

JUDICIAL ADVANCES FOR SECURING WOMEN'S RIGHT TO LIFE, DIGNITY AND EQUALITY IN INDIA: WHAT LESSONS FOR NIGERIA?*

Abstract

The violation of women's right to life, dignity and equality are routine in most patriarchal third world countries including India and Nigeria. Women in both countries suffer diverse physical and psychological abuses including rape, sexual harassment and son-preference. Indian women particularly suffer dowry violence/death and the elimination of female foetuses. The traditional Hindu practice of Sati (self-immolation) required a widow to set herself ablaze upon the death of her husband as a sign of her loyalty and perpetual fidelity. One BBC TV documentary later described India as 'a dangerous place to be a woman'. This paper explores pertinent judicial advances for protecting the life, dignity and equality of women in India, using the doctrinal methodology. These advances underline the creativity and activism of India's Supreme Court in interpreting both justiciable and non-justiciable rights in the Indian constitution. The paper concludes that those advances offer a model for Nigeria and other nations committed to protecting women's right to life, dignity and equality.

Keywords: Judicial Advances, Right to life, dignity and equality, Women, India, Nigeria

1. Introduction

Women in most patriarchal countries including India and Nigeria face diverse forms of indignity, inequality and abuse of life. These violations are usually physical and/or psychological and may be manifested as abusive acts or omissions. They include rape, sexual harassment and son-preference. Indian women suffer special threats of dowry violence/death, elimination of female foetus and forced labour. In extreme cases, they are compelled to indulge in the traditional Hindu practice of Sati (self-immolation) which requires a widow to set herself ablaze upon the death of her husband as a sign of fidelity that no other man can ever have canal knowledge of her.² The monstrosity of sexual abuses in India was made evident in a 2012 BBC TV documentary with the caption: *India: a dangerous place to be a woman*.³ Interestingly, the Indian judiciary continue to make progressive advances in response to the many violations and constitutional breaches against women. For instance, in *Khedat Majdoor Chetna Sanghat v. State of M.P.*,⁴ the country's Supreme Court held that the notion of human dignity is not different from the right to life and liberty guaranteed in Article 21 of the Indian constitution. The court made a particularly paramount finding in the manner of a query thus: 'If dignity or honour vanishes what remains of life?' This query underscores the undeniable judicial nexus between dignity on the one hand, and the right to life and personal liberty in India, on the other hand. In two landmark judgements: *Aneke v. Nweke*,⁵ and *Ukeje v. Ukeje*,⁶ the Supreme Court of Nigeria has also proclaimed the right to dignity and equality of women and girls, especially in the matter of succession and inheritance to immovable property under customary law.

This paper explores random judicial advances for protecting women's right to life, dignity and equality in India and Nigeria. It finds substantial progress in the case of India compared to Nigeria. The areas of progressive advantage include the introduction of the Rule of *Just, Reasonable and Fair* interpretation of fundamental rights in the Indian constitution as well as a wholesome definition of the right to life or personal liberty in Article 21 thereof. These innovations neutralized the implication of the constitutional dichotomy of justiciability between Fundamental Rights and the Directive Principles of State Policy, thereby introducing the implied enforcement of otherwise non-justiciable rights in India. Other innovative advances by the Indian judiciary for protecting women's right to life, dignity and equality include: the theory of Epistolary jurisdiction of courts, a new approach to Legal Aid, as well as what became known as the *Rule in Sheela Barse*, and the *Vishaka Guidelines*.⁷ On the basis of these advances, the Supreme Court of India is acknowledged as one of the 'consequential courts' in the global South.⁸ The paper particularly highlights the judgments in two landmark cases: *Vishaka & Ors v. State of*

* By **Aloy OJILERE, BL, LL.M, PhD**. The author is a Senior Lecturer in the Faculty of Law, Imo State University, Owerri, Nigeria. He holds the 2016 University Of Malaya Excellence Award for Outstanding Achievement in successfully completing a PhD (Law) in less than 3 years. His research interest is in the Judicialization, Globalization and Constitutionalization of Fundamental Rights in Nigeria, India and South Africa. Email: aloyojilere@yahoo.com.

² This obnoxious practice was abolished in 1829.

³ This was after the global outcry and condemnation of the December 2012 brutal gang-rape-to-death of a young medical student in a bus in Delhi, and a British Asian BBC reporter Radha Bedi, travelled to India to assess the reality of life for young women. See: India: A dangerous place to be a woman. <http://www.bbc.co.uk/programmes/b03696fw> (31/10/2019).

⁴ (1994) 6 SCC 260; AIR 1995 SC 31.

⁵ (2014) 234 LRCN 34.

⁶ (2014) 11 NWLR (part 1418) 384.

⁷ Most of these rules were popularized by Justice P.N. Bhagwati (former Chief Justice of India).

