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VIRTUAL PROCEEDINGS, FAIR HEARING & ELECTORAL PROCESS: THE EMERGING JURISPRUDENCE

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Abstract

Access to justice and the rule of law are some of the priority areas of the Nigerian Justice Sector Administration and the African Union Agenda 2063. With the outbreak of the dreaded Corona Virus in Wuhan, China in December, 2019 which later spread to almost all the parts of the world, several countries of the world were either totally or partially locked down. This, amongst other things, prevented a lot of people from having access to justice. Owing to this, there has been global efforts to design a global solution to the lack of access to justice triggered by the pandemic. The Nigerian Judiciary, just like her counterparts in other jurisdictions has

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developed regulations which allow for remote/virtual court proceedings in the various layers of courts in Nigeria. Election disputes, issues bordering on fair hearing, domestic violence and other areas of the justice sector suffered serious setbacks during the lockdown imposed by the Federal and State Governments in 2020. This paper therefore examines the application, prospects and challenges of virtual court proceedings with particular focus on electoral process and other emerging jurisprudence in Nigeria.

Keywords: Corona Virus, Virtual Proceedings, Fair Hearing, Election Petition, Nigeria

1.1 Introduction

The outbreak of the novel Coronavirus Disease 2019 (COVID-19) is an unprecedented event which has taken the world by storm and has left even the most powerful nations struggling for survival. The pandemic, which has been rightly described as "the biggest public health crisis in a century and the first of this scale in the globalized modern world"[1] has made governments across the world adopt several ingenious responses. The responses, which vary depending on the magnitude/severity of the disease in a country, largely include imposition of lockdowns, deployment of medical facilities

[1] R Chattopadhyay *et al*, 'An Introduction to COVID-19 and federalism' in R Chattopadhyay *et al* (eds) *Federalism and the Response to COVID-19: A Comparative Analysis* (2022) Routledge, New York. P.1.

through emerging challenges in governance and administration of justice. With regard to access to justice, the COVID-19 pandemic popularized the idea of virtual hearing in court proceedings even in election petition matters. Indeed, with the measures in place to control the pandemic, such as restriction of mass gathering and physical distancing, virtual proceeding seems a very potent option towards access to justice. This fact is further validated by the poor infrastructure, including small sizes of courts which have bedevilled the judiciary in Nigeria.[6] Thus, while virtual court proceeding appeared to be a means to an end in justice delivery, there are questions regarding its suitability/legality in the context of electoral process in Nigeria, especially in the context of fair hearing. The essence of this paper is therefore to examine the virtual proceedings in electoral process and the vexed issue of fair hearing.

The paper is structured in five parts. After the introduction, part two presents a conceptual framework on virtual proceedings, fair hearing and electoral processes to show their relationship. Part three examines the legal framework on virtual proceedings in electoral processes in Nigeria. Part four analyses the opportunities and challenges of virtual proceedings in electoral process and the last part, part five concludes with recommendations.

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[6] M T Adekilekun, et al, 'Covid-19 and African Nation: An Overview of the Legal and Infrastructural Challenges to Remote Court Proceedings, (2020) VOL. 4. NO.1, OAULJ Page 125.*Published by the Faculty of Law, Obafemi Awolowo University, Ile-Ife, Osun State.*

2.1 Conceptual Framework

In a bid to foster the rule of law, access to justice and fair trials during the pandemic, the Chief Justice of the Federation issued the National Judicial Council Guidelines for Court Sittings and Related Matters in the Covid-19 period in May 2020.The Guidelines directed heads of courts to issue practice directions factoring the existing exigencies.[7] The heads of courts responded to this directive by issuing several Practice Directions enabling virtual proceedings.[8] This action therefore necessitates a contextual understanding of the conception of virtual proceedings.

2.2 Virtual Proceeding

The concept of virtual proceedings has been described using different but related terminologies such as 'virtual court proceeding', remote proceeding' 'online court sitting' 'remote hearing', 'remote sitting' and 'virtual hearing'. In the National Industrial Court of Nigeria (NIC) Practice Directions and Guidelines for Court Sitting 2020 (Practice Direction) for example, virtual hearing is interchangeably referred to as 'online court sitting', 'remote court sitting' or 'virtual court

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[7] H. Yahaya, 'Coronavirus: NJC releases guidelines for court proceedings' 8 May 2020 *Premium Times* available at https://www.premiumtimesng.com/news/top-news/391917-coronavirus-njc-releases-guidelines-for-court-proceedings.html (accessed 3rd June, 2023).

[8] 'Virtual court hearings and the constitution' https://foundationchambers.com/wp-content/uploads/2020/06/VIRTUAL-COURT-HEARINGS-AND-THE-CONSTITUTION-1.pdf (accessed 2nd June, 2023); 'Virtual court hearings and the constitution' https://foundationchambers.com/wp-content/uploads/2020/06/VIRTUAL-COURT-HEARINGS-AND-THE-CONSTITUTION-1.pdf (accessed 2nd June, 2023);

sitting'. However, this legal instrument, like many others alike, does not define the concept.[9] From the phraseology of the concept and on a basic level, virtual hearing can be understood as a situation where court proceedings take place where the parties and relevant stakeholders are situated in different location other than the courtroom, through a platform powered by technology. The platforms may include zoom, skype or other approved video communication method.[10] Thus, the most important feature of a virtual hearing is that the actual trial takes place wholly or partly online or virtually. This differs from a situation where the trial takes place in the physical court premises and members of the public are given the opportunity to join virtually. Thus, where the proceeding of court is live-streamed or where it is accessed through social media platforms as anticipated by the NIC Practice Direction that would not constitute virtual hearing.[11] Virtual hearing also does not include a circumstance where court processes are filed and served electronically even though these are important in facilitating a truly remote proceeding.

