

Covid-19 Induced Virtual Courts Sessions in Nigeria: Practicalities and Impracticalities

Ademola Sunday-Ayeerun*, Eti Best Herbert**, Ngozi Chinwa Ole***

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Abstract

The Presidential Declaration of Corona Virus Disease 19 as a 'dangerous contagious disease' occasioned the emergence of several regulations imposing restrictions on movements and social distancing measures. The Chief Justice of Nigeria and other heads of court also approved the Guidelines and Practice Directions containing modalities for virtual court sessions. This paper aims to examine the legal implications of virtual court session. The traditional requirement that court sessions should be held in places open to the public signifies a constitutional disapproval of virtual court sessions. It is contended that Practice Directions and Guidelines are weak mechanisms for entrenching virtual court sessions in Nigeria since they are within the lowest rung of the hierarchy of laws. Hence, the reform needs to be holistic. It should entail amendment of certain provisions of the constitution, laws, and rules of courts to enable a virtual innovation without legal hiccups. In alternative to constitutional amendment which usually takes long, this work, in addition to predicting the decision of the apex court on six grounds, suggests the immediate need for a judicial intervention in interpreting the constitutionality of virtual court session. This is to put to rest the fear harboured by some individuals that the serious judicial efforts put in by judges and counsel via virtual court sessions would end up becoming a nullity on appeal to the apex court.

Keywords: constitutionality of virtual courts, covid-19 induced virtual courts, public hearing.

A. Introduction

The Coronavirus disease broke out in the city of Wuhan, China, 2019.¹ From China, the virus has rapidly spread to almost all states of the world. Nigeria is not an

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* Head of Chambers, Clifford Anuge & Co.; Doctoral Candidate, University of Ibadan, LL.B (Akungba), LL.M (Ibadan), B.L., (Ibadan), ademolaayeerun@gmail.com.

** Research Fellow, Bowen University, Iwo, Osun State, Nigeria, LL.B (Uyo), LL.M., B.L. (Ibadan), etiberbert@gmail.com.

*** Senior Lecturer and Acting Head Public Law Federal University Oye-Ekiti, Osun State, Nigeria; Research Team, Head of Environment and Water Regulation Unit, African Centre of Excellence for Water and Environmental Research, ACEWATER, LL.B. (First Class Hons), B.L., LL.M. (Uniberdeen), Ph.D. (Uniberdeen), olengoz@gmail.com.

¹ Candidus Nwakasi, et.al., "Factors Influencing Compliance with Public Health Directives and Support for Government's Actions Against Covid-19: A Nigerian Case Study," *Scientific Paper African*, no. 15 (2022): 1, <https://doi.org/10.1016/j.sciaf.2021.e01089>.

exception.² On January 30, 2020, the World Health Organisation (WHO) declared a public health emergency of international concern, that is, an extraordinary event which is serious, unusual or unexpected, carries transnational implications, and require immediate international action. On March 11, 2020, the WHO declared it a pandemic.³ Since the declaration, the whole world has not been the same. Measures, including lockdown, have been adopted at several levels to restrict its spread. A total lockdown of a nation would impact its economy negatively.⁴ It is worse for most African states where most citizens depend on daily wages to survive. For this category of people, total lockdown equals to death by hunger. It accounts for the inevitable, deliberate breach of lockdown orders.

Apart from total lockdown affecting the economy negatively, the judicial system was shut down for an initially indefinite period.⁵ Once there is a halt in justice system, breakdown of law and order resultantly becomes inevitable since people will take laws into their hands, in view of the fact that the justice system is not available for litigants to seek redress. For instance, by reason of the pronouncement of lockdown, between the period of March 30 to Mid-April 2020, several Nigerian security agencies were involved in extrajudicial killings and abuse of power, as recorded by the National Human Rights Commission (NHCR).⁶ It became important to prosecute offenders of the lockdown regulations. They could not just be arrested and kept behind bars indefinitely.⁷ The main challenge was how to ensure access to justice while still maintaining the social distance measures prescribed as preventive methods to forestall further spread of the virus in Nigeria.

All the foregoing reasons compelled the seemingly ingenious introduction of remote hearing and trial of cases by courts through the internet. The Chief Justice of Nigeria (CJN) issued a directive to all heads of courts to make Practice Direction. It will enable remote court hearing.⁸ Some states have given effect to those instruments. Despite the noble intention or innovative solution to this problem, it is pertinent to interrogate the legality and applicability of the instruments based on certain constitutional provisions and extant legislations. It should be noted that,

² Salihu Sabiu Musa, et.al., "COVID-19 and Lassa fever in Nigeria: A Deadly Alliance?," *International Journal of Infectious Disease*, no. 117 (2022): 46, <https://doi.org/10.1016/j.ijid.2022.01.058>.

³ Adebowale Oluwawemimo Oluseun, et.al., "Sars-Cov-2 (Covid-19 Pandemic) in Nigeria: Multi-Institutional Survey of Knowledge, Practices and Perception Amongst Undergraduate Veterinary Medical Students," *PLoS ONE* 16, no. 3 (2021): 1, <https://doi.org/10.1371/journal.pone.0248189>.

⁴ Martin Henseler, et.al., "Economic impacts of COVID-19 on the Tourism Sector in Tanzania," *Annals of Tourism Research Empirical Insights* 3, no. 1 (2022): 2, <https://doi.org/10.1016/j.annale.2022.100042>.

⁵ Gina Jurva, *The Impacts of the COVID-19 Pandemic on State & Local Courts Study 2021: A Look at Remote Hearings, Legal Technology, Case Backlogs, and Access to Justice* (London: Thomson Reuters, 2021), 2.

⁶ ACAPS, "ACAPS Thematic Report: Covid-19 in Nigeria (2020)," ACAPS, April 3, 2022, https://www.acaps.org/sites/acaps/files/products/files/20200526_acaps_thematic_report_covid19_in_nigeria.pdf.

⁷ Linda Mulcahy, "Virtual Poverty? What happens when Criminal Trials Go Online?," in Dave Cowan and Ann Mumford, *Pandemic Legalities: Legal Responses to COVID-19 Justice and Social Responsibility* (Bristol: Bristol University Press, 2021), 46.

