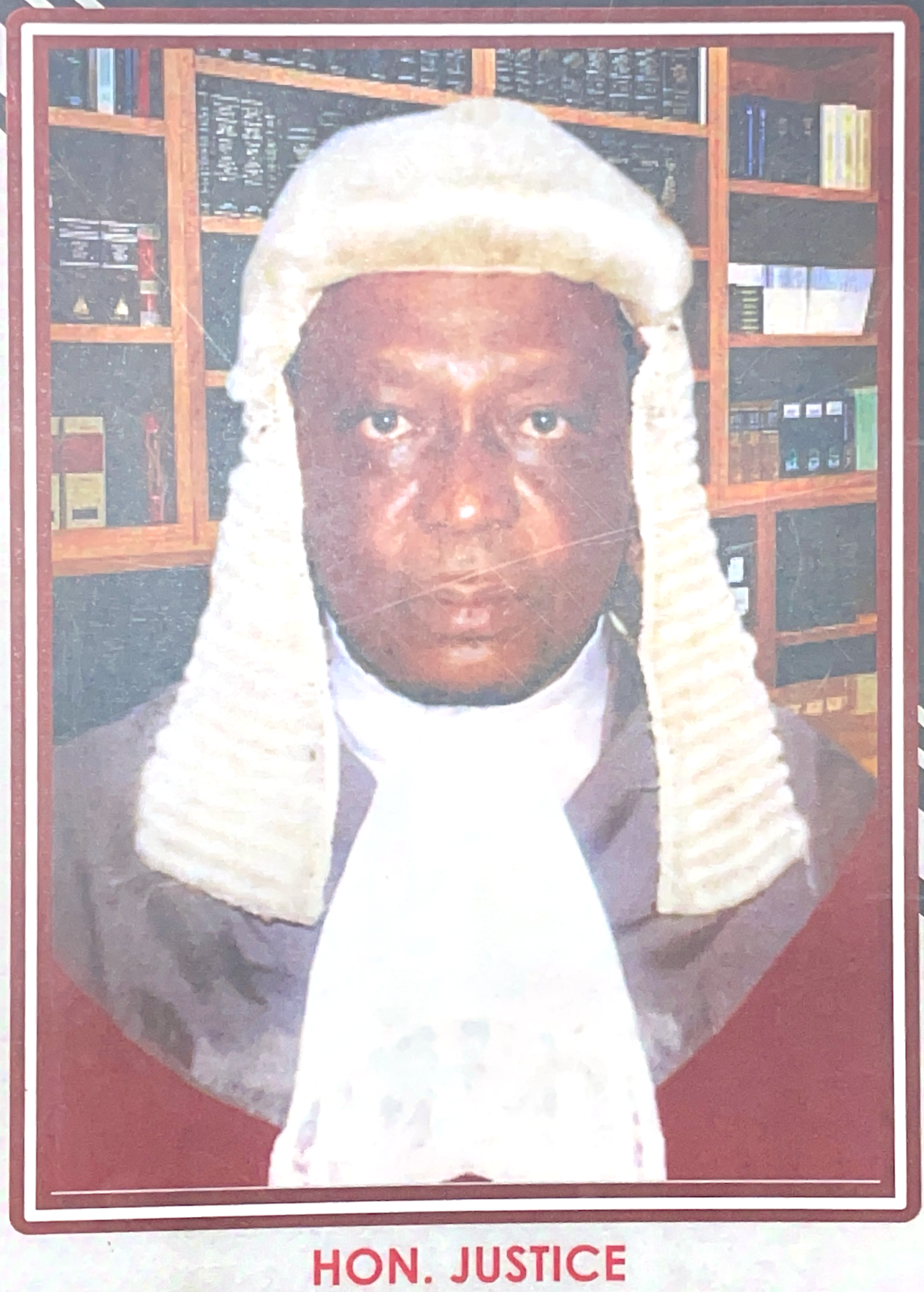
CHALLENGES OF DISPENSATION OF JUSTICE IN THE 21ST CENTURY NIGERIA

Legal Essays In Honour of



HON. JUSTICE

MUHAMMADU LAWAL BELLO FICMC

Chief Judge, Kaduna State

A Publication of the Private Law Department,
Ahmadu Bello University, Zaria, Nigeria.