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[9] Example, Practice Direction for Remote Hearing of Cases in the Lagos State Judiciary 2020. Available at https://www.aelex.com/wp-content/uploads/2020/04/PRACTICE-DIRECTIONS-FOR-REMOTE-SITTING-FOR-THE-LAGOS-STATE-JUDICIARY-003.pdf.Accessed 2 June, 2023.

[10] See for example, section 16 of the Practice Direction for Remote Hearing of Cases in the Lagos State Judiciary 2020

[11] Section 17(3), NICN Practice Direction, 2020.

2.3 Fair hearing in virtual proceedings

Despite the promises of virtual hearings, it has been the subject of controversies. The major controversy is its association with the concept of fair hearing. Fair hearing is a fundamental human right which is contained in the Nigerian constitution.[12] It essentially entails that the parties should be given equal opportunity to be heard by a court or tribunal and that a party should not be a judge in his/her own case which is encapsulated in the doctrines of *audia teram partem* and *nemo judex in causa sua*. One bedrock of the concept of fair hearing is that trial must be held in public.[13] This means that all the proceedings of the court must be done in public. While the Constitution does not define the term 'public', it is widely interpreted as a public space accessible to members of the society.[14] Therefore, the controversy has always been whether online or virtual space can be interpreted as "public" within the context of the Constitution.[15] Accordingly, most commentaries on this subject are in support of the view that virtual proceedings does not run afoul the constitutional requirement of public hearing considering that it is not

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[12] Section 36(4) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

[13] Section 36(3) and (4) of the Constitution of the Federal Republic of Nigeria, 1999.

[14] See for example the decision in *Gitto Construction General Nigeria Limited & Anor v Etuk & Anor* (2013) LPELR-20817(CA)

[15] F Aigbomian, 'Constitutionality of Virtual Court Hearings' https://primeraal.com/news/constitutionality-of-virtual-court-hearings/. Accessed 3 June, 2023.

'private' in the actual sense of it.[16] From this context, the view is that if the parties, their counsel and the general public are reasonably allowed access to the virtual platform of the proceeding, then it satisfies the constitutional requirement of a public hearing. The limitation in the number of participants allowable on the virtual platform may pose another conceptual challenge to satisfying the requirement of public trials. However, as Aigbomian argues, "this is not far from the reality with the usual courtroom settings where the courtrooms are very small and packed full with counsel and litigants."[17] This challenge therefore is reconcilable with the practice regarding physical trials.

2.4 Electoral process, virtual proceeding and fair hearing

One area where there have been prominent calls for the applicability of virtual proceeding is in electoral process. This is not unconnected with the fact of the generally acknowledged advantage of virtual trial in terms of speed in the dispensation of justice and the time-bound nature of electoral processes. The *sui generis* or peculiar nature of electoral disputes means that certain technicalities cannot be simply overlooked. Indeed, according to Ubanyionwu. 'Some technical defects or irregularities which in other proceedings

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[16] PA Akhihiero, 'Virtual Court Hearings: Towards a Purposive Interpretation of Statutes' available at https://edojudiciary.gov.ng/wp-content/uploads/2020/06/VIRTUAL-COURT-HEARINGSTOWARDS-A-PURPOSIVE-INTERPRETATION-OF-STATUTES.pdf. Accessed 3 June, 2023.

[17] Ibid, see supra Note 16.

are considered too immaterial to affect the validity of the claim, could be fatal to proceedings in election petitions.'[18] Thus, fair hearing in virtual proceedings need to be taken more seriously in electoral process. The limited time span in which election proceeding must be concluded has generally led to recommendations that virtual hearing should be adopted.[19] However, the lingering question remains whether the requirement of fair hearing can be satisfied when electoral proceedings are carried out virtually.

3.1 Legal framework for remote or virtual court sittings in Nigeria

The Covid-19 Pandemic has impacted the world adversely in all spheres of human endeavour. At some points in the year 2020, almost all sectors[20]were completely locked down. This led to poor access to justice at the early stage of the pandemic, with the accumulation of cases in Nigerian courts till date.[21]Courts around the world including the ones in Nigeria have had to respond quickly to the challenges presented by the pandemic and the social distancing

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[18] CJ Ubanyionwu, 'Strategies and Procedures for Expediting Election Petitions and Appeals' (2011) NAUJILJ also available online at https://www.ajol.info/index.php/naujilj/article/view/82416/72571.

[19] Ibid.

[20] The only exception was the health sector which was also at some point struggling to cope with the global health emergency.