⁸ National Judicial Council, "Re: National Judicial Council COVID-19 Policy Report: Guidelines for Court Sittings and Related Matters in the COVID-19 Period," *National Judicial Council*, March 13, 2022, <https://njc.gov.ng/30/news-details>.

whereas it is found that the CJN's Directive or Practice Directions are against any of the legislations, they would be set aside, and it would affect the validity of any case conducted through the remote court sessions. Thus, the thrust of this work is to examine the practicalities and impracticalities of remote trials in accordance with laws and newly introduced directives guidelines, and practice directions in Nigeria.

B. National Judicial Council Directives/Guidelines Towards Covid-19 Prevention

The federal and state governments decided to lock down. It had a spiraling effect since federal and states government ministries, departments, and agencies shut down their offices and services.⁹ In line with the presidential directive, the Chief Justice of Nigeria (CJN) and the head of the National Judicial Council issued a circular dated March 23, 2020, directing heads of the court to suspend all courts sitting for an initial period of 2 weeks, since March 24, 2020, with the exception of 'matters that are urgent, essential or time bound according to extant laws'.¹⁰ The directive was further extended on the 8 April 2020 until further notice.¹¹

The major grouse with these directives is that what constitutes 'urgent' and 'essential' matters were not defined clearly. A lot of matters could come under urgent and essential. For instance, matters that have to do with the freedom and personal liberty of a person can be said to be essential; an interlocutory application that has to do with *mareva* injunction or restraining a party from destroying the personal property of another can be said to be essential; a tenant who is about to be ejected, whether lawfully or unlawfully, would like to rush to court for protection from ejection; an application that has to do with freezing of account and immediate reversal of money that was fraudulently transferred from another person's account; etc. It is difficult to pretend that these instances do not constitute what is urgent and essential. It suggests the very important reason that the CJN should have classified what constitute urgent and essential matters.

At the same time, not limiting the scope of urgent and essential matters may be intentional and considered good in the interest of justice. At least, it allows heads of courts to exercise discretion on urgent and essential matters with regard to the unique facts of each case. However, the practice directions established by the heads of courts of some states were not helpful in expanding the meaning of 'urgent and essential or time bound'. For instance, the practice direction issued by the Chief Judge of Oyo State merely regurgitated the expression 'urgent, essential, or time bound'. It went further to state that such matter shall be considered based on the application of counsel to parties of a suit.¹² Here again, the burden has been

⁹ J. Jarpa Dawuni, *Gender, Judging and the Courts in Africa: Selected Studies* (Oxfordshire: Taylor and Francis, 2021), 282.

¹⁰ Emuobonuvie A. Majemite and Okorie Kalu, "The Covid-19 Directives of the Chief Justice of Nigeria and State of-the Judiciary," *Punuka.com*, March 6, 2022, <https://punuka.com/the-covid-19-directives-of-the-chief-justice-of-nigeria-and-state-of-the-judiciary>.

¹¹ National Judicial Council, 10.

¹² Section 3 (a) and (b), Oyo State High Court Practice Direction on Court Sitting.

shifted to counsel to convince a presiding judge to the effect that a particular case falls within the special class of ‘urgent, essential or time bound’. Certainly, a presiding judge would exercise discretion, one way or the other based on the circumstances of the case and personal perception whether the case is either ‘urgent, essential or time bound’. Therefore, it means that two judges may differ in their determination of whether two cases are ‘urgent, essential or time bound’, even if they are of similar facts and circumstances. It is all because the Directives and Practice Directions have not set out standards in deciding cases within that special class. The Lagos State version of the Practice Direction provides a better position in ensuring some level of certainty, as it mentions specific kinds of cases such as bail applications, adoption of addresses, rulings, and judgments that should be considered under the particular category.¹³

The National Judicial Council realized that courts could not be indefinitely shut down, considering their essential roles in ensuring a peaceful and orderly society. Then, the 91st meeting of the National Judicial Council, on 22 April 2020, constituted a committee saddled with the task of devising ‘guidelines and measures to enable safe Court sittings during this challenging period of the Coronavirus Pandemic’.¹⁴ The report was subsequently adopted as ‘Guidelines for Court Sittings and Related Matters in the Covid-19 Period’.¹⁵ These guidelines are to deliver a simultaneous accommodation of virtual and physical court sitting and prevention of the spread of Covid-19.

C. Legal Constraints and Issues Around Virtual Court Sessions

The introduction of virtual court sessions in Nigeria is, of course, not just innovative but an inevitable intervention during the pandemic. Up to the present, a permanent, rest-assured, and time-tested medication for Covid-19 is unknown hence the pandemic is continuing to exist as long as the medication remains a mystery. Nevertheless, courts cannot be indefinitely shut down. Therefore, there is a need of very necessary intervention of introducing virtual court sessions.¹⁶

It is important to state that Borno State High Court of Justice first introduced the practice of virtual court session in Nigeria.¹⁷ It happened in the case of *State v. Ali Mohammed*,¹⁸ wherein Justice Fadawu Umar delivered a judgement discharging and acquitting the defendant of murder charge. The Chief Judge of Borno State

¹³ Section 1 High Court of Lagos State Practice Direction for Remote Hearing of Cases in the Lagos State Judiciary.

¹⁴ National Judicial Council, “Re: National Judicial Council”.

¹⁵ National Judicial Council, “Re: National Judicial Council”.

¹⁶ Judith Fabricant, *Superior Court Operations During the Public Health Emergency Arising from the Coronavirus (COVID-19) Pandemic: Applicable to All Courts* (United States of America: Commonwealth of Massachusetts Superior Court, 2020), 1-2.

¹⁷ Onyekachi Umah, “The First Virtual Court Hearing was in Borno State and Not in Lagos State,” *SabiLaw*, March 21, 2022, <https://learnnigerianlaws.com/the-first-virtual-court-hearing-was-in-borno-state-and-not-in-lagos-state-daily-law-tips-tip-579-by-onyekachi-umah-esq-llm-aciarbuk/>.