Edited by:

DR. F. A. KERA & A. M. BOKANI Esq.

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CHAPTER FOUR

ONLINE CRIMINAL JUSTICE: CHALLENGES AND PROSPECT FOR THE ADMINISTRATION OF JUSTICE IN NIGERIA

By

Lukman Adebisi Abdulrauf*

1.1 Introduction

The recent COVID-19 pandemic has taught countries across the world a lot of critical lessons in the administration of justice generally. Various measures to curb the pandemic such as lockdown and physical distancing means that things must be done rather differently. The so-called new normal has also significantly affected almost every sphere of life include the administration of justice generally. Courts could no longer sit as a result of lockdown measures to contain the virus raising concerns of the fulfillment of the constitutional requirement on speedy trials.[1] Even when lockdown measures were gradually lifted, various public health measures such as physical distancing meant that they cannot accommodate their capacity. Therefore, rather than postpone court sittings indefinitely, other means of ensuring justice delivery need to be resorted to. The administration of justice online or remote administration of justice became the most convenient model to ensure justice delivery especially with the pandemic.[2] While this method has been largely commended for its convenience, speed and accessibility, there have been questions regarding its efficacy in criminal trials.[3]

The questions regarding the efficacy of online or remote trials for criminal matters generally revolve around whether they could satisfy the legal and institutional framework regarding criminal trials. Indeed, because of the need to protect the accused person and ensure s/he gets a fair trial, there are a lot of mechanisms in place to ensure that the formal procedure and due process are followed.

The objective of this chapter is to chapter is to examine the prospects and challenges in the applicability of online criminal justice in Nigeria as narrowly defined. The chapter is structured in 5 parts. After the introduction, the second part examines the concept of online criminal justice or remote criminal justice. The thrust of this part is to show that the concept actually operates narrow and it basically covers instances where the whole or part of the trial process is carried out online with the support of various online platforms. The third part considers the legal framework and constitutional challenges to this initiative while the fourth part analyses context-specific issues which constitute an obstacle to the application of online justice system in Nigeria. The last part concludes with some reflections toward paving a path for the smooth application online justice administration in Nigeria.

1.2. Online criminal justice in Nigeria: Pre and Post COVID-19

The COVID-19 pandemic has tremendously shaped the discourse around administration of justice across the world. As mentioned, this especially felt with sharp increase in the discussion around remote or online dispute resolution. Therefore, the influence of the pandemic cannot be ignored in a discussion on online criminal justice system. It is in the light of this that this section of the chapter considers how ICTs has been deployed in criminal justice administration before and during the COVID-19 pandemic. Before that is done however, it is apposite to first understand what the concept of online criminal justice as used in this chapter is all about.

1.2.1 Online criminal justice: conceptual framework

Online criminal justice is a term generally associated with the concept of administration of criminal justice. Administration of criminal justice is a very broad concept which focuses on the operation and management of the criminal justice system of a country. A criminal justice system generally includes the whole gamut of the legal and institutional framework responsible for administering the criminal laws and procedure including the police, prosecutory authorities (such as the state ministry of justices), the courts and other similar institutions. According to Okpara, 'The criminal justice system in Nigeria commences with the commission of a crime and continues with the subsequent interventions by the law enforcement agencies of the system that has the power to arrest, arraignment, trial, sentencing and punishment of the

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[1]Constitution of the Federal Republic of Nigeria 1999, Section 36(4). See also L Abdulrauf, "Managing Covid-19 in a 'façade federalism': The case of Nigeria" in N. Steytler (ed) Comparative Federalism and Covid-19: Combating the Pandemic (2022) Routledge, London p. 364.

[2] 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.

