hold a duty against fellow persons not to violate their human rights.

Deciding whether human rights are capable of being applied both vertically and horizontally is important as it is proof of transformative Constitutionalism. A Constitution which is willing to be flexible to meet the demands of society. This has proven that the time has come for the traditional way of attributing human rights duty to states only should be done away with. While it is true that the state has a major role to play in this, the judiciary must remain alive to the situation in the current Constitutional dispensation that now requires every person to respect, uphold and defend the Constitution.

BIBLIOGRAPHY

TABLE OF CASES

- Abdulhamid v Akar & anor (2006) LPELR-24 (SC).
- Agbeniha v Adejimiroye & anor (2016) LPELR-40138 (CA).
- Akwa Savings & Loans Ltd v Udoumana & ors (2009) LPELR-8861 (CA).
- Brink v Kitshoff (1996) 6 BCLR 752 (cc) 769 B-C.
- C.O.M. v The Standard Group Ltd and another Petition No. 192 of 2011.
- Daniels v Scribante and another (2017) ZACC 13.
- Du Plessis v De Klerk (1996) 3 SA 850 (CC).
- Georgina Ahamefule v Imperial Hospital & anor Unreported suit ID/1627/2000.
- Hassam v Jacobs No and others (2009) ZACC 19.
- Holomisa v Argus Newspaper (1996) 2 SA 588 (W) 596G-597C.
- Isaac Ngugi v Nairobi Hospital & 3 others (2013) eKLR.
- Kelvin Peterside v International Merchant Bank (Nigeria) Limited (1993) 2 NWLR (Pt. 278).
- Kenya Bus Services Limited & 2 others v Attorney General & 2 others (2005) eKLR.
- Khumalo v Holomisa (2002) ZACC 12.
- King N.O. and others v De Jager and others (2021) ZACC 4.
- Lovett v Grogan (1995) 3 IR 132, 133.
- MEC for Education, KwaZulu-Natal and others v Pillay (2007) ZACC 21.
- Mojekwu v. Iwuchukwu, (2004) 11 N.W.L.R. 196 (S.C.)
- Mojekwu v. Mojekwu, (1997) 7 N.W.L.R. 283 (C.A.).
- Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi (2011) eKLR, 17-18.
- Okafor & ors v Ntoka & ors (2017) LPELR-42794 (CA).
- Peter David v Ambassador Ralph Uwechue (ECW/CCJ/RUL/03/10.)
- President of the Republic of South Africa and Another v Hugo (1997) 4 SA 1 (CC).

Prinsloo v Van der Linde and Another (1997) 3 SA 101 (CC).

Rapu v Ikuegbowo & ors,¹ (2018) LPELR-45253 (CA).

Richard Nduati Kariuki v Leonald Nduati Kariuki and another (2006) eKLR, 7.

Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others (2014) eKLR.

S v Makwanyane and another (1995) 3 SA 391 (CC).

The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v

The President of the Federal Republic of Nigeria ECW/CCJ/APP/07/10).

Uhuru Muigai Kenyatta v Nairobi Star Publications Limited (2013) eKLR.

Wejinya & anor v Wordu & anor (2021) LPELR-55774 (CA)

TABLE OF LAWS AND STATUTES

Constitution of the Federal Republic of Nigeria, 1999 – Sections 1, 12, 15, 42

Constitution of Kenya 2010 – Articles 2, 10, 20, 27, 60, 227

Constitution of the Federal Republic of South Africa, 1996 – Sections 8, 37, 39,

Promotion of Equality and Prevention of Unfair Discrimination Act

Universal Declaration of Human Rights (1948)

International Covenant on Civil and Political Rights (1966)