¹⁸ *State v. Ali Mohammed*, Suit No. BOHC/MG/CR/115/19, 2020.

stated that the virtual court session is not just a judicial reaction to Covid-19. It enables the citizens of the state to have more access to justice.¹⁹ In quick succession, the High Court of Lagos State, in the case of people of *Lagos v Olalekan Hameed*,²⁰ held a virtual court session.²¹ The defendant was convicted of murder and sentenced to death. The judgment was delivered in the Zoom app. It enabled Justice Mojisola Dada to preside over the virtual proceeding. The court states “the sentence of this court upon you, Olalekan Hameed, is that you be hanged by the neck until you are pronounced dead, and may the Lord have mercy upon your soul. This is the virtual judgment of the court”.²²

The resort to virtual court sessions has enabled the court to ensure that justice is not grounded. It keeps running despite the difficulties in having a physical gathering for fear of Covid-19. However, it would be seen that this is a break away from the traditional method of having court sessions in courtrooms or *locus in quo*.²³ Since virtual court sessions are not within the contemplation of extant laws in Nigeria, and there may be some legal constraints or unresolved legal issues around it. For instance, there are fears that the virtual judgment could be set aside on that ground upon appeal since virtual court sessions are unfamiliar for criminal procedure and given the strict adherence to criminal procedures and safeguards usually afforded to defendants in a criminal case. This apprehension may have informed the usage of the expression ‘virtual judgment’ when reading out the death sentence in the *Olalekan Hameed’s Case*. Whether or not the current constitution and other legal framework in Nigeria directly or indirectly envisaged and support virtual court session has been a subject of controversy. There are diverse opinions on the legality of virtual court sessions. The legal constraints and issues surrounding virtual court sessions shall be discussed, straight off, under the next parts.

1. The Constitutionality of Virtual Court Sessions

The Constitution of the Federal Republic of Nigeria (CFRN) 1999, as amended, remains the *grundnorm* from which every other law derives their validity. The supremacy clause of the CFRN 1999 renders any law or any of its provisions that are inconsistent with it null and void to the extent of such inconsistency.²⁴ Did the

¹⁹ *State v. Ali Mohammed*, 2.

²⁰ Suit No. ID/9006C/2019, 2020. For additional commentary, see Emuobo Emudainohwo, “Appraising the Constitutionality of Virtual Courts in the National Industrial Court of Nigeria,” *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 12, no. 1 (2021): 20-22, <https://www.ajol.info/index.php/nauijilj/article/view/206730>.

²¹ Ngozika Rosemary Oji, “Nigeria: Are Virtual Court Hearings Constitutional,” *IMT International Journal of the Arts and Sciences* 3, no. 4 (2020): 4, <http://imtijotas.org.ng/sites/default/files/PDF/Virtual-Remote%20Hearing.pdf>.

²² Dennis Ezezi, “Man Gets Death Sentence as Lagos Holds Virtual Court Session,” *The Guardian*, March 3, 2022, <https://guardian.ng/news/man-gets-death-sentence-as-lagos-holds-virtual-court-session/>.

²³ Section 127 (2) Evidence Act 2011.

²⁴ Section 1 (3) of the Constitution of the Federal Republic of Nigeria, 1999.

constitution or its drafters envisage a situation like the current pandemic? the question could be answered negatively. Virtual court sessions could not have been envisaged because, in 1999, when the constitution was enacted, internet connectivity, which is the means of virtual court sessions, has not deeply entrenched yet in Nigeria, in contrast with present day. If the current pandemic was constitutionally envisaged, was virtual court sessions envisaged and/or supported by the provisions of the constitution as an alternative rescue to physical court sessions?

Having painstakingly perused the CFRN 1999, it is safe to categorically state as follows: no provision condemns or is directly inconsistent with virtual court sessions. The constitution cannot exhaustively address all aspects of human endeavor.²⁵ The most important thing is for a law not to offend the letters and/or the spirit of the constitution. This is the singular essence of the supremacy clause in the constitution.

Previously, the phenomenon that looks like a tacit determination of the constitutionality or otherwise of introducing technology to judicial system happened in Ghana: the case of *Attorney-General No. 2 v. Tsatsu Tsikata (No.2)*.²⁶ 'The Fast-Track High Court of Ghana (FTC)' was a high court with computers, audio recording, and case management facilities designed for speedy and effective trial. It was set up by the then Chief Justice of the Republic of Ghana'.²⁷ In 2002, the constitutionality of FTC became an issue for the Supreme Court of Ghana.²⁸ The major complaint is that Article 126 (1) of the Constitution of Ghana does not recognise the nomenclature of any court as FTC. The Supreme Court initially held in a 5-4 majority decision that FTC was unconstitutional.

However, the Supreme Court, on 26 June 2002, set aside its earlier decision and held in a 6-5 majority decision that FTC is constitutional. The decision is rested on the strong basis that the FTC is just a division of the high court; and the chief justice has the power to create a division of the court of appeal or high court even without any legislative endorsement or approval. Since virtual court session fundamentally rests on technology, and the Supreme Court of Ghana already held, even though tacitly, the introduction of technology to judicial system as constitutional, then it could be safely inferred that virtual court sessions can be back to the 2002 decision, without any necessary legislative intervention or further judicial interpretation.

In connection with the Nigerian constitution, there is a unique canon of interpretation which was delivered in the *locus classicus* cases of *Nafiu Rabiu v*

²⁵ Joseph Onyekwere, "Experts Examine Merits, Demerits of Virtual Court Hearings in Nigeria," *The Guardian*, March 10, 2022, <https://guardian.ng/features/experts-examine-merits-demerits-of-virtual-court-hearings-in-nigeria/>.

²⁶ *Attorney-General No. 2 v. Tsatsu Tsikata (No.2)* [2002] JELR 68281 (SC).

²⁷ Nana Yaw Ntrakwah, "Litigation and Technology: Making the Case for Virtual Courts in Ghana," *Ntrakwah & Co*, April 8, 2022, <https://ntrakwahandco.com/litigation-and-technology-making-the-case-for-virtual-courts-in-ghana/>.