[3]See generally JI Turner 'Remote criminal justice' (2021) 53 *Texas Tech Law Review* p. 198

offender.'[4] Over time, the concept of administration of criminal justice primarily focuses on the role of the adjudicatory authorities which is the court.

While criminal justice system has a far broader connotation, the courts have always been the focus being the custodians of the justice delivery sector in any nation. It is in this wise that the concept of online criminal justice has generally be discussed within the precincts of the adjudicatory role of the court. 'Online criminal justice' or 'remote criminal justice'[5] or 'virtual criminal hearings' is can be describe as the deployment of ICTs[6] in the dispensation of criminal justice. From this context, it is easily noticeable that the concept is largely used to describe one or more of the trial processes in a typical criminal proceeding. Therefore, the most convenient approach towards defining the concept is that it is the deployment of ICTs in one or more of the court process in a typical criminal proceeding. While this approach largely shows one of its essential character- the use of technology- it is submitted that online criminal justice entails more. First, online criminal justice is not just about the deployment of technology in a trial process but the fact of the remoteness. Therefore, if it merely involves a situation where ICTs such as a projector or a smart TV is used in a physical court where all the parties are present, it cannot be described as such. Remoteness in this regard means that one or more of the parties should be outside the vicinity of the courtroom and still partake actively in the court process via various ICTs and videoconference technologies such as Zoom, Skype or Microsoft Teams. Secondly, an online proceeding in this context generally focuses on the trial process which has rightly been described as commencing from arraignment to Sentencing.[7]It generally includes other bail hearings, plea taking, presentation of case, examination of witnesses and sentencing. Thirdly, the online platform should be interactive which means one should be able to speak to it and receive responses in real time and not a pre-

[4] LC Opara 'The Law and Policy in Criminal Justice System and Sentencing in Nigeria' (2014) 4(7) *International Journal of Asian Social Sciences* 886.

[5] As described by JI Turner in 'Remote criminal justice' (2021) 53 Texas Tech Law Review p. 198

[6] ICT is a term that covers all technologies which are used for the communication of information. It includes a 'wide range of computer and telecommunication technologies, including data processing (electronic retrieval, storage and management of data, document imaging); data management and communications services (telecommunications generally, wireless, video conferencing, electronic mail, the internet) workflow systems; and artificial intelligence.' See DMAbubakar 'Use of Information Technology in Courtroom: Merits and Challenges' (2020). A paper delivered at a national workshop for Information and Communication Technology Staff titled "Use of Information technology in Courtroom: Merits and Challenges" held at National Judicial Institute Abuja held on 8-10 September 2020.

[7] According to Bob Osamor, 'a criminal trial commences upon arraignment and ends with sentence.' See B Osamor *Criminal Procedure Laws and Litigation Practices* (Dee-Sage, Manchester 2012) p.331.

or post-recording feature. On the whole, online criminal justice is a situation where the trial partly or holistically takes place online with the aid of the internet of other ICTs.

1.2.2 Deployment of ICTs and Online criminal justice in Nigeria

Before the COVID-19 pandemic, there has not been so much discussion around online trials. Most of the initiatives by the government and court administrator focused on theuse of ICTs generally for any of the criminal justice process. Therefore, there were initiatives toward online filing and exchange of court processes via email. Some states also made effort to provide certain ICT infrastructure for the court but generally, many courts continued as they are with little or no basic ICT facilities. In terms of filing and case management, ICTs have been used in some courts. There has been a recent development of Nigerian Case Management System (NCMS) which is software for case management.[8] When fully deployed, NCMS will 'automate Case flow management in the courts and will also ensure a smooth, safe and secure exchange of documents between the different levels of courts'.[9]

There have been some efforts towards online filing of court processes in some courts. Libraries containing law report and legislation which are essential for the work of the court are only now contained in electronic databases, some of which are made available to the court. Even the process of recording of proceedings of the court which used to be done in long hand by judges is now also witnessing some revolution across some jurisdictions. ICTs have ensured that court proceedings are recorded using recording devices. In fact, there have been recent test of advanced voice recognition technologies for potential deployment in some courts.[10] According to Abubakar[11],

