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**ADVANCING REMOTE COURT PROCEEDINGS IN NIGERIA: LESSONS FROM
OTHER JURISDICTIONS**

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Advancing Remote Court Proceedings in Nigeria: Lessons from Other Jurisdictions

Abstract

The adoption of remote or virtual court hearing is still being debated in Nigeria as the myriads of challenges posed by the innovation infuses even more fear for stakeholders. However, abandoning a progressive innovation may only hinder future innovation as the law may trail behind innovations habitually. There is therefore a need to reassess the existing framework for remote or virtual court hearing in Nigeria and consider necessary reforms. This paper seeks to explore the legal framework for virtual court hearing in Nigeria whilst elaborating on the rules governing virtual court hearing in other jurisdictions. The qualitative methodology is adopted in a bid to derive lessons from these jurisdictions and recommend legal reforms and/or amendments of laws for the proper functioning of Remote Court Proceedings (RCP) in Nigeria. The paper found that there needs to be a deliberate attempt to define open courts to include virtual courts in Nigeria whilst legal amendments are required in the Evidence Act, Constitution, Administration of Criminal Justice Laws to enable fair hearing during RCP.

Keywords: Remote Court, Virtual Court, RCP, Proceedings, Technology

1.0 Introduction

In April 2020, the Chief Justice of Nigeria (CJN) through the National Judicial Council (NJC) recommended the adoption of 'Remote Court Proceeding (RCP)' to Heads of Courts.¹ Following the NJC's circular no. NJC/CIR/HOC/II/631, courts in Nigeria issued Practice Directions on the remote court proceedings particularly for court sittings during the Covid-19 pandemic.² Although it can be said that the impacts of the Covid-19 pandemic are gradually reducing, the adoption of RCP in Nigeria continues to be relevant as part of the necessary innovations to improve the dispensation of justice. RCP has been adopted in varying degrees globally³ and this paper seeks to cull up lessons from the use of RCP in other countries for the advancement of RCP in Nigeria. Benchmarking the laws on remote court proceedings in Nigeria against international standards aids the accumulation of lessons for the Nigerian Justice System. RCP is expected to meet the requirements of a traditional or physical court proceeding. As such, it should matter less that proceedings are held remotely so long as they meet the requirements of the law. Thus, to sustain the constitutionality of RCP in Nigeria, remote court must hold itself to the standards of a traditional or physical court, which standards include but are not limited to the need for the remote court to be properly constituted⁴, the need to have jurisdiction to entertain a matter⁵, the need to ensure the sustenance of the rules of fair hearing⁶ and the assurance of having legally binding decisions. This is more so that courts are created by law, hence trials conducted by the court should substantially be in compliance with the law, albeit remote⁷. The objective of this paper is to appraise the current framework for RCP in Nigeria, comparatively analyse RCP rules in some jurisdictions and expatiate on legal amendments and infrastructure needed for the proper functioning of virtual court hearing in Nigeria.

¹ Muhammad Ibrahim Tanko, 'Re: National Judicial Council Covid – 19 Policy Report: Guidelines For Court Sitting and Related Matters in the Covid-19 Period' (National Judicial Council, 7 May 2020) Circular No. NJC/CIR/HOC/II/660 < <https://njc.gov.ng/30/news-details> > accessed 26 February 2022

² Lagos State Practice Direction for Remote Hearing 2020, National Industrial Court Practice Direction: Guideline for Sitting During Covid 19 Pandemic 2020

³ Tania Sourdin, Bin Li & Donna Marie Mc Namara 'Court Innovations and Access to Justice in Times of Crisis' (2020) 9 Health Policy and Technology 447 – 453

⁴ Captain Y U Zakari V. Nigerian Army & Anor (2015) LPELR-24721 (SC) 24

⁵ Madukolu v. Nkemdilim (1962) 2SCNLR 341, Sken Consult v. Ukey (1981) 1SC 6

⁶ Constitution of the Federal Republic of Nigeria 1999, s. 36

⁷ University of Lagos v. Aigoro (1985) 1 NWLR (Pt 1) 143, Iwunze v. FRN (2014) 6NWLR (Pt. 1404)