²⁸ Nana Yaw Ntrakwah, "Litigation and Technology: Making the Case for Virtual Courts in Ghana."

*State*²⁹ and *A.G. Bendel State v A.G. Federation*.³⁰ In the case of *Nafiu Rabi v State*, the Supreme Court states that the Constitution establish broad and general framework and principles of government, not only technical rules of interpretation, and is applicable to varying conditions of evolving communities. In *A.G. Bendel State v A.G. Federation*,³¹ the Supreme Court has established 12 pillars of constitutional interpretation. They include, among others, clear and unambiguous language to be given its plain meaning; wholesome interpretation; societal progression to give new and fuller import to constitutional meaning; underlining constitutional principles should be preferred to literal meaning; avoidance stultifying interpretation of words. The significance of both cases above is to emphasize the requirement for broad application and interpretation of the constitution, except where broad interpretation may manifest injustice or a 'narrower interpretation will best carry out the objects and purposes of the Constitution'.

The only constitutional provisions that indirectly raises dusts with regards to the constitutional validity of virtual courts sessions are sections 36 (1), (3) & (4). The key words in subsection (1) are 'constituted in such manner as to secure its independence and impartiality'. Does introduction of virtual court sessions impact negatively on the 'independence and impartiality' of courts (and tribunals)? the answer is an emphatic 'no'. The provisions of the National Judicial Council (NJC) guidelines further emphasize and reinforce the independence and impartiality of courts. The singular fact that the NJC and the respective courts could issue directives for courts to safely function during the pandemic, even without the interference of the other arms of government (executive and legislature), is a strong pointer to the independence of the judiciary in this instance. Nothing could have given independence and free hands to respective courts to dispense justice based on the peculiar facts of each case and circumstances of each court than Item G (5) of the NJC guidelines that 'these guidelines are not exhaustive'.

Heads of Courts may expand on them and/or modify them, as necessary and/or required, based on the exigencies of the moment and the circumstances of each court'.³² Based on the 3rd proviso of the NJC guidelines, it only guides all heads of court "in adopting or formulating rules, directives and guidelines, as appropriate to the legal and material circumstances of their courts, with a view to achieving the goal of safely delivering justice in these unprecedented challenging times".³³ Thus, the introduction of virtual court sessions does not undermine, but rather enhances, the constitutional provision for the independence and impartiality of courts.

²⁹ *Nafiu Rabi v Kano State* [1980] *LawCareNigeria*/1088 (Supreme Court).

³⁰ *Attorney-General of Bendel State v Attorney-General of the Federation & others* (Supreme Court 17 of 1981) [1981] *Nigeria Supreme Court* 4.

³¹ *Attorney-General of Bendel State v Attorney-General of the Federation & others*.

³² National Judicial Council, "Re: National Judicial Council."

³³ National Judicial Council, "Re: National Judicial Council."

The NJC, as an independent body, in the interest of justice during the current pandemic does not safely favor physical court sessions. It only decided to take advantage of technology. The Nigerian Supreme Court, which the Honourable CJN directly superintends, endorsed the use of technology to enhance justice delivery. The Supreme Court, in the case of *C.M. & E.S. Ltd v. Pazan Services Nig. Ltd*,³⁴ describes as follows.

“In the instant appeal, there is evidence that a text message was sent by the registry of the court to the GSM numbers provided by counsel to both parties informing them that the matter had been adjourned to 15th March 2016. I hold the view that at this age of prevalence of information technology, the service of hearing notice through text message by the registrar of court is good and sufficient.”

The primary essence of the above case is to address the contemplation of some lawyers. It is most likely that the Supreme Court would set aside on constitutional ground, any trial and/or judgment delivered through virtual court sessions. The constitution neither provides for virtual court sessions whether there is a pandemic or not; nor did it recognize ‘text message’ as a proper medium to serve hearing notice. However, necessity compelled the Supreme Court to validate both. Both reflect technology but neither of the two undermines the independence and impartiality of courts. This study is of the position to suggest that the Supreme Court, owing to the independence and impartiality of courts, shall hold virtual court sessions as constitutional when called upon for interpretation.

2. How Public is Virtual Court Sessions?

Both subsection (3) and (4) of section 36 of the CRFN 1999 emphasize the need for court sessions to be held in public. Subsection (3) addresses civil suits; and subsection (4) addresses criminal trials. Both are to be held in public. It is a fundamental condition that goes to the root of the validity of a suit. There are ample occasions where the Supreme Court has set aside a trial that was conducted based on this ground.³⁵ In the case of *Oviasu v Oviasu*³⁶ where the hearing of a matrimonial cause proceeding was conducted in the chambers of the judge, the Supreme Court declare the decision to be a nullity. Similar decision had earlier been replicated in the case of *Macpherson v Macpherson*.³⁷

Although the various cases examined above are not based on virtual court sessions but on physical hearing in the chambers of a trial judge, these cases have expanded the jurisprudence of the meaning of ‘public’ for the purpose of court hearings. The key consideration as can be inferred therefrom had been about

³⁴ *C.M. & E.S. Ltd v. Pazan Services Nig. Ltd* (2020) 1 *Nigerian Weekly Law Report* (Part 1704) 70, 95.

³⁵ *Simon Ebido v. State* [2007] *Law Pavilion Electronic Law Reports* 1012 (Supreme Court).

³⁶ *Oviasu v. Oviasu* (1973) 11 *Supreme Court* (Reprint) 187.

³⁷ *Macpherson v. Macpherson* [1936] *Appeal Cases* 177, 220.

whether members of the public can gain 'free accesses to the court session to implement the principle to virtual court sessions, the main issue for determination is whether remote court hearing would restrain members of the public from attending the session? there are various reactions to the question. On the one hand, members of public would be restrained. on the other hand, members of the public would not be restrained; rather more members of the public could attend court sessions in the comfort of their respective locations. The need to satisfy the 'public hearing' requirements of the constitution seems to have been contemplated and taken care of by Item E (12) (a) of the NJC guidelines. The said provision directs heads of courts to facilitate live streaming of each virtual court proceedings by using the instrumentality of the court's publicized uniform resource locator ("URL" or "web address") or social media platforms, to enable observatory participation of members of the public as the proceedings progress.