> *It is now possible to have digital audio recordings of voice on the computer, allowing the judge capacity to annotate this record and listen to whatever portion he may want to listen to later. The record so recorded would have to be transcribed into a hardcopy format (for as long as a hard copy file is maintained), of*

[8] Ibid

[9] https://nji.gov.ng/images/Workshop_Papers/2017/IT_Workshop/s4.pdf

[10] DM Abubakar 'Use of Information Technology in Courtroom: Merits and Challenges' (2020). A paper delivered at a national workshop for Information and Communication Technology Staff titled "Use of Information technology in Courtroom: Merits and Challenges" held at National Judicial Institute, Abuja held on 8-10 September 2020.

[11] Ibid

> *which e-versions would be available too. It is also possible to have instantaneous recording of proceedings by court reporter which can be viewed by the judge and counsel at their respective desks as the proceedings continue. The advantage of the digital format is that it is easy to manoeuvre whether it is text, voice (sound) or images.*

The foregoing is largely the extent to which most courts have adopted ICTs in Nigeria before the COVID-19 pandemic. As mentioned, all the above instances do not strictly fall within the scope of online criminal justice as narrowly construed in this chapter. However, with COVID-19, there seems a paradigm shift toward a true online criminal justice.

The first significant implication of the COVID-19 pandemic on administration of justice was immediate need to suspend court sittings across the country due to public health concerns.[12]At the peak of the COVID-19 pandemic when it became obvious that it was not just going away overnight, there were concerns regarding the fate of accused persons who are standing criminal trials. This is more so for accused person who were unable to secure bail and are still in custody pending their trial. Online criminal justice was therefore regarded as a credible alternative in many parts of the world. According to Turner[13],

> *...the ability to conduct online hearings has been a welcome alternative to delaying criminal dispositions or attempting to hold hearings in person during the pandemic. During the pandemic, online proceedings help protect public health and have the advantages of convenience and efficiency. Attorney and participants save time by not having to travel to or wait in courtrooms, court benefit from more reliable scheduling, and all appreciate the ability to dispose of cases more promptly.*

With the pandemic, the Chief Justice of Nigeria issued the first National Judicial Guidelines for Court Sittings and Related Matters in the COVID-19 period in May

[12] L Abdulrauf, "Managing Covid-19 in a 'façade federalism': The case of Nigeria" in N. Steytler (ed) Comparative Federalism and Covid-19: Combating the Pandemic (2022) Routledge, London p. 364
[13] JI Turner 'Remote criminal justice' (2021) 53 Texas Tech Law Review p. 199.

2020 which effectively directed heads of courts to issue practice directions factoring the existing exigencies.[14]

1.3 The Legal Framework and constitutional challenges

The section of the chapter examines the legal basis for online criminal justice and the constitutional challenges inherent in the legal framework.

1.3.1 Legal framework of online criminal justice

It is important to examine the sources of criminal law in Nigeria to determine the extent to which the can accommodate online criminal justice system. Generally, the main sources of administration of criminal justice are the Constitutions and various criminal legislation in Nigeria. The constitution is, without a doubt, the ground norm of the land and is supreme to all authorities.[15] In recognition of the significance and supremacy of the constitution in the jurisprudence of the country, it is provided that any law which contradicts its provisions is void to the extent of its inconsistency and the constitution shall prevail.[16] Generally, criminal justice administration is within the legislative competence of state since it is a matter neither contained in the exclusive nor concurrent legislative list.[17] Online criminal justice is largely a procedural matter and should be ordinarily regulated under the criminal procedure laws of states. However, there is nothing in the Criminal Procedure Code Act of Criminal Procedure Act, applicable in the northern and southern parts of Nigeria respectively, which sanctions the use on digital technologies for criminal proceeding. The recent Administration of Criminal Justice Act (ACJA)(2015) is no different from the erstwhile laws in that it only recognizes online criminal justice in a very restrictive sense. According to the ACJA, 'where in any proceeding the court deems it necessary to protect the identity of the victim or a witness, the court may take any or all of the following measures: (a) receive evidence by video link'.[18] Impliedly, video conference for collection of evidence in examination of a witness can only be used *only* where there is the need to protect a witness.