⁸ Mate, M. (2013). Public Interest Litigation and the Transformation of the Supreme Court of India In D. Kapiszewski, G. Silverstein & R. A. Kagan (Eds.), *Consequential Courts: Judicial Roles in Global Perspective* (pp. 262-268). New York, USA: Cambridge University Press.

*Rajasthan & Ors*⁹ and *Sheela Barse v. State of Maharashtra*¹⁰ which led to the development of new policy guidelines for the protection of women against work-place and custodial sexual exploitation respectively at a time when there were no legislation against such specific violations.¹¹ The paper concludes that the judicial progress in India offer lessons of valuable model for Nigeria and other nations committed to the protection of women's right to life, dignity and equality.

2. Violation of Women's Life, Dignity and Equality in India and Nigeria

Most violation of women's rights in India and Nigeria are based on socio-cultural or religious myths and beliefs which are embedded in the rules of patriarchy and primogeniture. Although they vary in both countries, they generally include son-preference/elimination of female foetus, dowry-related violence and/or death,¹² discriminatory/denial of property inheritance and succession rights, as well as spousal rape/sex-related violence. Although the Hindu custom of *Sati* (self-immolation)¹³ has been abolished, it compelled women to set themselves ablaze once their husbands die, as a mark of her courage, perpetual loyalty and fidelity to him.¹⁴ As earlier said, most acts and omissions which violate Nigerian women's dignity and equality are also predicated on ancient socio-cultural or religious beliefs. These include: wife confinement (*Purdah*),¹⁵ wife chastisement,¹⁶ child/forced marriage,¹⁷ verbal divorce/instant divorce (*Triple Talaq*)¹⁸ and female dress code (*Hijab*),¹⁹ especially in Islamic Law prevalent in Northern Nigeria. Others are son- preference, scorn of barrenness and polygamy,²⁰ mythology of male headship, chattelization, domination and servitude of women (due to payment of bride price in marriage),²¹ wife donation,²² widow

⁹ JT 1997 (7) SC 384.

¹⁰ 1983 SCC 96.

¹¹ The Indian legislature later promulgated the *Vishaka Guidelines* into law: The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

¹² 'Dowry' is defined in section 2 of the Dowry Prohibition Act, 1961 to include 'any property or valuable security given or agreed to be given either directly or indirectly— (a) by one party to a marriage to the other party to the marriage; or (b) by the parents of either party to a marriage or by any other person, to either party to the marriage.' Oftentimes, men kill their wives because her parents failed to pay enough dowry or refuse to offer continued economic assistance.

¹³ This form of trado-religious 'sacrifice' has been described as connoting everything that was irrational, backward, archaic, and corrupt. See Rao, S. (1999). Woman-as-symbol: The intersections of identity politics, gender, and Indian nationalism. In *Women's Studies International Forum* (Vol. 22, No. 3, pp. 317-328). Pergamon.

¹⁴ Patel, S., & Kumar, K. (1988). Defenders of sati'. *Economic and Political Weekly*, 23(4), 129-130.

¹⁵ Islamic law in Nigeria permit men to lock-up their wives at home and away from public interaction or socialization.

¹⁶ Islamic law and Nigerian socio-cultural mythology permit a man to beat his wife as a form of discipline. Section 55 (1) (b) of the Penal Code (Cap C3 Laws of the Federation of Nigeria, 2004) approve wife beating/chastisement as long as it does not cause grievous bodily harm. In *Akinbuwa v. Akinbuwa*, (1998) 9 NWLR (Pt 564)100, the Nigerian Court of Appeal endorsed this practice.

¹⁷ Marriage is a voluntary union of one man and one woman to the exclusion of all others. Accordingly, the consent of the parties is *sine qua non*. However, in some customary laws, young or teenage girls are forced to marry prominent or rich men in order to provide security for the entire family or to raise money for the education, trading or vocational training for their brothers or to enable her family write-off a debt. Islam also permit parents and guardians to choose husbands for their virgin daughters, irrespective of her own choice or opinion.

¹⁸ This is a form of Islamic divorce whereby a man can divorce his wife by simply uttering the words: 'I divorce you' three times. This practice has been outlawed by the Supreme Court of India. See: *Shayara Bano v. Union of India*, (2017) 9 SCC 1 (SC).

¹⁹ Muslim women are typically required to wear robe/dresses which cover the entire body, sometimes including her face, as a way of concealing the beauty of married women and making them 'invisible' to other men.

²⁰ Customary rule of primogeniture view sons as heirs who can continue the family lineage, unlike daughters who will be married out to other families. A woman who bears only female children and no male child is therefore considered as 'yet standing on one leg' in the family, ditto a woman who has no child at all. Such women may be abandoned, treated scornfully by family members or even 'sent packing.' They are often treated as strangers and excluded from serious family discussions. See: Okonofua, F. E., Harris, D., Odebiyi, A., Kane, T., & Snow, R. C. (1997), <https://openresearch-repository.anu.edu.au/bitstream/1885/41267/2/Okono1.pdf> (2/11/2019).