2.0 Appraisal of the Legal Framework for Remote Court Proceedings in Nigeria

In appraising the legal framework for RCP in Nigeria, this section evaluated the Practice Direction issued by Heads of Court alongside extant laws such as the Constitution⁸, Evidence Act⁹, Administration of Criminal Justice Act/Laws¹⁰ and the Civil Procedure Rules as these laws are everyday laws used during court proceedings in Nigeria. These laws are relevant in determining key issues that pertain to RCP such as the constitutionality vel non of RCP, admissibility of evidence during RCP, and everyday procedural rules of criminal and civil procedure in a typical remote court proceeding.

2.1 Constitution of the Federal Republic of Nigeria: The Constitution is the supreme law of the land.¹¹ The Constitution specifies rules regarding the litigant's fundamental right to fair hearing¹² and the need for publicity of trial¹³ in every court proceeding. This grund norm also specifies the need to give adequate time and facilities to an accused person to defend himself and receive copies of records of proceedings and judgments¹⁴. Considering these constitutional provisions, RCP ought to be standardized in a way that the requirements of the Constitution are complied with in the course of proceedings. This has been the basis of some outcry on the constitutionality of remote court proceedings in Nigeria seeing as RCP has to comply with the Constitution. Buttressing this, Onyebuchi, Sholanke, and Onwuzulike¹⁵ expressed that the right to publicity of court proceedings as guaranteed under Section 36(3)¹⁶ is inviolable hence public accessibility to court proceedings must be guaranteed. The consequence of non-compliance with the Constitution is further brought to the fore with the caution and hesitancy displayed by

⁸ Constitution of the Federal Republic of Nigeria 1999

⁹ Evidence Act 2011

¹⁰ Administration of Criminal Justice Act 2015, Administration of Criminal Justice Law 2011, Administration of Criminal Justice (Amendment) Law 2021

¹¹ CFRN 1999, s.1

¹² Ibid, s. 36

¹³ Ibid

¹⁴ Ibid

¹⁵ Onyebuchi A, Sholanke I & Onwuzulike C, 'A Critique Of The Practice Directions For Remote Hearing Of Cases In The Lagos State Judiciary' (*Strachan Partners*, 4 May 2020) <<https://strachanpartners.com/wp-content/uploads/2020/05/A-CRITIQUE-OF-THE-PRACTICE-DIRECTIONS-FOR-REMOTE-HEARING.pdf>> accessed 1 February 2022

¹⁶ Constitution of the Federal Republic of Nigeria 1999, s. 36(3)

courts in adopting RCP during the Covid-19 pandemic as recounted by Soniyi.¹⁷ The argument is that a remote court is not an open court within the meaning of the Constitution and other laws and does not measure up with the requirement for publicity of trial. A public place is a place which is accessible to the public and not based on any form permission¹⁸ hence, for RCP to comply with the Constitution, remote court ought to be open to the public with no restricted access to ensure publicity of trial. Nonetheless, while the physical court room is open to the public, attendees are limited to the occupancy rate of the court room. If this does not interfere with assessment of publicity, then remote court attendees may also be limited by the number a virtual court can accept despite that the permission to join is open.

2.2 Evidence Act: The Evidence Act governs the admissibility of evidence, whether primary or secondary evidence¹⁹ and whether such evidence is a public, private or computer generated evidence.²⁰ The need to align the Evidence Act with RCP is important. Facts may be proved by documentary evidence (physical, original or copies) and the infrastructure for tendering of same has to be properly considered for the successful implementation of RCP. Specific rules may thus be required for tendering of original copies of documents during virtual court sitting. In the same manner, the law allows for secondary evidence to be tendered in event that the original document is destroyed, lost or cannot be found or produced.²¹ It would appear that any secondary copy (photocopy or electronic) may be tendered electronically during RCP to the exclusion of certified true copies of public documents. This is hinged on the trite principle of law that in respect of public documents, the only acceptable form of secondary evidence is a certified true copy. This breeds the question of how the certified true copy of a public document may be tendered during the RCP, a question which a review of the Evidence Act must now answer. There is a need for RCP to have clear rules for tendering of documents,