[14] 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-courtproceedings.html (accessed 28 December 2021).
[15] Constitution of the Federal Republic of Nigeria 1999, Section 1(1).
[16] Ibid, section 1(3)
[17] See *Attorney General of Ondo State V. Attorney General of the Federation & 35 Ors* (2002) 27 WRN 1.
[18] Administration of Criminal Justice Act, Section 232.

More specifically within the context of COVID Practice Direction issued by the Heads of Various courts for the operation of virtual hearing due to the pandemic in pursuant of the directive of the CJN. One such Practice Direction which was issued by the Chief Justice of the Federal Capital Territory High Court provides in Clause 9 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.*

1.3.2 Constitutional challenges

The constitution which forms the bedrock of criminal trials generally is one of the major challenges to the deployment of online criminal justice system. The main challenge is the extent to which online criminal trials can be accommodated under the constitutional provision which protects the rights of an accused person during trial. The relevant constitutional right which may appear to be a challenge to the adoption of virtual hearings include:

a. The right to be present
b. The right to counsel
c. The right to examine witnesses
d. The right to public trial

Among the right of the accused person in a criminal proceeding is the right to be present at his or her trial. Although not specifically mentioned in the constitution, the right can be impliedly read from provisions.[19] At crucial stages of the trial such as arraignment, it is important that the accused person be present. For example, it is when the accused is physically present that he can

[19]Like sections 36(6)(c &d), Constitution of Federal Republic of Nigeria 1999.

have a firsthand knowledge the accusation made against him and see his/her accuser. This is why the constitution provides that an accused person has the right to "defend himself *in person* or by legal practitioners of his own choice" and the right to "examine, *in person* or by his legal practitioners, the witnesses called by the prosecution."[20] The remote nature of virtual proceedings means that this requirement cannot be fulfilled and there may therefore be question regarding whether or not the constitutional right of the accused in in breach. The main question in the regard is whether 'in person' as used by the constitution must only be interpreted as being a face-to-face affair. In other jurisdictions such as the US, the approach adopted by the court is that the accused person must consent before online method is used in certain criminal trials.[21]

Virtual hearing can also constitute a challenge to the right to adequate representation by a legal counsel of one's choice.[22] This rights entail the an accused and his/her counsel must be able to confidentially discuss in the course of the proceedings. The nature of many of these platform does not allow this and trial must be stopped for the accused and his/her counsel to confer. In this regard, the experience of other countries is that states provide an assured confidential platform for the party and his/her platform to private confer.

The right to examine witnesses is also another critical fundamental right of an accused. It entails that an accused person must be allowed to "examine, in person or by his legal practitioners the witnesses called by the prosecution". As mentioned, it still unclear the extent to which virtual proceedings can satisfy this requirement but from experiences of other jurisdiction, this critical stage is one of the stages which has been recommended must only be physically done.

The constitution furthermore requires that trials should be held publicly and this goes to the root of a fair trial. Accordingly, "the proceedings of a court or tribunal...shall be held in public."[23] There have been controversies over whether or not virtual hearing can be considered to be a public hearing in fulfilment of the constitutional requirement. Many are of the opinion that virtual proceedings cannot be considered public since members of the public may not have access to the platform. Fortunately, the Supreme Court of Nigeria has explicitly affirmed the constitutionality of virtual in *Attorney General of Lagos State v. Attorney*

[20]Ibid. See also the Administration of Criminal Justice Act 2015, Section 266.
[21]See cases such as State v. Anderson (2017) 896. N.W. 2d 364 @ 367 with regard to plea hearing.
[22]Constitution of Federal Republic of Nigeria, Section 36(6)(c).
[23]Ibid, section 36(3)

General of the Federation &Anor.[24] This is indeed a very significant stride for online criminal justice and administration of justice as a whole in Nigeria.