²¹ Patriarchy recognizes a man as 'head' of the family, and permits him to *dominate* his wife or other females in the household. He may also rape his wife whom custom equally considers as *his property* because he had paid her *bride price*. It is however, abominable for a wife to even insult him in public. See Olong M. A. (2009) Cultural Practices and Traditional Beliefs as Impediments to the Enjoyment of Women's Rights in Nigeria, *Journal of Contemporary Legal Issues*, 1(1), 117-131.

²² In customary law applicable in parts of Kogi state, a man may *donate* his wife as sex-mate or comfort woman to a special guest or an august visitor as a sign of respect and hospitality.

inheritance,²³ traditional widowhood rites,²⁴ spousal, rape,²⁵ denial of right to inherit land or immovable property,²⁶ denial of reproductive rights and choices, especially on convenience and negotiation for sex and safer sexual relation with husband, as well as lack of opinion as to the number or spacing of children in the marriage.²⁷

3. Judicial Innovations on Women's Right to Life, Dignity and Equality in India and Nigeria

The Constitutions of Nigeria and India respectively contain provisions for both justiciable and non-justiciable rights,²⁸ that is, fundamental rights on the one hand, and the Fundamental Objectives and Directive Principles of State Policy on the other.²⁹ In Nigeria, relevant sections of the fundamental rights provisions in Chapter IV of the 1999 constitution prohibit discrimination against persons in any manner whatsoever or on the basis of gender, among others. It also guarantees the right to life as well as the right to dignity and equality in the acquisition and ownership of immovable property anywhere in Nigeria. Specifically, section 42 (1) thereof prohibits discrimination against a citizen of Nigeria for reason only that he is of a particular community, ethnic group, place of origin, sex, religion or political opinion while section 42 (2) provides that no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth. Section 43 also states that 'subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.'

On the basis of the foregoing, the Supreme Court of Nigeria recorded one of its greatest judicial advances in relation to women's right to dignity and equality by voiding the Igbo customary law which precluded women and girls from inheriting the intestate estate of a late husband or wife under customary law. Before this time, only the male could inherit, going by the traditional rule of primogeniture which recognize men as the only source of family succession. In *Anekwe v. Nweke*,³⁰ the plaintiff, Mrs. Maria Nweke was a widow. She instituted an action at the *Awka* Division of the Anambra State High Court in 1991, praying for a declaration that she was entitled to statutory right of occupancy of a parcel of land which she inherited from her husband. The defendants were half-brothers of the plaintiff's late husband. They had told the plaintiff to vacate the property because she had six female children only and no male child, and that under *Awka* customary law, she had no right to inherit land unless she purchased same with her money. The plaintiff ignored them and insisted that she was entitled to inherit her husband's property under customary law even as she had no male child. Both the High court and Appeal court gave judgements in her favour but the defendants appealed to the Supreme Court. The crux of this final appeal was whether the respondent (plaintiff) who had no male child can inherit the property of her late husband? The Supreme Court also found for her and remarked *inter alia* that, for a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric, worrying and flesh skinning, and that relying on such a custom in the 21st century societal setting will only tend to depict the absence of the relatives of human civilisation.³¹

²³ Under certain Ibo customary law, a widow may be inherited as 'wife' by her stepson or any male family member or brother of her deceased husband.

²⁴ Some cultures compel a widow to drink the bath water of her husband's corpse before his burial, as traditional 'oath taking' that she had no hand in his death.

²⁵ Section 357 of the Criminal Code Act Cap 77, Laws of the Federation of Nigeria, 1990 (applicable in Southern Nigeria) permit spousal rape by defining 'rape' as unlawful carnal knowledge of a woman or girl by *any person* without her consent, or with her consent, if it was obtained unlawfully. Section 6 thereof, however, define 'unlawful carnal knowledge' as 'carnal connection which takes place otherwise than between husband and wife.'

²⁶ Customary law does not recognize women as independent persons but rather as an appendage of a father or mother, hence, they were denied property inheritance and succession rights, as approved in the old case of *Suberu v. Sunmonu (1957) 2FSC*, the Nigerian Supreme Court upheld the Yoruba customary law which disentitled a wife from inheriting her deceased husband's property. This custom has however, been reversed by the Supreme Court of Nigeria in two 2014 landmark cases: *Anekwe v. Nweke*, (n. 5 *supra*) and *Ukeje v. Ukeje*, (n. 6 *supra*). This was pursuant to relevant provisions of the CFRN, 1999 and Article 16 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), which empower women to own or alienate immovable property anywhere.

²⁷ A wife of customary law marriage is considered a *property owned* wholly and entirely by her husband. She is ordinarily his servant, and expected to do all his biddings including sex on demand.