¹⁷ Soniyi Tobi, 'Judges Oppose Virtual Court Sitting, Say it's unconstitutional' (*This Day*, 17 May 2020) <<https://www.thisdaylive.com/index.php/2020/05/17/judges-oppose-virtual-court-sitting-say-its-unconstitutional/>> accessed 1 February 2022

¹⁸ Kosebinu & Ors v. Alimi (2005) LPELR 11442 CA per Muhammad I.T, JCA (as he then was)

¹⁹ Evidence Act 2011 s.86, 87

²⁰ Ibid s. 103 - 105

²¹ Ibid, s. 87,89,90

particularly the tendering of electronic versions of originals and certified true copies of same in electronic form. The law also places a responsibility on parties to link all documents tendered in respect of a case to prevent dumping of evidence on the court.²² Hence, the RCP infrastructure should be one that allows witnesses identify and link documentary evidence just as would have been done in a physical court proceeding. Another major aspect of the Evidence Act is in relation to the proof of delivery of messages. The Evidence Act permits the court to presume that messages sent through electronic means were sent to the identified address solely.²³ The presumption does not however extend to presuming the person on whom the message was sent.²⁴ This provision has implications on service of court processes which if found to be improper can go to the foundational root of the case no matter how well conducted.²⁵ It would appear that Section 153 still places the onus on the party serving to prove the identity of the person served since rules of court allow for person service at first instance and since the court may be able to presume the address but not the identity of the person served. Additionally, the law provides that witnesses are kept out of hearing whilst the testimony of another witness is ongoing.²⁶ For this requirement to thrive during a virtual court, break out room functions may need to be activated and should thus be an important consideration in deciding the best infrastructure for RCP in Nigeria.

2.3 Administration of Criminal Justice Act/ Laws: The ACJA/ACJL is the law that regulates criminal procedure. Crucial to the framework for adopting RCP for criminal trials are the provisions for the arraignment of accused persons²⁷, trials²⁸, the usage of witness depositions in criminal trials²⁹, service of summons,³⁰ electronic record of evidence,³¹ power of court to dispense with personal attendance of defendant,³² the

²² Oghenetega G Emerhor & Anor V. Ifeanyi A Okowo & Ors (2017) NACLR Pt. 104 Pg. 40 at Pg. 74

²³ Evidence Act 2011, s. 153

²⁴ Ibid

²⁵ Madukolu v. Nkemdili (1962) 2SCNLR 341, Sken Consult Nig. Ltd v. Ukey (1981) 1 SC 6, Estate of Chief Humphrey Idisi v. Ecodril Nig Ltd & 3 Ors (2017) NACLR Pt 93

²⁶ Evidence Act 2011, s. 212 - 213

²⁷ Administration of Criminal Justice Act 2015, s. 271

²⁸ Ibid, s. 116, 117, 121- 130

²⁹ Ibid, s. 232, 356

³⁰ Ibid, s. 121- 130

³¹ Ibid, s. 364

³² Ibid, s. 135

interpretation of the phrase “open court”³³ and how the virtual court fits into this definition. The ACJA sets the framework for arraignment of a defendant providing that the arraignment of a defendant is to be taken from the dock except the court directs otherwise.³⁴ Virtual courts may or may not operate with background docks hence the use of a physical dock is not a natural occurrence in a virtual court. Therefore RCP framework requires that the dock is either dispensed with by law or the total arraignment is taken physically. In any case, there have been arguments against the use of docks in criminal proceedings and jurisdictions such as the United States and Netherlands now seek to avoid the use of docks or adopt alternatives.³⁵ The root of this argument is that the use of docks infringes the right to fair hearing and is not immediately compactible with the presumption of innocence.³⁶ Clearly, there is a need for the legislature to revisit the requirement for a dock in criminal trials especially as the law requires the attendance of a defendant through his trial.³⁷ The provisions of Section 356 of the ACJA³⁸ which requires that the defendant be placed in the dock through his trial ought to be realigned with Section 272, ACJA³⁹ and Section 211 ACJL, Lagos⁴⁰ which dictate the procedure for arraignment of defendant which allows the defendant to be placed unfettered before the court without more. The position as to public access to hearing in Lagos was recently redefined where Section 200⁴¹ was amended to permit virtual hearings without an express pronouncement of a virtual court as an open court.⁴² It would appear, the interpretation of an open court is critical to Section 200 as amended. Having gone this far, the definition of an open court ought to have been amended in Section 371 of the ACJL⁴³ to include virtual court. The ACJL Amendment Act⁴⁴ went further to create a new Section 371