1.4 Prospects and challenges

There is no doubt that the Nigerian criminal justice system faces significant challenges which appears to be overwhelming. The most significant of these challenges is case overload in courts and longtime take for criminal trials which has sometimes made accused persons remain in detention for years without trial.It has been estimated that on the average, a typical criminal trial takes between 5 to 6 years and some even take as much as 13 years.[25]It must be restated that the cumbersome process of the criminal justice system and the fact that judges are simply swamped are all independent challenges. Online criminal justice seems to afford the courts the opportunity to dispose of some of these cases expeditiously as they are able to overcome some of the challenges resulting from logistics of transporting accused persons to court, absence of lawyers and so forth.

In Nigeria, there are quite a number of obstacles that will stand in the way of typical online criminal justice system. The challenges are either legal or practical. The legal challenges are basically based on the limited nature of the legal regime on administration of the criminal justice in Nigeria. The restrictive constitutional provision is a huge challenge. The requirement for public trials is a challenge. Although, the courts have made significant intervention in this respect, this cannot be substituted for a properly spelt out constitutional provisions. Indeed, it is high time the constitution is amended and future constitutional amendment must take note of the digital age and the importance of technology to the 21st century. Apart from the constitution, other criminal (procedure) laws also do not make categorical statement in support of online criminal justice. For example, the Administration of Criminal Justice Act which is seen as one of the most innovative and recent criminal justice instrument makes only scanty provisions on the deployment of ICTs in the criminal justice process generally without specific recognition of online criminal justice.

Apart from challenge of inadequacy of the legal framework, other practical challenges exist. The absence of necessary infrastructure is one among the many challenges. Online criminal trials require huge investment in infrastructure

[24]Suit No. SC/CV/260/2020

[25]O Olugase 'Utilising Technology in Making the Nigerian Administration of Criminal Justice Act Effective for Criminal Trials' (2020) 11(2) International Journal for Court Administration p. 3.

by the judiciary. There is the need to have a proper environment, online platform and gadgets such as computers, smart screens, high definition cameras etc. All these demand a lot of money and only a government that is committed to administration of justice will be ready to make such investment. As things stand today, the judiciary is improperly funded for even for the basic things. There have been incessant complains by heads of court on the issue of funding. These complaints cut across the courts at both federal and state level.

Two other basic infrastructures lacking in most court and which constitute significant obstacles to the application of online criminal justice is electricity and internet. As it is generally known, electricity is a challenge in Nigeria even in the big cities. Most people have to rely on alternative sources of power which has over time proved either too expensive to maintain, insufficient or unsustainable. In view of the funding crisis which most courts face, requiring them to devote certain percentage of their allocation for alternative energy seems like a mirage. Accordingly, most court are not conducive for even typical physical trials. Unless the government is able to do something about the electricity crisis across the nation, any activity which is heavily reliant on power will obviously suffer. Apart from electricity, the next most important infrastructure for remote hearing is internet. Although, Nigeria has recorded significant milestones with regard to internet penetration, the current situation still leaves must to be desired.[26] The importance of access to internet in the court cannot be over-emphasized. Apart from the courts, the parties who would like to join via online platforms must also have access to high quality internet. The efficiency of an online system is usually determined by the quality of the internet services and without it, the process cannot be smooth. For example, there was a trending video online in Nigeria showing a court proceeding where the counsel could not hear the judge and the was intermitted disruption of the network as a result of poor internet service. Besides, a very good internet service is obviously need to power high definition cameras which is needed to effective online justice administration.

It is one thing to have sufficient infrastructure and it is another thing to have people who are capable of operating the infrastructure. The fact must be noted that court official and lawyers are yet to appreciate some of the significant benefits of online justice delivery system. Most of them are only grounded in their

[26]The current internet penetration rate is approximately 51%. See 'Digital 2022: Nigeria' https://datareportal.com/reports/digital-2022-nigeria#:~:text=Nigeria's%20internet%20penetration%20rate%20stood,percent)%20between%20021%20and%202022

basic Word processing knowledge without experience in the use of online platform. The same can also be said of the judges leading to a reluctance to adopt this method. Overall, it can be argued safely that there is a high level of computer illiteracy in the country.[27] Until this attitude is changes, online criminal justice will continue to remain a mirage.