²⁸ Articles 12-35 of the Indian Constitution, 1950 contain the Fundamental Rights.

²⁹ In the Indian Constitution, one of the objectives encourage the adoption and pursuit of measures of positive discrimination in favour of women. See: Women's Rights Initiative, http://nlrd.org/womens-rights-initiative/legislations-laws-related-to-women/constitutional-and-legal-provisions-for-women-in-india?subscribe=success#blog_subscription-2 (22/10/2013).

³⁰ *Supra*, n. 27.

³¹ *Per* Ogunbiyi, JSC 36-37 paras A-B.

Similarly, in *Ukeje v. Ukeje*,³² the plaintiff, Miss Gladys Ada Ukeje (a daughter of late Mr. Lazarus Ogbonna Ukeje, the deceased who died in 1981) sued Mrs. Lois Chituru Ukeje, (widow of the deceased) and her son, Mr. Enyinnaya Lazarus Ukeje to the Lagos State High Court, claiming that as one of the children of the deceased, she ought to benefit from the family estate just as other children of the deceased who died in 1981. The trial court found in her favour. The Court of Appeal, Lagos division also affirmed the judgement of the lower court judgment. Upon a final appeal, the Supreme Court *per* Justice Bode Rhodes-Vivour, voided the Ibo customary law which disentitled females from inheriting land or immovable property of their deceased father because such custom was obnoxious and contrary to the rights to freedom from discrimination on the basis of sex or circumstance of birth guaranteed by section 42(1) of the 1999 Constitution, as well as the right to acquire and own immovable property guaranteed by section 42 (2) of the 1999 Constitution.

Despite these judicial strides, some valuable lessons abound within the Indian judicial system which may add value to Nigeria's current constitutionalism on women's rights generally. This proposition is trite because the strength of Constitutionalism in India especially with regards to the protection of women's rights actually lie in the independence, innovations and interpretative activism of the Indian Supreme Court. Thus, even where legislations are weak or non-existent, the Supreme Court of India exhibited creativity and activism in providing effective and enforceable judicial guidelines for the protection of women's rights pending a proper legislative enactment by parliament.³³ One of the foremost advances of the Indian judiciary is the innovation of the rule of *reasonable, fair and just* interpretation of fundamental rights. This rule offers broad interpretation of other constitutionally guaranteed rights as ancillary to the sacrosanct right to life and personal liberty guaranteed in Article 21 of the Indian Constitution. Accordingly, the rights to dignity, equality before the law³⁴ and freedom from discrimination³⁵ were accorded equal importance with the right to life. Thus, in *Bandhua Mukti Morcha v. Union of India*,³⁶ the Supreme Court described Article 21 as the heart or nucleus of the fundamental rights, that is, 'the minimum conditions which must exist in order to enable a person to live with human dignity.'

Under the said Article 21, 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' The phrase, 'procedure established by law' is not defined by the constitution, and ordinarily, this gap may raise legal technicalities. However, by sheer ingenuity manifested in the celebrated case of *Maneka Gandhi v. Union of India*,³⁷ Bhagwati, J (as he then was) interpreted the phrase to mean no less than a procedure which is *reasonable, fair and just*, and that the expression *personal liberty* is of the 'widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man.' Accordingly, any intended interference with the personal liberty of a person must satisfy three conditions: it must prescribe a procedure; the procedure must not be in violation of such rights as freedom of speech, religious worship, association, peaceful assembly and movement conferred by Article 19; and it must not derogate from the right to equality and equal protection of the law in Article 14. Suffice to say that any law and procedure authorising interference with the personal liberty must also be right and just and fair and not arbitrary, fanciful or oppressive otherwise it would be a null procedure within the meaning of Article 21.³⁸ This innovation became known as Justice Bhagwati's due process rule of just, reasonable and fair interpretation of fundamental rights and directive principles of state policy in the Indian constitution. This rule of interpretation was applied by the Indian Supreme Court in *Frances Coralie Mullin v. The Administrator, Union Territory of Delhi and others*,³⁹ where the Court emphasized that the guarantee of right to life in Article 21 is not limited to physical existence or to the use of any faculty or limbs but also includes the right to live with basic human dignity and all the bare necessities of life such as nutrition, clothing, shelter, facilities for reading, writing freedom of expression, freedom of movement and freedom of association, and that no one can be deprived thereof because 'no procedure by which such deprivation may be effected can ever be regarded as reasonable, fair and just.' It is equally significant that this rule has logically necessitated an inclusive interpretation and *implied* justiciability of the otherwise non-justiciable Directive Principles of State Policy.⁴⁰ This presupposes that the cultural exploitation and violation of a woman's dignity (including marital rape) is no longer

³² *Supra*, n. 6.