³³ Ibid, s. 494

³⁴ Ibid, s. 356(8)

³⁵ Jodie Black Stock, ‘In the Dock: Reassessing the use of dock in criminal trials’ (London, 1 July 2015) <<https://justice.org.uk/in-the-dock/>> accessed 1 February 2022

³⁶ Jodie Black Stock, ‘In the Dock: Reassessing the use of dock in criminal trials’ (London, 1 July 2015) <<https://justice.org.uk/in-the-dock/>> accessed 1 February 2022

³⁷ Administration of Criminal Justice Act 2015, s.356

³⁸ Ibid

³⁹ Ibid, s. 272

⁴⁰ Administration of Criminal Justice Law of Lagos State, 2011

⁴¹ Administration of Criminal Justice Law of Lagos State, 2011, s. 200

⁴² Lagos State Administration of Criminal Justice (Amendment) Law 2021, s.12

⁴³ Administration of Criminal Justice Law of Lagos State, 2011, s. 371

⁴⁴ Lagos State Administration of Criminal Justice (Amendment) Law 2021, s. 371

which permits that offences listed in Section 135, 137 and 260⁴⁵ need not be held in open court. The real question is how these amendments stand in relation to the Constitution. Section 362 of the ACJA⁴⁶ also permits for the use of witness deposition for expert and sick witnesses but this may be extended to all witnesses for the sake of fast tracking RCP in criminal trials especially as evidence can be taken in either electronic form or in writing.⁴⁷ The law allows for criminal proceedings to be recorded electronically with the transcript of same signed and authenticated by the court.⁴⁸ This provision promotes RCP as proceedings may be recorded using the recording feature on the video conferencing app and thus saving cost for the court. Section 122 of the ACJA also specifies that the issuance and service of summons shall be made by either a police officer, court official or by way of courier service. The summons is to be delivered to the exact entity to be served, also known as personal service⁴⁹ while the acceptable mode of substituted service is having the duplicate of the summons pasted at the home or residence of the person to be served.⁵⁰ To ensure the proper implementation of RCP, it might be more practicable if the mode of substituted service in criminal trials is aligned with that of civil trials which allow for service by way of email provided however that it is shown that the email is shown to be active and belonging to the person to be served. Also since there is the requirement that all court sittings must be in open court,⁵¹ it may be beneficial for virtual courts to be accommodated within the meaning of “open courts” under the law.

2.4 Civil Procedure Rules/Practice Direction: The commencement of any action is by filing a claim at the registry.⁵² Following the Practice Directions on remote court hearing, claims may now be filed physically in line with existing rules of court or electronically by way of Email or Whatsapp.⁵³ Assessment of filing fee is also through Whatsapp⁵⁴ and