Employment Equity Act of 1998

Employment Act 2007

HIV and AIDS (Anti-Discrimination) Act of 2014

Discrimination Against Persons with Disabilities (Prohibition) Act, 2018

TABLE OF BOOKS, JOURNALS AND ARTICLES

- Bakan, J. (2004) BOOK EXCERPT The Corporation: The Pathological Pursuit of Profit and Power How companies extract money from young children, and more. DOLLARS AND SENSE, 21-23.
- Balkan J. (2004) The Corporation: The Pathological Pursuit of Profit and Power. New York, Free Press 2004.
- Bamforth N. (2007) Prohibited Grounds of Discrimination under the EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap. Cambridge Year Book of European Legal Studies, Ch 1.
- Banda, S. (2009) Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance', 31 Dublin University Law Journal: 263-97, at 263.
- Basson, D. (1996) South Africa's Interim Constitution. JS Afr. L., 411.
- Bedi, S. (2014) The Scope of Formal Equality of Opportunity: The Horizontal Effect of Rights in Liberal Constitution. Political Theory, 42(6), 716-738.
- Black,Jr. C. (1967) Foreword: "State Action," Equal Protection, and California's Proposition. 81 Harvard LR 69, 95.
- Bose, S., & Paul, R. (2021) Horizontal Enforcement of Queer Rights in India: Constitutional Solution. De Lege Ferenda, 4(2), 66-93.
- Boyd, S. B. (Ed.). (1997) Challenging the Public/Private Divide: Feminism, Law, and Public Policy. University of Toronto Press.

- Cheadle, H., & Davis, D. (1997) The Application Of The 1996 Constitution In The Private Sphere. *South African Journal On Human Rights*, 13(1), 44-66.
- Chianu, E. (2007) Towards Fair Hearing for all Nigerian Employees. *Review of Nigerian Law and Practice*, 1(1), 29-43.
- Chirwa, D. M. (2006) The Horizontal Application of Constitutional Rights in a Comparative Perspective. *Law, Democracy & Development*, 10(2), 21-48.
- Clapham A. (1993) *Human Rights in the Private Sphere*. Oxford University Press, Oxford. 137.
- Collins, H. (2012) On the (in) compatibility of Human Rights Discourse and Private Law. LSE Law Society and Economy Working Papers. London School of Economics and Political Science Law Department. 16.
- Currie, I., & De Waal, J. (2001) *The New Constitutional and Administrative Law: Constitutional Law (Vol. 1)*. Juta.
- Dafel, M. (2015) The Directly Enforceable Constitution: Political Parties And The Horizontal Application Of The Bill Of Rights: Political Rights Since 1994 Focus. *South African Journal On Human Rights*, 31(1), 56-85.
- Durojaye, E. (2013). So sweet, so sour: A commentary on the Nigerian High Court's decision in *Georgina Ahamefule v Imperial Hospital & Another* relating to the rights of persons

- living with HIV. *African Human Rights Law Journal*, 13(2), 464-480.
- Friedman N, (2014) *The South African Common Law and the Constitution: Revisiting Horizontality*. *South African Journal on Human Rights*, 30(1), 2014. 63–88.
- Gardbaum, S. (2003) *The “Horizontal Effect” of Constitutional Rights*. *Michigan Law Review*, 102(3). 387-459.
- Gerstenberg O. (2004) *Private Law and the New European Constitutional Settlement*. *European Law Journal* 10(6). 769.
- Goosby, B. J., & Heidbrink, C. (2013) *The Transgenerational Consequences of Discrimination on African-American Health Outcomes*. *Sociology compass*, 7(8), 630-643.
- Health Outcomes. *Sociology compass*, 7(8), 630-643.
- KC, S. F. F. (2022) *Discrimination Law*. Oxford University Press.
- Lerner, N. (2021) *Group Rights and Discrimination in International Law*. Leiden, the Netherlands: Brill.
- Lubano, C.N. (2013) *The Application of Fundamental Rights to Private Relations in Kenya: Striking a Balance Between Fundamental Rights and the Freedom of Contract - Published LLM Thesis, University of Cape Town, Cape Town*. 33.
- Mandela, N. (2009) *Long Walk To Freedom*. Vol 2: 1962-1994. Hachette UK.