³³ Maja Daruwala (ed). (2005) 'Human Rights and Policing: Landmark Supreme Court Directives and National Human Rights Commission Guidelines.' CHRI, New Delhi, Biennial Report on Human Rights Issues to the Commonwealth Heads of Government Meet, CHOGM) p. 20-21.
http://www.humanrightsinitiative.org/publications/hrc/humanrights_policing.pdf.

³⁴ Article 14, Constitution of India.

³⁵ Article 15, *ibid*.

³⁶ AIR 1984 802.

³⁷ (1978) 1 SCC 248.

³⁸ *Ibid*.

³⁹ AIR 1981 SC 746.

⁴⁰ Part IV, Indian Constitution: Articles 36-51 is similar to Chapter II of Nigeria's 1999 Constitution which the courts have upheld as non-justiciable against all odds per s. 6(6) (c) thereof.

considered a domestic or *family affair* in India because the right to dignity is as sacrosanct as the right to life and personal liberty.⁴¹ Thus, in *Shri Bodhisattwa Guatam v. Ms. Subhra Chakraborty*,⁴² the Supreme Court held that the right to life in Article 21 includes the right to live with human dignity and that women have a right to liberty and a right to be respected, lead an honourable and peaceful life and be treated as equal citizens, and that rape is a crime against society and not the woman-victim *per se*, even though it destroys her own personal psychology, deep emotions and most cherished right to life.⁴³

The ouster provision in section 6(6) (c) of the 1999 Nigerian constitution which declare the negative rights in the directive principles to be unenforceable is similar to Article 37 of the Indian Constitution.⁴⁴ Nonetheless, while the Nigerian courts insist that its hands are tied by the ouster provision, the Indian court believes otherwise. Accordingly, by sheer courage, independence, fearlessness and interpretative ingenuity, the Supreme Court of India has also raised non-justiciable negative rights to the level of Article 21 with the effect that socio-economic rights are 'impliedly' enforceable as positive fundamental rights in India.⁴⁵ The attitude of the Indian Supreme Court on ouster clauses derive from its broad interpretation of Article 13 of country's constitution which voids every law, Ordinance, order, bye-law, rule, regulation, notification, custom or usage which are inconsistent with the fundamental rights. Inherent in Article 13 is the constitutional power of judicial review which the court considers to be without limit and can be employed thereby to review or void any custom, usage or law, including executive, legislative, administrative action which derogates from or is inconsistent with the fundamental rights guaranteed in the constitution.⁴⁶ The Court amplified this fact in the case of *Bidi Supply Co v. Union of India*⁴⁷ thus:

The heart and core of a democracy lies in the judicial process, and that means independent and fearless Judges free from executive control brought up in judicial traditions and trained to judicial ways of working and thinking. The main bulwarks of liberty and freedom lie there and it is clear to mean that uncontrolled powers of discrimination in matters that seriously affect the lives and properties of people cannot be left to executive or *quasi*-executive bodies even if they exercise *quasi*-judicial functions because they are then invested with authority that even Parliament does not possess. Under the Constitution, Acts of Parliament are subject to judicial review particularly when they are said to infringe fundamental rights, therefore, if under the Constitution Parliament itself has not uncontrolled freedom of action, it is evident that it cannot invest lesser authorities with that power.'

In its quest to protect the life, equality and dignity of women, the Indian judiciary also manifested creativity and activism in the broad interpretation of the 'Legal Aid' in the Indian Constitution, bearing in mind that in some instances, poverty and inability to pay for legal services may hinder the capacity to litigate abuse and violations. Article 39A of the Indian Constitution provides that: 'The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.' Instructively, Article 39A falls under the directive principles of state policy in the Indian constitution which is ordinarily declared non justiciable by Article 37 thereof. Nonetheless, by the judicial courage and subsequent interpretative activism of the Indian Supreme Court, the right to free legal aid is actually read into and enforced as part of the fundamental rights.⁴⁸ Thus, in the case of *M.H. Hoscot v. State of Maharashtra*,⁴⁹ the Indian Supreme Court, per Justice Krishna Iyer held that the state was under an obligation to provide free legal aid to any indigent, poor or incommunicate person as of constitutional right, if the circumstance of the case and the need for justice permits. In a bid to improve on its previous decisions on fundamental rights, the Indian Supreme Court even applied Justice Bhagwati's legendary *rule of fair, reasonable*

⁴¹ In *State of Punjab v. Ramdev Singh* AIR 2004 SC 1290, the Supreme Court observed that rape, marital or otherwise, was a gross violation of the right to life was therefore to be dealt with decisively and sternly.

⁴² AIR 1996 SC 922; 1996 1 SCC 490. See also *C. Masilamani Mudaliar v. Idol of Sri Swaminartha Swami*, AIR 1996 SC 1697; (1996) 8 SC 525.