⁴⁵ Criminal Law of Lagos State 2015, s. 135, 137, 260

⁴⁶ Ibid, s. 362

⁴⁷ Ibid

⁴⁸ Ibid, s. 364

⁴⁹ Ibid, s. 123

⁵⁰ Ibid, s. 124

⁵¹ Ibid, s.259

⁵² NICN Civil Procedure Rules 2017 , Or. 3 R. 1

⁵³ NICN Practice Directions and Guidelines for Court Sittings 2020, s.4

⁵⁴ Ibid

payment may be made through Remitta. The Practice Direction allows for electronic service by way of email, whatsapp or SMS.⁵⁵ Under the existing civil procedure rules, service may be by personal service or substituted service.⁵⁶ Whilst the Practice Direction permits for electronic service, it would be beneficial to state clearly if electronic service will be by personal or substituted service. Moreover, where service is by electronic means, the process to be served is to be sent to the email address provided.⁵⁷ This raises questions as to the verification that the email is owned by the party to be served and that the email is currently in use. The Practice Direction of the National Industrial Court (NIC) for instance sought to address this concern by requesting first and foremost for the electronic addresses of legal practitioners from the Nigerian Bar Association (NBA).⁵⁸ Where electronic record of a member is incorrect or not up to date and has been adopted for service by the court, who takes responsibility for the effect of such error, is important in ensuring fair hearing for parties. Whilst electronic service is laudable, proof of authenticity of service is key. There ought to be a realistic assurance that the email belongs to the person to be served and that same is active. The Practice Direction by implication also seems to impose the responsibility of electronic service on the counsel to the party effecting service⁵⁹ which is at a variance with rules regarding service in the physical court which places the responsibility of service on an officer of court.⁶⁰ The Practice Direction therefore ought to distinguish between service of the originating process and court processes from service of other documents such as written addresses. On the actual hearing, remote proceedings were limited to cases that do not require taking of evidence under the NIC Practice Direction⁶¹ although the court is allowed to experiment the taking of evidence virtually⁶². The Lagos Practice Direction was silent on whether remote court proceedings accommodated contentious matters. The proceedings may be taken through video conferencing platforms. In terms of objections to

⁵⁵ NICN Practice Directions and Guidelines for Court Sitings 2020, s.6 (4)

⁵⁶ NICN Civil Procedure Rules 2017, Or. 7 r. 1, Or. 8 r. 13, High Court Civil Procedure Rules of Lagos State 2019, Or. 9 r. 3, 5

⁵⁷ NICN Civil Procedure Rules 2017, Or. 7 R. 1

⁵⁸ NICN Civil Procedure Rules 2017, Or. 6

⁵⁹ NICN Practice Directions and Guidelines for Court Sitings 2020, s.6 (9)

⁶⁰ NICN Civil Procedure Rules 2017, Or. 7 R. 1(2)

⁶¹ NICN Practice Directions and Guidelines for Court Sitings 2020, s.7

⁶² Ibid, s.7 (5)

admissibility of documents, parties are required to identify the documents to which they intend to object at the court sitting⁶³ since all documents sought to be tendered would have been filed fourteen clear days ahead of hearing.⁶⁴ Hearing may be in the court room or judges chamber during RCP but litigants and/or their counsel require leave of court or written agreement of parties to attend.⁶⁵

3.0 Global Outlook on Remote Court Proceedings

A number of lessons can be learnt from the other jurisdictions and international court in understanding how Nigeria can benefit more from RCP. The focus point in this paper is Singapore, Australia, the International Court of Justice (ICJ) and the Economic Community of West African State (ECOWAS) Community Court of Justice.

3.1 Singapore: Singapore approved video conferencing and telephone hearing for remote court proceedings⁶⁶. To encourage RCP, the country's Practice Direction extends RCP to criminal matters.⁶⁷ Claims are filed online using the Community Justice Tribunal System (CJTS)⁶⁸. It is on this platform that parties fill the claim, upload supporting documents⁶⁹ and pay filing fee.⁷⁰ Respondent's notice is also generated therefrom for service on the respondent.⁷¹ Service of the originating process is by personal service but substituted service may be obtained by leave of court to allow for pasting, posting, email or internet transmission.⁷² The service is by email, the party seeking to serve must show that the email of the party to be served is not only active but also belongs to the party to be

⁶³ Ibid

⁶⁴ NICN Civil Procedure Rules 2017, Or. 3 Rule 11

⁶⁵ NICN Practice Directions and Guidelines for Court Sittings 2020, s.8

⁶⁶ Singapore State Court, Practice Direction 2021, s. 57(2) < https://www.judiciary.gov.sg/docs/default-source/new-roc/state-courts-practice-directions-20215026094db6e245deb484a00713e42d69.pdf?sfvrsn=46c44cfa_2 > accessed 1 February 2022

⁶⁷ Ibid, s. 57(1)