However, the argument is valid that illiteracy, poverty, lack of internet compliant phones, lack or poor internet connection, poor electricity, etc. could prevent members of the public from being aware of any virtual court session, let alone attend same. These are serious factors that cannot be overlooked or simply pushed aside just because the law does not prevent those affected by the said factors from attendance. This may have influenced the position of Awomolo, SAN that "one common feature of 'public place' for the purposes of conducting legal proceedings is that same is an open place which is accessible to everyone without hindrance".³⁸ The equation has been expanded to 'public place' even though the relevant constitutional provision only uses the expression 'public'.

The expression of the senior advocates amounts to pinning the constitutional interpretation to physical location. His position also suggests the absurd interpretation that a courtroom should be able to accommodate the entire Nigerian population without hindrance; and since no courtroom has such capacity, all previous decisions of court should be set aside. It is obvious that this is impossible. The law could not have commanded the doing of an impossible by directing court proceeding to be held in public while court rooms are built to only accommodate few persons.

Virtual court session is different from physical court session, where any member of the public can freely walk into any courtroom and attend court proceeding. In other words, even though by law members of the public are allowed to attend virtual court sessions, would the limiting factors listed above not restrain them from attending? and if members of the public are restrained, how public are virtual court sessions as constitutionally expected? truly, the constitution stipulates that court sessions must be held in public but it does not conclusively imply that members of the public usually troop out to attend court proceeding. Based on the

³⁸ A. Awomolo, "Reviewing the Constitutionality of Virtual Hearings Publicity in the Context of Nigeria's Technological Advancements," *The Nigeria Lawyers*, May 10, 2022, <https://thenigerialawyer.com/reviewing-the-constitutionality-of-virtual-hearings-publicity-in-the-context-of-nigerias-technological-advancements/>.

law practice experience, most of those persons who are present in a court room per time are either parties, interested or connected to parties to a suit; or persons who have one activity or the other to do within the court premises.

Hardly, an average person will ordinarily go to court just to attend court proceeding. Since an average person who attends court proceedings has one interest or the other at stake, then, it could be safely assumed that members of the public in this instance would ensure having appropriate knowledge about ongoing virtual court sessions and has the relevant login password that would enable access to view the court session. The restraints occasioned by illiteracy, deficient electronic gadgets, lack of electricity, poor internet facilities, etc. are outside the control of the judiciary. Notwithstanding these challenges, the law remains that court proceedings must be made public. In other words, any member of the public that chooses to attend proceeding must not be legally restrained. These challenges are not legal restraints, rather, incidental challenges to attending virtual proceedings. As such, the judiciary cannot be held accountable for that, provided the login password to each court session has been made available to the public.

Physical court sessions have limited number of audiences it can accommodate given the limited capacity of a physical building. Through the medium of virtual court session, court proceedings gain wider publicity and more members of the public can access court proceedings at relatively low cost from anywhere in the world. It can even afford them to do this while attending to other issues of interest at the same time, without even disrupting the business of the court. The relative ease associated with attending virtual proceeding is unlike a situation where litigants in some cases would have to travel from far distance to attend physical court session, only to discover that the court would not sit for one reason or the other. Such litigant or spectator would have wasted transport fare, risked fatality associated with vehicular movement, expenses on lodging, and loss of scarce businesses time, etc.

A cost or benefit analysis of virtual court sessions and physical court sessions would embolden one to conclude that virtual court session is still most preferable, cost-effective, and, most importantly, accommodates more members of the public than physical court sessions. The challenges associated with virtual court sessions are resolvable. Physical court sessions are also facing a lot of challenges such as lack of voice enhancement facilities, unconducive court rooms, poor record keeping, small sizes of court rooms that restrains spectators and limits the 'publicity' of court proceeding, etc. Despite all of these, the law remains the same. The fundamental question is: is virtual court sessions publicized? the answer is in the affirmative.

The establishment of a court session public is not absolute. There are exceptions where members of the public could be lawfully restricted or excused from attending a court proceeding, either physical or virtual. Section 36 (4) CFRN addressed it. If only physical court sessions operate during this pandemic,

paragraph (a) above could be relied on as a valid ground to restrain the public from accessing court rooms save the direct parties to a case. Parties to a case could, however, be said to attend in dual capacities, first as parties to the case, second as members of the public. Paragraph (a) categorically stipulates 'interest of public safety' as a constitutional ground to make a court session, either physical or virtual, exclusive.

At a time like the current pandemic, public safety is very important, considering the medium of spread of Covid-19. Public safety consideration forced the World Health Organization (WHO) and the National Centre for Disease Control (NCDC) to strongly advise social/physical distance and individualism. This further necessitated the introduction of total lockdown. If a court, in furtherance of the interest of 'public safety', relies on paragraph (a) above to deliberately restrict the members of the public from its physical proceedings without the alternative option of virtual proceeding, it is rather not condemnable but commendable. The Nigerian judiciary introduced virtual court session to protect and balance the dual interest of the public in this instance. It ensures 'public safety' by curbing further spread of Covid-19, and attendance of court proceedings at the convenience of the public.

3. Admitting Witnesses and Evidence

A witness is a person with information that is crucial to judicial proceedings, including criminal proceedings.³⁹ With regards to the involvement of a witness in any suit, the constitution, being largely a substantive law, does not provide beyond the right of a party to a suit to call any witness of the party's interest and the right of the opposing party to, personally or through a counsel, cross-examine witness.⁴⁰ This is more like a skeletal framework that is fleshed up through other legal frameworks like the Evidence Act 2011, Administration of Criminal Justice Act (ACJA) 2015, other relevant laws and case law.