In the United States for example, many jurisdictions have adopted online criminal justice mechanism at various levels. In some states, online or remote hearings have been used for initial appearances and arraignment especially in felony cases.[28] Video conferencing in criminal proceedings have also been adopted for witness testimony, motion hearings, without witnesses and even court trial in different states.[29] The same can be said of countries like Australia, Canada, New Zealand 'primarily to save costs and expedite proceedings.'[30] The point being made here is not to undermined the significant gap in the level of development and ICT uptake between Nigeria and these countries but to emphasize the fact that virtual hearing can be adopted at different stages of the trial and not necessarily holistically.

Notwithstanding the forgoing, there are also some inherent challenges which make even developed countries skeptical about online criminal justice mechanisms in criminal trials. The first in this category is the fact of the absence of interpersonal or face-to-face contact between the parties, witnesses and even with the judge. As it is generally noted, this may be a challenge especially in the process of taking oral evidence. Indeed, one of the benefits of the process of examination of witnesses is the opportunity it gives the court and parties to observe the demeanor of a witness when providing testimony.[31] This has its own critical significance especially in criminal trials. In addition, remote trials do not afford counsel the opportunity to interact with their client during the proceedings. This also is crucial in the building or organization of presentation of the case.

[27]CS Ibekwe& C Onwuatuegwu 'ICTs in the Administration of Justice: Challenges and Prospects for Labour and Productivity' (2021) 8(1) *NAUJCPL* p. 8

[28]Types of Criminal Proceedings That Utilize Video Conferencing (illustration), in Video Conferencing Survey, NAT'L CTR. FOR STATE CTS. (2010), https://www.ncsc.org/__data/assets/image/0023/16682/q21-png.png

[29]https://www.ncsc.org/__data/assets/image/0023/16682/q21-png.png

[30]A Wallace 'Virtual Justice in the Bush': The Use of Court Technology in Remote and Regional Australia' (2003)19 *Journal of Law Information and Science* p.4

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

1.5 Conclusion

We now live in the digital age which is heralded by a large scale migration of several hitherto physical activities online. The administration of criminal justice must also be dynamic and advance with time.[32] Online criminal justice is something that must be widely embraced across the country. While the process is associated with a lot of concerns and skepticism, there is need to still put in place some initiative in that direction. The fact that Nigeria is only recently grappling with technology uptake across several sectors is not really an excuse. Besides, the deployment of online criminal justice even in advanced countries is not with its own challenges. However, these countries have found a way around it by taking gradual steps in that direction. Even in the US, there is no evidence that the totality of a criminal trial can take place online. The method adopted is a gradual one where only some of the stages on the trial can be done online. For example, as a first step, Nigeria can start with allowing the process of arraignment to proceed online. Again, this can be made to be optional for those who find it more convenient. In addition, the process of adoption of motions, arguments on preliminary objection, hearing on point of law and non-trial proceeding such as application for bail can be proceeded online. Other more complex processes which are heavily reliant on face-to-face contact can remain physical with an opportunity for inactive participants (parties) to watch remotely.

COVID-19 has therefore taught a lot of countries important lessons with regard to the administration of justice generally. Policymakers must not wait for another pandemic before they are proactive in these issues. Indeed, all these can only be done with the necessary infrastructure and facilities. Therefore, we return full circle to the role of the government in this regard. Necessary funding must be provided for the required infrastructure. With recent initiatives such as NCMS, there are reasons to believe that all these are doable. All that is needed is the strong political will to overcome the legal, technical and administrative glitches towards promotion of the administration of justice generally in the country.

[32]See generally, AO Bello 'Criminal Law in Nigeria in the Last 53 Years: Trends and Prospects for the Future' (2013) 9(1) *ActaUniversitatisDanubius* p. 15