[21] See Obi-Ochiabutor, Clara Chinasa, & Akpamgbo Ebube Hillary; Courts in Nigeria and Access to Justice in the Covid-19 Era. Being a Conference Proceedings retrieved from www.academicexcellencesociety.com. Accessed on 24May, 2023.

restrictions associated with it.[22] This has posed significant challenges for the justice system and such challenges are likely to be further compounded in the post-pandemic era especially where other deadly variants such as the Delta and Omicron Variants are being discovered.[23]

The pandemic has also introduced a new jurisprudence into the electoral process in Nigeria. The 'new normal' requires a new thinking in line with the current realities arising from the pandemic. Provoked by the controversies surrounding the conduct and prosecution of election petitions in recent times, there have been various suggestions on the need to adopt the virtual court proceedings in the prosecution of election cases too.[24] However, it is important to first of all examine the legality or otherwise of the virtual court method under the new legal order. The next sets of discussions will focus on this.

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[22] Tania Sourdin, Bin Li, and Donna Marie McNamara, Court innovations and access to justice in times of crisis, retrieved from https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/. Accessed 25 May, 2023.

[23] In November, 2021, another deadly Variant of Covid-19 was discovered and named Omicron by the World Health Organisation (WHO). As a result, several countries have again ordered for another lockdown and closure of their territorial boarders. This, no doubt poses another great challenge to the justice sector.

[24] Ines Levin and R. Michael Alvarez 'Introduction to the Virtual Issue: Election Fraud and Electoral Integrity'. Published online by Cambridge University Press. Retrieved from https://www.cambridge.org/core/journals/political-analysis/article/introduction-to-the-virtual-issue-election-fraud-and-electoral-integrity/6D49C0D49267D11DE9C5B6E11A303C39. Accessed 2 June, 2023.

3.2 The 1999 Constitution and the Practice Direction

On Monday, 11th day of May, 2020, the Chief Judge of the Federal Capital Territory High Court rolled out some practice Directions allowing the FCT High Courts to adopt the virtual court proceedings in dealing with causes and matters before the courts. Clause 9 thereof provides that:

> Causes and matters and other proceedings that can be determined on the basis of affidavit evidence may, as far as practicable, be heard and disposed of by Remote Hearing on virtual platforms such as Zoom, Microsoft Teams, Skype or other audio or video platforms as may be approved by the Chief judge. This includes cases initiated by originating summons or originating motion, applications for enforcement of fundamental right and interlocutory motions, as well as adoption of written final addresses and delivery of judgments/rulings. All participants in a remote hearing shall dress appropriately for court proceedings.

In the same vein, the National Judicial Council, at its 91st meeting held on 22nd April, 2020 set up a Committee headed by **Hon. Justice Olabode Rhodes-Vivour JSC, CFR** to come up with guidelines for virtual court sittings during the COVID-19 pandemic. The Committee submitted its report on the 6th of May, 2020 and the NJC consequently released same as its Guidelines and urged the heads of both federal and state

courts to be guided by same in the formulation of their rules, directives and guidelines.[25]

According to the NJC Guidelines,[26] physical sittings by courts in courtrooms are to be avoided as much as possible and thereby limited to time bound, extremely urgent, essential and contentious matters requiring calling of evidence that may not be held by the court remotely or virtually. The heads of courts are saddled with the responsibility of determining the matters that fall within these categories. Judicial officers, court officials and security personnel are to sit and be in regular courtrooms for remote sittings with the exception of appellate courts' Justices who sit in panels who are allowed to participate in virtual court sittings from their chambers where it is impossible to maintain the required 6 feet social and physical distances in the courtrooms between themselves and also between their Lordships and the court registrars.

It is pertinent to first consider the constitutionality or otherwise of the virtual court proceedings which was recently adopted by all the courts in Nigeria. This is with a view to finding whether it is right for courts in Nigeria to resort to virtual court hearing, instead of the usual courtroom practice.

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[25] Ref No: NJC/CIR/HOC/II/660 May, 2020.

[26] See Solola & Akpana in Nigeria: A Review of the National Judicial Council Guidelines for Court Sittings And Related Matters In The Pandemic Period (Part One). Retrieved from https://www.mondaq.com/nigeria/operational-impacts-and-strategy/941464/a-review-of-the-national-judicial-council-guidelines-for-court-sittings-and-related-matters-in-the-pandemic-period-part-one. Accessed 2 June, 2023.

Section 36 (3) and (4) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) state as follows:

> 3. The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal shall be held in public.
> 4. Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn be entitled to a fair hearing in public within a reasonable time by a court or tribunal.

There have been several arguments as to whether the remote hearings are in conformity with the constitutional requirement that the proceedings be held in public in accordance with Section 36 (3) and (4) of the Constitution.[27] For the opponents of the virtual Court Proceedings, it was contended that **Section. 36(3) and (4)** of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which make mandatory, the hearing of civil and criminal cases as well as delivery of judgments "in public" does not contemplate the adoption of remote or virtual court proceedings of any kind, whether by Zoom, WhatsApp, or any other audio visual or

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[27] Peter Chidera Aneke: The Legality of Virtual Court Hearing in Nigeria: The Way Forward. *Published by Madona University Law Journal.* Retrieved from https://journals.ezenwaohaetorc.org/index.php/MUNFOLLJ/article/view/1538/1582.Accessed 12 May, 2023.

video-conference platform.[28] It was further stated that same is inconsistent with the provision of **Section 266** of the *Administration of Criminal Justice Act 2015 ["ACJA"] which requires the* physical presence of an accused person at his/her trial in a courtroom that is open to the public as opposed to a remote hearing or virtual proceeding that can only be accessed by those invited to participate through the links.