⁶⁸ Singapore State Court, Practice Direction 2021, s. 83, 128 < https://www.judiciary.gov.sg/docs/default-source/new-roc/state-courts-practice-directions-20215026094db6e245deb484a00713e42d69.pdf?sfvrsn=46c44cfa_2 > accessed 1 February 2022

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Ibid

⁷² Singapore State Court, Practice Direction 2021, s. 28 < https://www.judiciary.gov.sg/docs/default-source/new-roc/state-courts-practice-directions-20215026094db6e245deb484a00713e42d69.pdf?sfvrsn=46c44cfa_2 > accessed 1 February 2022

served.⁷³ Unauthorized recording of court proceeding is criminalized.⁷⁴ Remote proceeding is conducted either in chambers or open court and where conducted in chambers, interested parties may apply to join the proceeding in chambers.⁷⁵ The modality adopted for defendants in custody is that the evidence of such defendants may be taken through a video link.⁷⁶ However, where a witness intends to give evidence via video link, leave of court must be sought and obtained.⁷⁷ On the use of interpreters in RCP, Singapore's directs that interpreters must interpret from open court during RCP.

3.2 Australia: Australia's directive for RCP is based on the Federal Court of Australia's litigant's guide for online learning.⁷⁸ To commence remote court proceedings in Australia, an order of court is required and the parties are expected to provide email addresses for the purpose of service.⁷⁹ Hearing is conducted through Microsoft teams and all participants are to log into the court link at least fifteen minutes prior to the online hearing. Participants are also prohibited from engaging in unauthorized recording of court proceedings.⁸⁰ Permission of court is required to join virtual hearing.⁸¹ To share documents with the court, Australia utilizes email and other online sharing platforms.⁸² In respect of filing of claims, documents to be filed may be e-lodged, faxed, or emailed.⁸³ The recommended time for virtual hearings is a total of two hours in Australia as explained by the Pacific Judicial Strengthening Initiative.⁸⁴ For criminal cases, a remote point coordinator is appointed to ensure the defendant gets access to the remote court

⁷³ Ibid, s. 28(6)

⁷⁴ Administration of Justice (Protection) Act 2016 of Singapore 2016, s.5

⁷⁵ Ibid, s. 13, 74

⁷⁶ Ibid, s. 114

⁷⁷ Ibid, s. 115

⁷⁸ Federal Court of Australia, 'National Practitioners/Litigants Guide to Online Hearing and Microsoft Teams' < <https://www.fedcourt.gov.au/online-services/online-hearings/National-Practitioners-and-Litigants-Guide-V5.pdf>> accessed 1 February 2022

⁷⁹ Ibid, 2

⁸⁰ Ibid, Australia Federal Court Rules 2011, Division 6.2

⁸¹ Ibid, 3

⁸² Ibid

⁸³ Federal Court of Australia, 'Special Measures in Response to Covid 19: Special Measures Information Note' (Australia, 31 March 2020) < <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/SMIN-1-31-March-2020.pdf>> accessed 1 February 2022

⁸⁴ The Pacific Judicial Strengthening Initiative, 'Remote Court Proceeding Tool Kit' (2020) Federal Court of Australia < <https://www.fedcourt.gov.au/pjsi/resources/toolkits/remote-court-proceedings/RCP-Toolkit-Amended-May-2021.pdf>> accessed 1 February 2022

room where the defendant is in custody prior to court hearing.⁸⁵ The virtual backgrounds are to be disabled during evidence to confirm non-interference with evidence whilst the witness must confirm to be alone in a room while giving evidence. While disruptive participants are kept in waiting rooms, breakout rooms are permitted to encourage lawyer-client conversations.⁸⁶ To ensure publicity, remote case, written transcripts are publicized on the court's website with links to remote court proceedings.⁸⁷