⁴³ See Justice Bhagabati P. Banerjee & Bhaskar P. Banerjee (2012) *Judicial Control of Administrative Action*, LexisNexis Butterworths, Wadhwa, Nagpur, p. 1264.

⁴⁴ The said Article 37 provides that: 'The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.'

⁴⁵ Bhagwati, P N (1987), 'Social Action Litigation: The Indian Experience', in Trivetelram and Coomaraswamy (eds.), *The Judiciary in Plural Societies*, p.20.

⁴⁶ This is similar to the decision of the Supreme Court of Nigeria in *Ukeje and Anekwe*, (*Supra*, n. 32).

⁴⁷ AIR 1956 SC 479.

⁴⁸ S.L.A. Khan, (2001) *Justice Bhagwati on Fundamental Rights and Directive Principles*, Deep & Deep Publications Pvt. Ltd. New Delhi, India, p. 155.

⁴⁹ AIR 1978 SC 1548.

and just interpretation, in defining the scope of legal aid in *Khatri v. State of Bihar*.⁵⁰ The court explained that the due process application of Article 39A creates a continuing right which attaches to the accused person from the time of his first arraignment before a magistrate up till his final appeal at the Supreme Court, and that it also creates an unqualified constitutional obligation on the state to provide the legal aid irrespective of any real or imagined administrative or financial constraints.

However, in Nigeria where legal aid is also listed as a directive principle in the Constitution⁵¹ (and therefore non-justiciable), the Nigerian Legal Aid Act,⁵² provides that only 'needy persons' standing criminal trials or making accident claims may be entitled to legal aid provided their annual income do not exceed N1,500 per annum⁵³ unless the concerned applicant is willing to provide counterpart funding.⁵⁴ It is therefore clear from the foregoing, that on legal aid too, the Nigerian judiciary has much to learn from India. In its activism and fearlessness, the Indian Supreme Court held in *Centre for Legal Research v. State of Kerala*,⁵⁵ that the legal aid provision also cover social action groups and voluntary organisations which render legal services and benefits to deserving public. Justice Bhagwati declared therein that:

The State Government undoubtedly has an obligation under Article 39-A of the constitution which embodies a directive principle of State policy to set up a comprehensive and effective legal aid programme in order to ensure that the operation of the Legal system promotes justice on the basis of equality...If we want to secure people's participation and involvement in the legal aid programme, we think the best way of securing it is to operate through voluntary organisations and social action groups. These organisations are working amongst the community at the grass-root level and they know what are the problems and difficulties encountered by these neglected sections of Indian humanity.

Another area of women's rights protection where India's apex court has excelled is the innovation of the dictum of *Epistolary Jurisdiction* of courts.⁵⁶ It is arguably one of the most liberal forms of access jurisprudence of all times. The dictum permits a court which receives a mere personal letter addressed to a judge or to a court in India alleging any illegality or breach of a fundamental right, to assume jurisdiction in the matter (not formally filed) without much ado. The process is so swift, informal, effective and cost-free. In *Keshavananda Bharati v. State of Kerala*⁵⁷ the court expanded the dictum and held that apart from letters, media information contained in newspaper reports can also be accepted and heard as proper fundamental rights petitions.⁵⁸ This is a gateway for impecunious women whose life or dignity may be violated, and there is, therefore no reason why such innovation may not be transplanted in Nigeria, bearing in mind that access to justice is one basic human right without which several other human rights may be difficult or impossible to realize.⁵⁹ In *Veena Sethi v. State of Bihar and Ors*,⁶⁰ a newspaper journalist wrote a scathing exposé on human rights violation in India. A lawyer sent the article to the Supreme Court and on the basis of this, the Court heard it a properly filed writ petition. In the judgement, Justice Bhagwati explained thus:

There are some people who are critical of the practice adopted by this Court of taking judicial action on letters addressed by public spirited individuals and organisations for enforcement of the basic human rights of the weaker sections of the community. This criticism is based on a highly elitist approach and proceeds from a blind obsession with the rites and rituals sanctified by an outmoded Anglo-Saxon jurisprudence.

In its quest to secure women's dignity, life and equality rights, the Indian Supreme Court also set a classical template in the art of judicial law-making, otherwise known as *judislatio*.⁶¹ For instance, in two landmark cases:

⁵⁰ AIR 1981 SC 928.

⁵¹ Section 46(4)(b) CFRN, 1999 (as amended).

⁵² See second Schedule to the Legal Aid Act, Cap L9 Laws of the Federation of Nigeria, 2004.

⁵³ Section 9 of Cap L9 Laws of the Federation of Nigeria, 2004.

⁵⁴ Section 9 (2)-(3) of the Legal Aid Act.

⁵⁵ 3 SCJ 1986 SC 17.

⁵⁶ Grammatically, 'epistolary' is 'associated with correspondence by letter' and 'in the form of a letter or letters.'

⁵⁷ AIR 1973 SC 1461.