On the other hand, it was submitted by the proponents that the provisions of **Section. 36 (3) and (4)** of the Constitution are wide enough to accommodate remote hearing or virtual proceedings which are open and accessible not only to the Nigerian public but the entire world and therefore more public than proceedings conducted in a physical courtroom.[29] It was further contended that the Constitution of the Federal Republic of Nigeria 1999 (as amended) is an organic document that should be interpreted broadly rather than narrowly in order not to defeat the clear intention of its framers; and that the meaning of the word 'public', which is not qualified in any way in s. 36(3) and (4) of the Constitution, has evolved over time from open space to buildings and now to the internet or world wide web as we know it today, which explains why defamatory material published on the internet is actionable.

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[28] See the Mock Viva Court Proceedings in SUIT NO. FCT/HC/CV/0001/2020 between *Kehinde Ogunwumiju, SAN v Jibrin Samuel Okutepa SAN* delivered by Hon. Justice Peter O. Affen on 18th May, 2020.

[29] See the decision of the Supreme Court of Nigeria in *Obi v Mbakwe [1984] NSCC (Vol. 15) 127* and *Marwa v Nyako [2012] 6 NWLR (PT. 1296) 199.*

In that case, **Hon. Justice Peter Affen** put the position admirably thus at Pages 9-10 of the ruling thus:

> The mere fact alone that remote hearing or virtual court proceedings are a novelty in our court system is certainly not a valid basis for developing any anxiety in this regard. To paraphrase the legendary Lord Denning, if we never do anything which has not been done before, nothing will change; the entire world will move on whilst the law remains the same and that will be bad for both the world and the law. See *Packer v Packer*[30]

These arguments were later laid to rest by the Supreme Court of Nigeria when it affirmed the constitutionality of virtual hearings in the case of *Attorney General of Lagos State v. Attorney General of the Federation & Anor.*[31] The question for the determination of the court was whether remote hearings of any kind (whether by Microsoft Teams, WhatsApp, zoom, Skype or any other audio-visual or video conference platform) by the Lagos State High Court (or any other courts in Nigeria) in aid of hearing and determination of cases, is constitutional.[32] The plaintiffs subsequently

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[30] [1953] 2 ALL E.R. 127.

[31] Suit No. SC/CV/260/2020 *Attorney General of Lagos State v Attorney General of the Federation & Anor.*

[32] M T. Adekilekun et al, 'Covid-19 and African Nation: An Overview of the Legal and Infrastructural Challenges to Remote Court Proceedings' (2020), *VOL. 4. NO. 1, OAULJ Page 131. Published by the Faculty of Law, Obafemi Awolowo University, Ile-Ife, Osun State.*

withdrew the case; however, while striking out the case, the Supreme Court stated that '***as of today virtual sitting is not unconstitutional***'[33]

To facilitate online court sittings, the responsibility of providing fast and reliable internet, end-user hardware (desktops, laptops, tablets etc), collaborative platform (Microsoft Teams, Zoom, Google Meet etc) and reliable electricity for the duration of the sitting is placed on the courts. Litigants and their counsel shall however be responsible for the provision of their own gadgets to join and participate in remote court sittings. The Guidelines also mandated that hearing notices are to contain information stating that the sittings are to be conducted virtually, that clients are not expected in the courtroom and the time for commencement of remote hearing and other details that would enable parties participate in virtual sittings. In a bid to satisfy the public hearing requirements, the Guidelines provide that live streaming of all virtual court proceedings are to be provided through a website or any other social media channel.

Notwithstanding the fact that hearing is being conducted virtually, control of the process lies with the court and the court is empowered to: allot time to counsel for making submissions or adopting addresses, record proceedings,

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[33] Felix Omohomhion, 'Supreme Court dismisses suits against virtual hearing' (Business Day Weekender, 14 July 2020), see https://businessday.ng/news/article/supreme-court-dismisses-suits-against-virtual-hearing/, accessed 12 May, 2023.

provide Certified True Copies (CTCs) of record of any virtual sitting on the party's application and grant access to counsel to record any virtual sitting from his/her own end-user device provided that when such access is granted, it shall apply to all other counsel in the case. It is the responsibility of counsel to ensure that their remote location and that of their client are devoid of distractions, disturbances or interference.

3.3 Applicability of Virtual Court Proceedings in Election Petition Cases

It is important to consider the propriety or otherwise of adopting virtual court proceedings in the adjudication of election petition matters. This will be done by looking again at the Provisions of the Constitution and the Practice Directions. A cursory look at the said Practice Directions would reveal that same did not anticipate the adoption of Election Petition matters to be conducted through the Virtual Court method. **Clause 9** of the FCT High Court Practice Direction refers to only ***'Causes and matters and other proceedings that can be determined on the basis of affidavit evidence may, as far as practicable, be heard and disposed of by Remote Hearing on virtual platforms such as...'.***[34]

Also, according to the NJC Guidelines,[35] physical sittings by courts are limited to time bound, extremely urgent, essential

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[34] See https://olumidebabalolalp.com/wp-content/uploads/2021/01/FHC-Rules-2019-Federal-High-Court-Civil-Procedure-Rules-2019-1.pdf. Accessed 11 June, 2023.