Taking the evidence of a witness goes beyond the witness just standing to testify. The demeanor and countenance are important. Physical presence before a court shows that a witness is not under duress or the physical influence of anybody during the time he or she testifies. Physical presence of a witness ensures that answers are not dictated to him or her during cross-examination. All of these help the court to arrive at the justice of a matter. The pertinent question is whether

³⁹ F. Waziri-Azi, "Legal Framework of Witness Protection Measures During Criminal Trial in Nigeria and Emerging Practices," *European Journal of Research in Social Sciences* 7, no. 1 (2019): 1-12, <http://www.idpublications.org/wp-content/uploads/2018/12/Full-Paper-LEGAL-FRAMEWORK-OF-WITNESS-PROTECTION-MEASURES-DURING-CRIMINAL-TRIAL-IN-NIGERIA.pdf>.

⁴⁰ The 1999 Constitution of Nigeria, S.36. It provides for citizens' right to fair hearing. Paragraph d provides for the citizens' right to call and cross examine witnesses. For more commentaries on this right, see Ibingo Inyo Evans, "Right to Fair Hearing in Nigeria Under the Imperatives of Covid-19 Control," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 12, no. 1 (2021): 76-77, <https://www.ajol.info/index.php/naujilj/article/view/206734>.

these are achievable with virtual court sessions wherein a witness testifies from a remote end?

The likely suggestion is that witnesses alone should be physically present at the remote end of a judge, while other participants attend from their respective ends. It is untenable, as it is most likely not feasible because Item E (5) (a) of the NJC guidelines forecloses it, save with the leave of court. It also considers the situation of total lockdown, where movements are restricted. Further, asking witnesses to be physically present at the remote end of a judge may defeat the essence of introducing virtual proceeding at this period, which is the prevention of the spread of Covid-19 and ease of having court sessions.

The National Judicial Council clearly envisioned the legal impracticability of taking the testimony of a witness through virtual court session. Hence, the introduction of Item F provides guidelines for physical court sessions. On the one hand, the NJC guidelines encourage taking witnesses and evidence in remote proceedings. On the other hand, the court may resort to physical court session if there would be any difficulty or impediment thereto. Although virtual court session is not intended to completely replace physical court sessions, simply making physical court sessions attend to what could be done by virtual court session indirectly defeats the essence of introducing virtual court session.

The NJC guidelines recognize the difficulty that may arise in taking witnesses in virtual court sessions. Hence it states,⁴¹ “as the courts and Counsel become proficient in virtual court sitting arrangements, the courts may, on a trial-run basis gradually experiment with taking witnesses and evidence virtually”. Taking oral evidence may not be as challenging as tendering documentary and real evidence during trial. For documentary evidence, over time alternative options may be innovatively created to tender same. For instance, provided documents were earlier frontloaded and served on all parties, documents tendered and admitted may be scanned in its original form to court’s e-mail address assigned for that purpose. Such documents may also be ordered to be physically submitted or sent to assigned court officials within a particular timeframe. Conversely, there can never be an alternative to tendering real evidence such as, ammunitions, telephones, laptops, etc. The need for court to visit the *locus in quo* may also prove challenging. considering these difficulties, virtual court sessions are very effective only to the extent that witnesses would not be called upon, particularly in contentious cases, not to talk about tangible pieces of evidence being tendered.

It is important to note that the Covid-19-induced NJC guidelines⁴² is not the first legal document in Nigeria that introduce taking evidence through virtual means. The idea is not completely novel to the Nigerian justice system. The NJC guidelines used the word ‘trial-run’ because, actually, there was hardly any recorded instance where court took witnesses and evidence solely through video conferencing or

⁴¹ National Judicial Council, “Re: National Judicial Council.”

⁴² National Judicial Council, “Re: National Judicial Council.”

virtual means. Rather, it has usually been achieved through allied forms like face mask, pseudonyms, enclosed sessions, etc.,⁴³ to protect witnesses. Prior to Covid-19, some Nigerian statutes already envisaged and provided for virtual court sessions. These statutes are pre-Covid-19, and most likely, will transcend Covid-19, as they still maintain their validity.⁴⁴

To conclude, procedurally, it is difficult if not impossible to take witnesses through virtual proceedings, particularly in contentious matters, let alone tender evidence. It is a fundamental impracticability that limits the effectiveness of virtual court sessions and further re-echoes the impossibility of a complete replacement of physical court session with virtual court session.

4. Predicting Supreme Court's Judicial Reaction to The Constitutionality of Virtual Court Session

As a preferred alternative, this study suggests the immediate need for a judicial intervention in interpreting the Section 36 (1) (3) & (4) of the CFRN 1999 to allay the fear harbored by some individuals that the results of virtual court sessions would end up becoming a nullity on appeal to the apex court. This paper is not trying to preempt the decision of the Supreme Court and the position of the Supreme Court is almost predictable, at least, for six reasons. The first persuasion could be obtained from the decision of the Supreme Court in the *locus classicus* cases of *Nafiu Rabiu v State*⁴⁵ and *A.G. Bendel State v A.G. Federation*.⁴⁶ It was established that the constitution should rather be broadly interpreted to accommodate new developments except where such broad interpretation would occasion manifest injustice or illegality or a "narrower interpretation will best carry out the objects and purposes of the Constitution". The second basis can be gleaned from the decision of the Supreme Court in the case of *C.M. & E.S Ltd v Pazan Services Nig. Ltd*,⁴⁷ where the Supreme Court upheld the prevalence and use of information technology to enhance justice delivery. The third reason is that the NJC guideline was indirectly birthed into existence by the justices of the Supreme Court, thereby serving as a strong endorsement of virtual court sessions.

The fourth basis finds persuasion in the current Supreme Court practice of using internet technology for filing, serving processes, and other administrative purposes, which is pursuant to the Nigerian Judiciary Information Technology Policy (NJITP), 2012.⁴⁸ Even prior Covid-19, the NJITP already made some reforms by

⁴³ Ikechukwu Nnochiri, "Catholic Church Bombing: Court Sentences 'Kabiru Sokoto' to Life Imprisonment," *Vanguard*, May 11, 2022, <https://www.vanguardngr.com/2013/12/catholic-church-bombing-court-sentences-kabiru-sokoto-life-imprisonment/>.

⁴⁴ Administration of Criminal Justice Act 2015, Section 232; Terrorism (Prevention) (Amendment) Act 2013, s. 33 and 34; The Anti-Torture Act, Act No 21, s. 17.