3.3 International Court of Justice (ICJ): The ICJ's 'Guidelines For The Parties on The Organization of Hearing By Video Link'⁸⁸ gives guidance as to RCP in the court. The first step taken by the ICJ was to amend paragraph 2 of Article 59 and 94 of its rules to read plainly that the ICJ as a court is permitted to hold court hearing virtually.⁸⁹ The court also created no dichotomy between physical court hearing and virtual hearings by stating that virtual court hearing should be conducted the same way as physical court hearing.⁹⁰ Prior to RCP, the court registrar confirms the length of the virtual hearing, the time zone of different parties alongside the logistic requirement.⁹¹ Also to be confirmed is the number of participants joining the hearing and whether evidence will be given or submitted electronically.⁹² Subsequently, the video link is sent at least three clear days prior to the hearing.⁹³ Some of the required etiquette for the virtual hearings includes isolation of the participants to prevent disruption of hearing,⁹⁴ muting of all microphones,⁹⁵ and non-admittance of participants after commencement of virtual hearing.⁹⁶ Evidence are presented electronically whether documentary or not⁹⁷ and the

⁸⁵ Ibid, p. 5

⁸⁶ Ibid

⁸⁷ Ibid, p. 22

⁸⁸ International Court of Justice, 'Guidelines For The Parties on The Organization of Hearing By Video Link' (Hague, 13 July 2020) <<https://www.icj-cij.org/en/other-texts/guidelines-videolink>> accessed 26 January 2022

⁸⁹ Ibid, s. 2, 3, Rules of Court of the International Court of Justice, 1978, Art. 59, 94

⁹⁰ International Court of Justice, 'Guidelines For The Parties on The Organization of Hearing By Video Link', s. 3 (Hague, 13 July 2020) <<https://www.icj-cij.org/en/other-texts/guidelines-videolink>> accessed 26 January 2022

⁹¹ Ibid, s. 5

⁹² Ibid, Rules of Court of the International Court of Justice, 1978, Art. 31

⁹³ International Court of Justice, 'Guidelines For The Parties on The Organization of Hearing By Video Link' s. 8 (Hague, 13 July 2020) <<https://www.icj-cij.org/en/other-texts/guidelines-videolink>> accessed 26 January 2022

⁹⁴ Ibid, s. 12

⁹⁵ Ibid, s. 13 (a)

⁹⁶ Ibid, s. 13(b)

⁹⁷ Ibid, s. 15

evidence of witness is taken through video link.⁹⁸ Witnesses may only participate in virtual trial only when it is time to testify.⁹⁹ Upon conclusion of court hearing, the judges exit the virtual hearing link before other participants.¹⁰⁰

3.4 ECOWAS Community Court of Justice: Virtual court hearing is permitted by the ECOWAS Practice Direction of Electronic Case Management and Virtual Court session.¹⁰¹ Filing of cases is permitted electronically but email address and telephone contact of the party filing must be provided.¹⁰² Documents to be filed electronically are signed and stamped before being scanned and filed.¹⁰³ In terms of service, same is allowed by email, courier or by any other means directed by the court.¹⁰⁴ The proof of service is the print out generated while the service was effected.¹⁰⁵ The virtual hearing may be commenced on application of a party or by the court suo motu.¹⁰⁶ The suitability of the virtual hearing may also be determined prior to the court hearing.¹⁰⁷ Internal participants such as lawyers, parties and/or their agents may participate in virtual proceedings but members of the public would require court accreditation.¹⁰⁸ During the RCP, participants are to log in fifteen minutes before the hearing and have their microphones muted.¹⁰⁹ Leave of court is required to record court proceedings¹¹⁰ but the court retains the duty to record proceedings and provide certified true copies after payment of the required fees.¹¹¹ Judgment is delivered virtually.¹¹²

4.0 Recommended Amendments to Legal Framework

⁹⁸ Ibid, s. 17, Rules of Court of the International Court of Justice, 1978, Art. 62

⁹⁹ International Court of Justice, 'Guidelines For The Parties on The Organization of Hearing By Video Link' s. 20 (Hague, 13 July 2020) <<https://www.icj-cij.org/en/other-texts/guidelines-videolink>> accessed 26 January 2022

¹⁰⁰ Ibid, s. 22

¹⁰¹ Edward Asante, 'Practice Directions on Electronic Case Management and Virtual Court Session' (Ecowas, 22 May 2020) <http://www.courtecawas.org/wp-content/uploads/2020/05/PD_ENG.pdf> accessed 29 January 2022