⁵⁸ See also Law letter, Legal Awareness Magazine, April 1995, p. 4.46 (cited in S.L.A. Khan, n. 48 *op. cit.*) at 192.

⁵⁹ *S.P. Gupta v. President of India*, AIR 1982 SC 149.

⁶⁰ AIR 1983 SC 339.

⁶¹ This is as opposed to 'legislation' made by a constitutional Parliament. See Aloy Ojilere & Gan Ching Chuan (2015). Learning from the Indian Judiciary: New Directions for Securing Nigerian Women's Right to Dignity. *Asian Women*, 31(1), 81-106; Aloy Ojilere & Ine Nnadi (2018). Judicialization of the Fundamental Rights and the Directive Principles of State Policy in India: Road Map for the Globalization of Women's Dignity and Other Rights in Nigeria. *University of Jos Law Journal*, 13(1), 150-163.

*Vishaka & Ors v. State of Rajasthan & Ors*⁶² and *Sheela Barse v. State of Maharashtra*,⁶³ the court did not ‘standby in hopelessness’ in the face of critical human right violations against women in India simply because there were no legislation at the time to address such violation. Instead, the court issued novel guidelines and regulations⁶⁴ which operated as ‘law’ until Parliament eventually enacted proper laws.

In the *Vishaka* case, female social worker was gang raped at her workplace in Rajasthan, at a time when such rapes were becoming commonplace in India. At that time too, there was no formal legislation on sexual harassment of women at the workplace. While the criminal trial was pending in court, some social activists and NGOs filed a writ Petition as class action litigation for the enforcement of the fundamental rights of working women under Articles 14: right to gender equality, article 19(1) (g): right to practise any profession, or to carry on any occupation, trade or business, and article 21: right to life and personal liberty. Although there was no law on the subject, the Supreme Court ingeniously set new guidelines against sexual harassment of women at workplace. Those guidelines became known as the *Vishaka Guidelines*. The Preamble to the guidelines show that they were ‘necessary and expedient’ to ensure that employers in work places as well as other responsible persons or institutions took practical steps to ensure the prevention of sexual harassment of women, ‘taking notice of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time.’ Under the guidelines, no woman or her witnesses shall be made to suffer victimization or discrimination for making any complaint of sexual harassment against any person. It also entitles a victim of sexual harassment to either seek transfer of the violator or of herself, and it mandates employers to ensure that the working environment in their establishments is healthy, hygienic, safe and not hostile for women such that no working woman would have the least reasonable apprehension that she is disadvantaged in her employment.⁶⁵ The Court observed that equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place, relying on relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) especially Articles 11 and 24.⁶⁶ Above all, the Court emphasised that the *Vishaka* guidelines and their due compliance under Article 141 of the Constitution of India were mandatory and not symbolic, until such time that appropriate legislation was enacted by the Parliament.⁶⁷

Similarly, in *Sheela Barse*, the Indian Supreme Court formulated guidelines based on a class action litigation brought by an activist third party for the protection of the rights of women and girls reported to be suffering harrowing experiences of rape, physical molestation, indignity and sexual exploitation in police cells/lock-ups India.⁶⁸ At that time there was no legislation under which such specific violations could be redressed. In its creative ingenuity, the Supreme Court made special Directives stipulating rules to be applied at all police lock-ups and detention centres for protecting the fundamental rights and dignity of female detainees. Under the new *judislatio*:

1. The interrogation of females must be carried out in the presence of female Police officers.
2. Female suspects must be kept in separate police lock-ups under the supervision of female constables only.
3. The police officer in-charge at any station/post must take responsibility for the safety of women in custody and ensure that bodily searches on them are conducted decently by women officers only.
4. Notice should be conspicuously put in each police lock-up informing arrested persons and detainees of their rights.
5. A woman judge or judicial officer should be appointed to carry out regular surprise visits to police stations to verify that all legal safeguards for the protection of the dignity of female detainees are being enforced.

These directives became known as the *Rule in Sheela Barse*, and it invariably opened the door to possible remedies and protections for securing the life, dignity and equality of female detainees in India. As such, Indian courts had additional powers to order that rehabilitation and necessary assistance be provided to female inmates in the

⁶² n. 9 *supra*.

⁶³ n. 10 *supra*.

⁶⁴ The *Vishaka Guidelines* and the *Rule in Sheela Barse* respectively.

⁶⁵ The Indian legislature later enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act and Rules 2013. The Act also covers domestic servants in the *unorganised sector*.

⁶⁶ Article 11 enjoin State Parties to take all appropriate measures to eliminate discrimination and inequality at work for both men and women, bearing in mind that the right to work (and under safe and healthy conditions) are inalienable right of all human beings.

Article 24 enjoin State Parties to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the Convention.

⁶⁷ *Medha Kotwal Lele and others v. Union of India and others*, (2013) 1 SCC 297.