[35] H. Yahaya, 'Coronavirus: NJC releases guidelines for court proceedings' 8 May 2020 *Premium Times* available at https://www.premiumtimesng.

and contentious matters requiring calling of evidence that may not be held by the court remotely or virtually. No doubt, election petition proceedings are time bound and very contentious in nature. **Section 285 (6)** of the Constitution of the Federal Republic of Nigeria 1999 provides for a maximum period of 180 days within which a tribunal can dispose of any election petition matter.[36]More so, there are always barrage of documents[37] to tender through many witnesses that the parties usually call to substantiate their claims in election petition proceedings.

However, the right to issue Practice Direction for Election Petition matters is vested in the President of the Court of Appeal.[38] In the case of *Tony Dimegwu v Independence Ogunewe & Ors*[39] the Court of Appeal while interpreting section 275 of the 1999 Constitution (as amended) and Paragraphs 1 & 2 of the 6th Schedule on the power to issue Practice Direction in election Petition matters held thus:

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com/news/top-news/391917-coronavirus-njc-releases-guidelines-for-court-proceedings.html. Accessed 3 June, 2023.

36 See *Alhaji Kashim Shettima & Anor v Alhaji Mohammed Goni & Ors* (2011) LPELR-417 (SC) and *Adamu Muhammed & Anor v INEC & Ors* (2015) LPELR-40631 (CA).

37 These documents sometimes come in form of Voters Registers, Ballot Papers, Ballot Boxes, studs and results (Forms EC8 Series) etc.

38 See Section 275 of the 1999 Constitution of the FRN (as amended) and Paragraphs 1 & 2 of the 6th Schedule to the Constitution on the Powers of the President of the Court of Appeal to issue Practice Direction for election Petition Matters.

39 (2008) LPELR-4039 (CA).

> In view of the Provision of Sections 275 of the Constitution (Supra) and Paragraphs 1 & 2 of the Sixth Schedule thereto, the President of the Court of Appeal is undoubtedly empowered to make rules for regulating the procedure and practice of the Election Tribunals established under section 285 of the Constitution. Thus, in the instant case, the Election Petition Tribunal and Court Practice Directions, 2007 (Supra) made by the President pursuant to Paragraph 50 of the Sixth Schedule to the Electoral Act, 2006 is valid and, a fortiori, has the force of law.

It is clear from the above provisions that the President of the Court of Appeal, if he deems fit may issue Practice Direction for the hearing of election matters through Virtual methods either wholly or partly. This would be justified provided that the powers of the President is exercised in accordance with the provisions of **Section 36 (3)[40] and (4)[41]** of the Constitution of the Federal Republic of Nigeria 1999 (as amended).[42]

However, another very important question that needs to be answered is that can virtual proceedings guarantee fair hearing in election petition proceedings? Considering the complexity of election petition proceedings. This question is

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[40] Section 36(3) of the 1999 Constitution of the FRN (as amended).

[41] Section 36(4) of the 1999 Constitution of the FRN (as amended).

[42] See https://nigeriarights.gov.ng/files/constitution.pdf. Accessed 12th June, 2023.

asked against the background of the very huge materials and documents that are normally being tendered during election petition proceedings, and which remote court method may not accommodate.

It is common knowledge that there have been many problems associated with the conventional electoral system in Nigeria. These include but are not limited to; high security printing costs, massive logistic requirements, slow and tedious counting and computation of results which are always very prone to manipulation and fraud, votes buying and electoral violence amongst others. The electronic voting too has been viewed with suspicion and is said to be capable of being manipulated. India has developed what is referred to as Blockchain Technology which makes their electronic voting system to be difficult from hacking and free from manipulations.[43]

In Nigeria, a new Electoral Act was passed into law in 2022.[44] It was used in the conduct of the 2023 General elections in Nigeria which were held between February to March, 2023. The Act which will pave way for electronic voting in Nigeria. Section 41 of the Electoral Act, 2022[45] permits the use of Electronic Voting machine and any other voting device that may be deployed for the conduct of the elections. Section 47

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[43] Blockchain system's theoretical underpinnings ensures a transparent and accountable record of data. In that system, there is a virtual token representing a 'vote'.

[44] This was assented to by Mr. President on the 26th day of February, 2022.

[45] Section 41 of the Electoral Act, 2022.

of the Act[46] has now permitted the use of Electronic voting to aid in the accreditation, voting and transmission of results.[47] It works with any computer device once it is connected to the Internet or an Electronic Voting Machine (EVM) designed for that purpose by the relevant electoral body. This new method has been a major outcome of the technological revolution.[48]

Only India and Brazil have an established tradition of e-voting in the whole world.[49] Although, the United States of America was the first country to introduce voting machines, however, the process is still being greatly contested going by the outcomes of the very recent elections that were held in that country.[50] Both Brazil and India have had very free, fair and credible elections through e-voting.[51] Other countries such as South Korea, Russia, Philippines, Estonia, Mongolia and Namibia have made frantic efforts towards the

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46 Section 47 of the Electoral Act, 2022.

47 See the Government Notice 147 Published in the Official Gazette on the 2nd day of March, 2023.

48 Electronic voting and transmission of results – the imperative to safeguard democracy; Being the Editorial published by Premium Times on 4th October, 2021. Retrieved from https://www.premiumtimesng.com/news/top-news/487818-editorial-electronic-voting-and-transmission-of-results-the-imperative-to-safeguard-democracy.html.Accessed 28 May, 2021.