⁴⁵ *Nasiu Rabiu v State*, 28.

⁴⁶ *A.G. Bendel State v A.G. Federation* [1981] Nigerian Supreme Court Cases 314.

⁴⁷ *C.M. & E.S Ltd v Pazan Services Nig. Ltd* (2020) 1 Nigerian Weekly Law Report (Pt 1704) 70, 95.

⁴⁸ Nigerian Judiciary Information Technology Policy (NJITP) 2012, "JITPO Policy Document," *Nigerian Judiciary Information*, May 11, 2022, https://nji.gov.ng/Images/PDF/JITPO_PolicyDocument.pdf.

introducing information technology to the daily running of the courts' activities. The NJITP provides, among others, for video conferencing to take evidence of witnesses from remote end and e-court system in general.⁴⁹ It all boils down to virtual court session. The NJITP arguably influenced the decision of the Supreme Court in *C.M. & E.S. Ltd v Pazan Services Nig. Ltd*.⁵⁰ Notwithstanding the innovative nature of the NJITP, it still remains in the realm of policy. It is conceded that the NJC is a policy-making body. However, its policies are not expected to be beyond its powers nor its policies contrary to the Constitution.⁵¹ It is a plausible argument that the constitutionality of virtual court session may be challenged someday. Possibly, it is held to be unconstitutional, which most likely may not be the case. Then the NJITP automatically becomes void. Conversely, any eventual decision of court in favour of virtual court session will strengthen the NJITP. The fifth ground is the fact that the Supreme Court delivered two decisions remotely/virtually on May 7, 2021.⁵² The sixth ground is the Obiter (hint) of the Supreme Court in the cases of *Attorney General of Lagos State v Attorney General of the Federation & the National Assembly*,⁵³ and *Attorney General of Ekiti State v Attorney General of the Federation & 2 Ors*.⁵⁴

The foregoing six pointers suggest the 'body language' of the Supreme Court and the likely outcome of its decision if asked to determine the constitutionality or otherwise of virtual court sessions and its incidental guidelines. Indeed, the Supreme Court was not pretentious about showing the direction towards which it would straighten up its judgment in the recent attempt by Lagos⁵⁵ and Ekiti States⁵⁶ to challenge the unconstitutionality of virtual court session before the Supreme Court. The hint of the Supreme Court to the effect made the two states to withdraw their suits. In the meantime, the Supreme Court sounded a knell of warning that judges who failed or refused to conduct virtual court sessions to be petitioned to the NJC for appropriate disciplinary sanctions.⁵⁷

Notwithstanding the unfriendly disposition of the Supreme Court regarding the tacit challenge on the constitutionality of virtual court session in the previously mentioned cases, it is argued that the Supreme Court is yet to make a pronouncement or judicial precedent on the subject matter. This is because the cases were not determined on the merit. The main issue for determination before the Supreme was not about the constitutionality or otherwise of virtual court

⁴⁹ Nigerian Judiciary Information Technology Policy (NJITP) 2012.

⁵⁰ Nigerian Judiciary Information Technology Policy (NJITP) 2012.

⁵¹ *Buhari v INEC* (2008) 19 Nigerian Weekly Law Report (Pt. 1120) 236, 341-342.

⁵² The Nation, "Supreme Court Voids Council Dissolution in Katsina, Oyo," *The Nation*, May 11, 2022, <https://thenationonline.net/updated-supreme-court-voids-council-dissolution-in-katsina-oyo/>.

⁵³ *Attorney General of Ekiti State v. Attorney General of the Federation*.

⁵⁴ *Attorney General of Ekiti State v. Attorney General of the Federation*.

⁵⁵ *Attorney General of Ekiti State v. Attorney General of the Federation*.

⁵⁶ *Attorney General of Ekiti State v. Attorney General of the Federation*.

⁵⁷ Ajiri Daniels, "Breaking: Supreme Court Declares Virtual Court Sittings Constitutional," *The Sun*, May 11, 2022, <https://www.sunnewsonline.com/breaking-supreme-court-declares-virtual-court-sittings-constitutional/>.

session. In the Ekiti case, the plaintiff challenged the directive of the Attorney General of the Federation issued to the Head of Courts at Federal and State levels on April 20, 2020, prescribing virtual Court sittings. In other words, the Attorney General of the Federation acted *ultra vires* by issuing a directive. It purports to bind State courts in Ekiti. Instead of make a pronouncement on the case, the Supreme Court hinted that the suits were largely premature and speculative.⁵⁸ The Lagos State similar replicated pronouncement in the sister case.

It was based on the non-binding hint of court that the plaintiffs voluntarily withdrew the suits. Therefore, the Supreme Court made a pronouncement on the constitutionality or otherwise of virtual court hearing when the matter was not surrendered to it for determination. The court cannot answer a question that is not before it or answer a question that is not relevant for the just determination of a case.⁵⁹ Hence, any expression to that effect is regarded as *obiter dictum*. However, the reaction of the Supreme Court in this instance has already foretold the end from the beginning, which is to the effect of upholding the constitutionality of virtual court session.⁶⁰

5. Legal Implication of the NJC Guidelines and Practice Directions as Legislative Instruments

From the forgoing, virtual court session is a practice, which is strange to extant substantive and procedural laws. Indeed, the guidelines and practice directions do not offend provision of the constitution on court sessions being held in the public. However, a constitutional amendment to give effect to virtual hearing would still not be out of place. The Nigerian Senate Committee's Chairman on Judiciary, Human Rights, and Legal Matters has already suggested a constitutional amendment to constitutionalized virtual proceedings and the power of judges to conduct same.⁶¹ The difficulty and the time-consuming legislative rigors of constitutional amendment had made the NJC quickly rise to the occasion to salvage the day through its guidelines and Practice Directions.