- Matu, D. (2017) Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review. *Strathmore Law Review*, 2(1), 63-84.
- Mensch N. (2006) Codes, Lawsuits or International Law: How Should the Multinational Corporation be Regulated with Respect to Human Rights? 14(2) *University of Miami International and Comparative Law Review*. 249.
- Muchlinski P. (2001) Human Rights and Multinationals: Is There a Problem? 77(1) *International Affairs*. 35.
- Murphy, S. D. (2004) Taking Multinational Corporate Codes of Conduct to the Next Level. *Colum. J. Transnat'l L.*, 43, 389.
- Nandakumar S.M. (2013) The Shortcomings Of Corporate Ethics And Corporate Social Responsibility In The Protection Of Human Rights. 1(2) *International Journal Of Research And-Analysis*. 454.
- Nicholas B., et al, (2008) *Discrimination Law: Theory and Context (Text and Materials)*. 1st Ed. Sweet and Maxwell (London).
- Nolan A (2014) Holding Non-State Actors to Account For Constitutional Economic And Social Rights Violations: Experiences and Lessons From South Africa and Ireland. 12(1) *International Journal OF Constitutional Law*. 62.
- Nwabueze, R. N. (2010) Securing Widows' Sepulchral Rights Through The Nigerian Constitution. *Harvard Human Rights Journal*, 23(1), 141-156.

- Phillipson, G. (1999) The Human Rights Act, Horizontal Effect And The Common Law: A Bang Or A Whimper. *Mod. L. Rev.*, 62, 824.
- Reddy, K. K. (2006) The Horizontal Application Of The Equality Guarantees And Race Discrimination By The Business Sector. *Journal Of South African Law*, 2006(4), 783-802.
- Rivera-Perez, W. (2012) What The Constitution Got To Do With It: Expanding The Scope Of Constitutional Rights Into The Private Sphere. *Creighton International And Comparative Law Journal*, 3(1), 189-214.
- Sachs, A. (1991) *Protecting Human Rights In A New South Africa*. Oxford University Press.
- Salako, H. A. (1996) An Overview Of Privatisation In Nigeria And Options For Its Efficient Implementation. *CBN Economic & Financial Review*, 37(2), 17-30.
- Salman, B. (2017) An Evaluation Of The Nigeria Electricity Sector Post Privatization. *Journal Of Energy And Environment*, 9(1).
- Sang Y. K., B. (2018) Horizontal Application Of Constitutional Rights In Kenya: Comparative Critique Of The Emerging Jurisprudence. *African Journal Of International And Comparative Law*, 26(1), 1-27.
- Sethi, S. P. (2002) Corporate Codes Of Conduct And The Success Of Globalization. *Ethics & International Affairs*, 16(1), 89-106.

- Tushnet, M. (2003) The Issue of State Action/Horizontal Effect in Comparative Constitutional Law. 1 Int'IJ. Consti. L. 79.
- Tushnet, M. (2003). The Issue of State Action/Horizontal Effect in Comparative Constitutional Law. 1 Int'IJ. Consti. L. 79.
- Van der Walt, A. J. (1995) Marginal Notes On Powerful (L) Legends: Critical Perspectives On Property Theory. THRHR, 58, 396.
- Vernon R (1999) Business and Human Rights' Harvard Law School Human Rights Program. 49. <
<http://hrp.law.harvard.edu/wp-content/uploads/2013/08/BusinessandHumanRights.pdf>
 > accessed on 26th February, 2023.
- Woolman, S., & Davis, D. (1996) The Last Laugh: Du Plessis v De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions. South African Journal on Human Rights, 12(3), 361-404.
- Zeng, D.Z. (2008) Knowledge, Technology and Cluster-Based Growth in Africa. World Bank Institute. 66.