49 See Electronic Voting in Brazil, retrieved from https://cs.stanford.edu/people/eroberts/cs201/projects/2006-07/electronic-voting/index_files/page0006.html. Accessed on 28 May, 2021.

50 The election that brought in Donald Trump in 2016 and that of 2020 Presidential election had various arguments about the credibility of the process.

51 In the year 2000, Brazil became the first country to have elections completed by an electronic voting system. It is a perfect example of a country with electronic voting system.

introduction of electronic voting, but in most of them, it remains a contested methodology.[52]

On the 4th day of September, 2021, Kaduna State became the first state in Nigeria to conduct an election using an electronic voting method. The Kaduna State Government had amended the State Electoral Commission Law in 2018 to pave way for electronic voting in the State.[53] **Section 16 (3)(a)**[54] of the law provides that the State Independent Electoral Commission shall have the power to determine the method by which voters may be verified and accredited for the purpose of casting their votes, while **Section 16(3)**[55] went further to provide that accreditation and voting shall be carried out through the use of approved electronic device, smart card reader and electronic voting machine.[56] The State Governor was said to have lost in his own polling unit due to the fact that the election was generally adjudged to be free and fair despite the fact that the state had some security challenges.

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52 Ibid.

53 See the Kaduna State Independent Electoral Commission Law No. 2 of 2018 which came into operation on the 6th day of February, 2018.

54 Section 16(3)(a) of the Kaduna State Independent Electoral Commission Law No. 2 of 2018 which came into operation on the 6th day of February, 2018.

55 Section 16(3) of the Kaduna State Independent Electoral Commission Law No. 2 of 2018 which came into operation on the 6th day of February, 2018.

56 See: https://kdsg.gov.ng/wpfd_file/kaduna-state-independent-electoral-commissions-law-no-2-2018/. Accessed on 11 June, 2023.

In fact, the ruling party did not win all the seats unlike what the situation used to be if the elections were conducted manually.

The point being made is that electronic voting or e-voting has the tendency to ensure credibility in the election processes and the election petition proceedings that may be filed by any of the aggrieved contestant(s). Most of the documents needed in election petition matters would have been in their electronic forms and therefore easier to tender through virtual means. This will make the application of virtual proceedings to be easier in electoral matters. Otherwise, adopting remote/virtual proceedings for an election which was conducted manually will pose a lot of challenges. It will be easier for the election tribunal that is to adopt virtual method to consider electronic materials that were used during the voting exercise.

3.4 The Situation in Other Jurisdictions

Two jurisdictions will be examined under this part. These are the United Kingdom and Singapore.

3.4.1 United Kingdom

The UK government stressed the importance of continued administration of justice and that the courts continue operating with adjustments. While most civil courts still remain open despite the COVID-19 outbreak, civil hearings are now being conducted remotely where possible and physical hearings are only to take place where remote hearings are not possible and suitable arrangements can be

made to ensure safety. While civil courts in the United Kingdom have long permitted remote hearings in appropriate circumstances, a new 'Protocol Regarding Remote Hearings'[57] was issued on March 20, 2020 necessitating the use of remote hearings where possible, providing guidance including on the forms of remote technology offered and the use of electronic documentation, and prescribing that the mode of conducting remote hearing is a matter for the judge in accordance with applicable laws, rules and practice directions amongst other things.[5859] The courts' technological infrastructure is also being rapidly scaled up to support expanded utilization of telephone, video and other remote technology (Zoom, Skype etc).[60]

In an interesting development in *Hyde and Murphy v Nygate*, a case involving four factual witnesses and thirteen experts.[61] An application was brought against the usage of remote hearing. The judge rejected the application and upheld the usage of remote hearing in the case on grounds that; remote

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[57] See https://www.judiciary.uk/publications/civil-court-guidance-on-how-to-conduct-remote-hearings/. Accessed on 23May, 2021.

[58] https://judiciary.uk/publications/civil-court-guidance-on-how-to-conduct-remote-hearings/ accessed 20 May, 2023.

[59] https://www.uk.practicallaw.thomsonreuters.com/w-024-6398?transitionType=Default&contextData=(sc.Default)&firstpage=true&bhcp=1 accessed 21 May, 2023.

[60] 'COVID-19 and the Global Approach to Further Court Proceedings, Hearings'. Norton Rose Fulbright. April, 2020. https://www.nortonrosefulbright.com/en-za/knowledge/publications/bbfeb594/covid-19-and-the-global- approach-to-further-court-proceedings-hearings accessed 20 May, 2023.

[61] Hyde [2020] EWHC 845 (Ch).

hearings are not contrary to but in line with government advice, the available technology is capable of delivering a remote trial of this complexity, safety concerns about witnesses and the risk of procedural unfairness affects both sides equally.[62] On March 24, 2020, the Supreme Court of England conducted its first ever remote hearing.[63] The Supreme Court building has closed and will be conducting all cases and delivering judgments through video-conferencing until further notice.