The NJC guidelines and practice direction are argued to be constitutional. However, both instruments are weak legislative tools. A guideline cannot be considered a legislation. It is merely a quasi-legislative instrument that is issued by

⁵⁸ Kenna Partners, "Constitutionality of Virtual Proceedings vis-a-vis Rulings of the Supreme Court in Re: Sc/Cv/260/2020 – Attorney General of Lagos State v Attorney General of The Federation & The National Assembly; and Sc/Cv/261/2020 – Attorney General of Ekiti State v. Attorney General of The Federation & 2 Others," *Kenna Partners*, March 21, 2022, <https://kennapartner.com/wp-content/uploads/2020/07/CONSTITUTIONALITY-OF-VIRTUAL-PROCEEDINGS-VIS-A-VIS-THE-RULINGS-OF-THE-SUPREME-COURT-1.pdf>.

⁵⁹ *University of Calabar v Essien* (1996) 12 Supreme Court Cases 304, 326.

⁶⁰ E. Emudainohwo, "Appraising the Constitutionality of Virtual Court Hearings in the National Industrial Court of Nigeria," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 12, no. 1 (2021): 22, <https://www.ajol.info/index.php/nauijilj/article/view/206730>.

⁶¹ Law TV News, "The Constitutionality or otherwise of the Virtual Hearing Proceedings," *Law TV News*, April 11, 2022, [https://lawtvnews.com/opinion/the-constitutionality-or-otherwise-of-the-virtual-hearingproceedings/?utm_source=Reviv OldPost &utm_medium=social&utm_campaign=ReviveOldPost/](https://lawtvnews.com/opinion/the-constitutionality-or-otherwise-of-the-virtual-hearingproceedings/?utm_source=Reviv%20OldPost&utm_medium=social&utm_campaign=ReviveOldPost/).

administrative bodies. It also has a non-binding effect. It is ordinarily called in aid to interpret substantive legislation.⁶² Notwithstanding the threat of the Supreme Court to impose sanction on judges who make a mistake in complying with the guidelines, this does not confer legal status to guideline. It may only apply to judicial officers who are bound to work within the framework and direction of their employer. It has no bearing in determining the right of parties whose cases are presented before the court for determination according to law.

A practice direction is a quasi-legislation. It is an inferior and supplementary instrument to the rules of court. According to the Supreme Court, it is “a direction given by the appropriate authority stating the way and manner a particular rule of court should be complied with, observed or obeyed”.⁶³ The Supreme Court, in the case of *Nwankwo v Yar’ Adua & Ors*⁶⁴, state that practice direction carries the force of law. Parties are bound to observe strict compliance.⁶⁵ Nevertheless in *Nigerian Airways Authority v Okoro*⁶⁶, the Supreme Court admitted that the statutory authority of practice direction does not equal to a statutory rule. The Supreme Court states, “practice directions will not have the force of law if they are against the constitution or the statutes which enables it”.⁶⁷ The cases demonstrate that guidelines and practice directions are in the lowest of the hierarchy of laws.⁶⁸ It implies the need for the NJC, chief judge of each state of the federation and other concerned law making entities to take reasonable steps to make the necessary constitutional amendments or substantive law enactments to give virtual court sessions a strong footing in Nigeria.

D. Conclusion

The outbreak of the Covid-19 pandemic and the social distance method adopted to prevent further spread of the pandemic has threatened and stultified the operation of courts, which is crucial to the maintenance of law and order. The lockdown did not prevent the breakdown of law and order in the society.⁶⁹ Hence, the swift and innovative action by the NJC to restore the functionality of the judiciary within this period is highly commendable. The Constitution of Federal Republic of Nigeria (CFRN) is a living document. The interpretation can be stretched to accommodate new development. A careful analysis of the CFRN 1999 shows the NCJ guidelines

⁶² Department of Justice Canada, “There Ought to be Law Instrument Choice: An Overview of the Issues,” *Government of Canada*, May 7, 2022, https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rp02_10-dr02_10/p2.html.

⁶³ *University of Lagos v Aigoro* (1984) 11 Supreme Court 152, 159.

⁶⁴ *Nwankwo v Yar’ Adua & Ors* (2010) 12 Nigerian Weekly Law Report (Pt. 1209) 518.

⁶⁵ *Owuru v Awuse* (2004) All Federation Weekly Law Report 1425, 1439.

⁶⁶ *Nigerian Airways Authority v Okoro* (1995) 7 Supreme Court of Nigeria Judgement 292, 301.

⁶⁷ See the case of *Buhari v INEC* (2008) 19 Nigerian Weekly Law Report (Pt. 1120) 236, 341-342.

⁶⁸ Chioma Bernadine Nwankwo, “A Legal Critique of the Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021 as it Relates to Taxpayers Rights,” *Nnamdi Azikiwe University Journal of Commercial and Property Law* 9, no. 1 (2022): 159, <https://journals.unizik.edu.ng/index.php/jcpl/article/view/1015/854>.

⁶⁹ A. Ailemen, “FG Steps up Action Against Rape, as 799 People Arrested,” *Business Day*, March 11, 2022, <https://businessday.ng/security/article/fg-steps-up-action-against-rape-as-799-people-arrested/>.

and practice directions made by various heads of courts in the federation are not directly in breach of any provision of the constitution. It is strongly contended herein that no form of court session could be more 'public' than virtual court sessions. The indifference of the constitution does not absolve the legal possibility of testing the constitutionality of virtual court session in court. However, this study also pointed out the challenges of the virtual court sessions during trial. For instances, witness has to testify; or parties want to tender real and material evidence.

Undoubtedly, the time-consuming legislative process had made it impracticable for a constitution amendment or enactment of a substantive act of the National Assembly considering the emergency of the situation. Hence, it is the resort to quasi-legislation, though not unconstitutional, but weak legislative instrument. To have a sustainable virtual court session in the administration of justice beyond the period of pandemic, the Supreme Court is invited to make a firm judicial pronouncement on the constitutionality or otherwise of virtual court session. This may be delayed for an unpredictable period when such legal issue is brought before the Supreme Court. In the alternative, there is a need for virtual court session to be reflected in the constitution through an amendment process. It may not be achieved any time soon, considering the cumbersome process of constitution amendment. The quickest alternative is the enactment of a substantive law on virtual court session by the relevant legislative bodies. Ultimately, any of these three alternatives will permanently resolve the controversy surrounding the constitutionality or legality of virtual court sessions in Nigeria.

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