⁶⁸ *Ram Kumar v. S H Pradesh* AIR 1995 SC 1995; *P Rathinam v. S of Gujarat* (1993) 2 Scale 631.

presence and under the consultation of a specified NGO or social action group. The Indian judiciary has also exhibited creativity and courage in tackling the menace of female foeticide arising from the demeaning culture of son-preference induced by patriarchy and primogeniture, notwithstanding legislative prohibition of same under the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. Thus in the Writ Petition of *Centre for Enquiry into Health and Allied Themes (CEHAT) & Others v. Union of India & Ors*,⁶⁹ an Indian High Court observed that the notion of son- preference violate the rights to life and dignity of women and girls, even before, during and after conception. In the instant case, the petitioner/NGO reported that in spite of express legislative prohibition, medical personnel were still using advanced techniques to determine the sex of the baby and to remove female foetuses, thereby subverting the 1994 Act technically. In reaction to this, the Court laid down several new directions which eventually led to the amendment and renaming of the Act as: The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1996. The preamble thereto state that its object is 'to prevent the misuse of medical or other such techniques for the purpose of pre-natal sex determination leading to female foeticide and for matters connected therewith or incidental thereto.' Unfortunately, the violation of the amended Act continued secretly and the Indian judiciary lived up to its ingenious bidding. Thus, in *State through District Appropriate Authority-cum-Civil Surgeon, Faridabad (Complainant) v. Dr. Anil Sabhani, Prop. M/s Dr. Anil's Ultrasound Opp. G.H. Palwal, Faridabad & 2 Ors*,⁷⁰ it convicted two medical doctors for violating the Pre-Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994 and Rules, 1996 and sentenced them to two years imprisonment and fine.

In its judgement the court observed that:

The convicts have prayed for a lenient view against them, but in my considered view they do not deserve the leniency prayed for. As earlier discussed, due to the illegal acts of the persons like the convicts the sex ratio is declining day by day in the country and in the State and because of the persons like the convicts the day is not far when there would be no girl child around.

On the vexed issue of *locus standi*, the Indian judiciary has shown greater reasonableness and liberality in its application than her Nigeria counterpart⁷¹ because Indian courts do not recognize technicalities as a limiting factor in seeking redress for human rights violation. Instead, they recognize third party right to litigate for another through the application of both Public Interest Litigation (PIL) and Class action litigations (CAL), in addition to epistolary jurisdiction of courts. It is therefore evident from the from the totality of the foregoing that comparatively, Indian courts have manifested greater reasonableness and ingenuity on matters of violation of women's rights and fundamental rights generally, thereby underlying valuable lessons which Nigerian courts may benefit from.

4. Conclusion

Among apex courts in developing countries, the Supreme Court of India remains an unrivalled independent and consequential institution on the interpretation of constitutional guarantees and access to justice. It has also set global templates for securing women's right to life, dignity and equality. Nonetheless, it remains baffling and a subject for further inquiry why the Indian society continue to experience 'significant human rights problems'⁷² in spite of good laws, proactive legislature, a vibrant media, an active civil society, and 'a respected judiciary.'⁷³ As ably stated, 'the choices made by the Indian judiciary have yielded some payoffs in advancing the rights of vulnerable segments of the Indian society. However, such choices are not necessarily a panacea to all human rights evils. It is a choice that has its fair share of internal and external contradictions. Certainly, no easy victories or even difficult ones are expected in such choices but it is a positive and confident first step to which many more can follow.'⁷⁴ Suffice to say, that notwithstanding the progressive decision of Nigeria's apex court in *Ukeje* and *Anekwe*, it still has significant valuable lessons to learn from its Indian counterpart for securing women's right to life, dignity and equality, as well as human rights generally.

⁶⁹ Writ Petition (civil) 301 Of 2000 (Judgement delivered on 10/9/2003).

⁷⁰ Case No. 295/2 OF 2001; Date of Institution: 5.11.2001/20.7.2004; Date of Decision: 28.3.2006.

⁷¹ In Nigeria, a petitioner/applicant must show reasonable interest before his suit can be heard.

⁷² Human Rights Watch, 2012 <http://www.hrw.org/world-report-2012/world-report-2012-india> 11/11/2013. See also Fadaee, S. (2014). Civil society organisations in India and construction of multiplicity of human rights. *The International Journal of Human Rights*, 18(4-5), 567-577.

⁷³ Human Rights Watch, 2012, *ibid*.

⁷⁴ Kunbor B, 'Epistolary Jurisdiction of the Indian Courts and Fundamental Human Rights in Ghana's 1992 Constitution: Some Jurisprudential Lessons', Refereed article, *Law, Social Justice & Global Development (LGD)*, 2001 (2) <http://elj.warwick.ac.uk/global/issue/2001-2/kunbor.html>.