3.4.2 Singapore

Before COVID-19, there was an existing practice in Singapore Courts that enabled lawyers make applications by video link. Singapore courts are also quite used to parties or witnesses appearing in court by way of video link. As far as the Supreme Court of Singapore is concerned, hearings are continuing.[64] On 27 March, 2020, the Supreme Court of Singapore released a Guide on the Use of Video Conferencing and Telephone Conferencing which chose Zoom as the official platform. The Guide also explained and demonstrated the step-by-step usage of the platform. Counsel and parties are also required under the Guide to continue

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[62] https://www.simmons-simmons.com/en/publications/ck93zhbdv0m9o0925sj32lkxb/court-hearings-during-the-covid-19-lockdown--england-and-wales- accessed 18 May, 2023.

[63] An appeal involving Friends of the Irish Government against The Government and various state parties.

[64] M.T. Adekilekun et al, 'Covid-19 and African Nation: An Overview of the Legal and Infrastructural Challenges to Remote Court Proceedings' (2020),*VOL. 4. NO.1, OAULJ Page 131. Published by the Faculty of Law, Obafemi Awolowo University, Ile-Ife, Osun State.*

observing court dress and etiquette as if appearing in person except as it relates to standing and bowing. Unauthorized recording of audio/video of proceeding is prohibited. In cases where technical difficulties are encountered, the court has the option to adjourn, use the telephony option in Zoom, conduct the hearing via telephone or make any other direction as may be appropriate in the circumstances of the case.[65] Hence, while the Singapore Courts have taken further measures to implement virtual hearings, these measures are an extension of the pre-existing use of technology prior to the COVID-19 pandemic.

4.1 Opportunities and Challenges

As shown in earlier sections of this paper the National Judicial Council introduced the Guidelines for Court Sittings and Related Matters in the COVID-19 Period 2020 to ensure that court sitting is safe in the administration of justice in the wake of the COVID-19 pandemic. Practice directions have also been issued by various courts. For instance, the Federal High Court of Nigeria Practice Direction 2020 for the COVID 19 period (the FHC Practice Direction). Some of the opportunities and challenges faced with the courts sitting virtually are discussed below:

4.1.1 Opportunities

The FHC (Civil Procedure) Rules 2019 had before the outbreak of COVID-19 introduced e-filing provisions.[66] The

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[65] Guide on the Use of Video Conferencing and Telephone Conferencing and Video Conferencing for Hearings before the Duty Registrar by the Supreme Court of Singapore. 27th March, 2020.

[66] Order 58, Rules 2 – 11 Federal High Court (Civil Procedure) Rules 2019.

FHC (Civil Procedure) Rules 2019 allow the filing of documents and court processes to be done electronically.[67] Thus, the outbreak of the COVID 19 pandemic aided the reinforcement of the already existing e-filing provisions in the Federal High Court. The Guidelines for Court Sittings and Related Matters in the COVID-19 Period 2020 however extends the use of virtual means to attain justice. For instance, the National Judicial Council Guidelines 2020 provide for the payment of filing fees electronically.[68] The evidence of such payment may be by e-mail, SMS, WhatsApp or any other electronic means courts choose for sending such e-payment evidence to a court nominated official.[69]

Nigeria has also adopted electronic transactions in order to facilitate easy payment of fees in business relationships. The rate of e-commerce in the Nigerian economy is on the increase.[70] The courts can also key into the opportunities provided by the electronic Transactions legislations in the filing or processing of filing fees in all the courts in Nigeria. Electronic signatures are now being used in contracts, authorisations and signing of court processes.[71] Section 93(3)

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[67] Ibid.

[68] National Judicial Council COVID-19 Policy Report: Guidelines for Court Sittings and Related Matters in the COVID-19 Period 2020, section C.

[69] Ibid C (3).

[70] See An Overview of the Electronic Transactions Bill 2007. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3275075. Accessed 12 June, 2023.

[71] See The Validity and Limitations of Electronic Signatures under the Nigerian Laws. Retrieved fromhttps://omaplex.com.ng/the-validity-and-

of the Evidence Act, 2011 provides for the use of electronic signature where the hard copy of the document itself cannot be signed.[72]

Also, the National Information Technology Development Agency Act[73] was enacted to create an effective, impartial regulatory framework for the development of information and digital economy in Nigeria. The provisions of this Act will help the courts, the litigants as well as the Counsel in facilitating the transactions and filing of court processes.[74]
The Guidelines for Court Sittings and Related Matters in the COVID-19 Period 2020 also provides for service of court processes and hearing notices to complement existing physical service.[75] The service may be via email or WhatsApp for service by the courts and opposing parties.[76] The Nigerian Bar Association has been directed by the Guidelines 2020 to work with the heads of courts for the publication of a lawyers' directory on a state by state basis.[77] The directory is to contain information such as addresses, emails, telephone numbers and telephone numbers with WhatsApp capabilities.[78] This way, parties are certain that court

limitation-of-electronic-signatures-under-the-nigerian-law/.Accessed 12 June, 2023.

72 See the 2011 Evidence Act Cap E14, Laws of the Federation of Nigeria.

73 No. 28 of 2007.

74 See https://techpoint.africa/wp-content/uploads/2021/08/NITDA-Act-.pdf. Accessed 12 June, 2023.

75 Ibid D (5).

76 Ibid D (1).

77 Ibid.

78 Ibid.

processes and hearing notices are delivered to accessible electronic accounts of parties. In *CM and ES Ltd v Pazan Services Nigeria Ltd,*[79] the Supreme Court of Nigeria held that the service of hearing notices via text messages constituted good, sufficient and valid service.

In order for the court to continually administer justice despite COVID-19, the National Judicial Council also provided the opportunity for the courts to sit remotely. This is not to say that the courts have done away with sitting physically, what the Guidelines 2020 provide is that only time-bound, extremely urgent and essential matters that cannot be heard remotely or virtually are allowed to sit physically.[80] The matters that are considered time-bound, extremely urgent and essential are to be determined by the Heads of Courts.[81] The courts are directed to insist on sitting virtually for matters that do not require taking any evidence. All rulings, directions and judgments may be delivered and handed down by the courts in and through remote court sitting.[82] The NJC Guidelines 2020 direct that platforms such as Google Meet, Microsoft Teams and Zoom may be used to conduct virtual court sittings.[83]

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79 [2020] 1 NWLR (Pt. 1704) 70.

80 National Judicial Council COVID-19 Policy Report: Guidelines for Court Sittings and Related Matters in the COVID-19 Period 2020, section E(1).

81 ibid.

82 ibid E(2).

83 ibid E(6)(c).

In essence, where a matter is to be decided virtually, the court, its officers, the parties, witnesses, experts and other stakeholders do not have to be gathered in a location to administer and dispense justice.

Virtual court sitting also presents an opportunity of safeguarding persons who may be in danger if the courts are to sit physically only. The Attorney General of the Federation and Minister of Justice, Abubaka Malami (SAN) believes that virtual courts will boost Nigeria's economy because the funds to be used in moving inmates can now be channelled to other areas to assist the country to meet up with global best practices in terms of the administration of criminal justice.[84]

Accordingly, where there are no technical hitches, virtual courts should be encouraged beyond COVID-19 as it presents an opportunity for matters to be dispensed with speedily in line with section 36(4) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides for the fair hearing of matters within a reasonable time.

4.1.2 Challenges

A noticeable challenge is the lack of the requisite infrastructure to implement the provisions of the National Judicial Council Guidelines 2020.[85] Nigeria still suffers from

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[84] Kayode Oyero, 'How Virtual Court Proceedings will Boost Nigeria's Economy – Malami' *Punch* (Lagos, 6 December 2021) <https://punchng.com/how-virtual-court-proceedings-will-boost-nigerias-economy-malami/> accessed 29 December 2021.

[85] ibid E(6)(a - d).

electricity blackouts from time to time. Thus, the electricity supply in the country is irregular. Internet speed is also slow as many states do not have private internet providers to provide internet at cheaper rates when compared to the rates of the major internet providers, so all involved in virtual sitting will have to depend on the major internet providers for internet at a higher rate.

Another challenge is that not all parties to be involved in the virtual sitting of the court may have the tools like computers to attend court virtually. This may be the reason why the FHC Practice Directions 2020, Part F4 states that where parties and lawyers in a case agree to virtual hearing, they are to work with the registrar to schedule the hearings. In addition, in-person testimony is seen to be more believable than taking testimony virtually. This is because virtual testimony may take away the ability to access non-verbal clues, body language and demeanors. Non-verbal clues help in assessing the credibility of persons.[86]

Accordingly, without a stable power supply, adequate internet, access to computer and computer know-how and seeking ways to assess the non-verbal clues of parties, experts and witnesses, remote or virtual sittings may not be effective in Nigeria.

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[86] Peter Chidera Aneke, 'The Legality of Virtual Court Hearing in Nigeria: The Way Forward' (2021) 2 *Madonna University Nigeria Faculty of Law Law Journal 56, 61.*

5.1 Conclusions and Recommendations

This paper has examined the trio concepts of Virtual/Remote Proceedings, Fair Hearing and Electoral Process. We have also extensively examined the legality of the adoption of virtual proceedings in Nigeria and whether the methodology can be adopted in election petition causes and matters. The opportunities and challenges of using the virtual proceedings by the Nigerian courts have also been set out extensively. No doubt, the Covid-19 pandemic has presented novel challenges facing the administration of justice all over the world. The adoption of virtual style of proceeding is the new normal absolutely in conformity with the provisions of the constitution and the Practice Directions which heads of courts are empowered to make. The paper further concludes that adoption of electronic voting method will aid election petition litigation because the election results and all other very vital documents would have been in electronic form and thus, easy for the election petition tribunal to consider in arriving at a just conclusion. Finally, virtual court proceedings, if properly conducted, has the propensity to guarantee fair hearing in all matters including election petition litigations.

The following recommendations are necessary for implementation by the judiciary, legislature, policy makers and all other stakeholders in the administration of justice sector in Nigeria:

Provision of up-to-date infrastructure like internet facilities, computers, projectors, scanning devices, and all other devices

or facilities that will make the remote court process work in the courts.

Improvement of power infrastructure and access in the long term. In the meantime, alternative and reliable power sources. like Solar power, should be provided for courts to power the virtual proceedings.

Amendment of the 2011 Electoral Act to give room for electronic voting in Nigeria.

There is also the need to train and retrain the judicial staff members as well as to sensitise their Union on the advantages of the technological innovations and improvements that will be brought about by the adoption of the virtual court methods.

The Federal and State Governments should increase the budgetary allocations to the courts. This will help the judiciary in the upgrading and continuous maintenance of these critical infrastructures which are necessary for the operation and sustenance of the virtual court methods.