¹⁰² Ibid, Ecowas Rules of Procedure 2012, Art.3(2), Art. 32(6), 33(3), 74(3)

¹⁰³ Edward Asante, 'Practice Directions on Electronic Case Management and Virtual Court Session' (Ecowas, 22 May 2020) <http://www.courtecawas.org/wp-content/uploads/2020/05/PD_ENG.pdf> accessed 29 January 2022 Art. 3(4)

¹⁰⁴ Ibid, Art. 4(2)

¹⁰⁵ Ibid, Art. 4(4)

¹⁰⁶ Ibid, Art 5(1)

¹⁰⁷ Ibid, Art 5(4)

¹⁰⁸ Ibid, Art. 5(6)

¹⁰⁹ Ibid, Art. 6(3)

¹¹⁰ Ibid, Art 7(2)

¹¹¹ Ibid, Art 7

¹¹² Ibid, Art 8

The paper explored the provisions of extant laws and the extent to which these laws advance RCP in Nigeria. The evaluation showed the existence of lacunas which ought to be taken into consideration in event of legislative amendments. These proposed amendments are discussed below.

4.1 Amendment of Constitution of the Federal Republic of Nigeria

The constitutional provisions relevant to the proper functioning of RCP include the need for publicity of trial and the need to enforce the right to fair hearing as entrenched in the Constitution.¹¹³ The arguments around the constitutionality of RCP would be better put to rest with an amendment of Section 36 of the Constitution. It is recommended that Section 36(3)¹¹⁴ be amended to read that the proceedings of a court shall be accessible to the public. In the same manner, Section 36(4)¹¹⁵ should include a proviso stating thus *‘Provided that nothing in this section will prevent the publicity of trials of a defendant virtually or by a virtual court’*. At the same time, the phrase *‘it would not be in public interest for any matter to be publicly disclosed’* as made in Section (4)(b)¹¹⁶ may be substituted with the phrase *‘it would not be in public interest for any matter to be publicly accessed or disclosed’*. On constitutional requirement, the interpretation section, Section 318¹¹⁷ ought to be amended to define a court or open court as a *‘physical or virtual room or place where a court sits to determine matters.’*

4.2 Amendment of Evidence Act

The Evidence Act should address issues regarding the admissibility of evidence in a virtual court. As earlier adumbrated there may be challenges tendering original documents as primary evidence during RCP and this challenge is further displayed with more institutions issuing originals in electronic form¹¹⁸. As such, an amendment to Section 86¹¹⁹ is necessary to allow for original documents in electronic form for the purpose of tendering during RCP. The choice would be for the law to recognize original documents in electronic form as originals and

¹¹³ Constitution of the Federal Republic of Nigeria 1999, s. 36

¹¹⁴ Constitution of the Federal Republic of Nigeria 1999, s. 36(3)

¹¹⁵ Ibid)

¹¹⁶ Ibid

¹¹⁷ Ibid, s. 318

¹¹⁸ Antony Otaru, ‘CAC adopts electronic distribution of company certificates’ *The Guardian* (Nigeria, 27 July 2020) < <https://guardian.ng/news/nigeria/national/cac-adopts-electronic-distribution-of-company-certificates/>>

¹¹⁹ Evidence Act 2011, s. 86

primary evidence or in the alternative recognize the original documents in their electronic form as a copy and thus secondary evidence for the purpose of admissibility of documents in court. However, it may be argued that the forwarded or copied version of electronically generated original documents is nothing but a duplicate of the original and in that wise such copies can only be secondary evidence within the confines of the Evidence Act. On this basis, Section 86¹²⁰ is recommended for amendment to read that ‘*an original document issued in electronic form which is sought to be tendered in evidence shall qualify as secondary evidence for the purpose of inspection in any court.*’ Also required for amendment is Section 89¹²¹ and 90 respectively as it relates to the certified true copies of public documents. As earlier alluded to, public offices are now adopting the issuance of electronic originals¹²² thus considering that more institutions may adopt electronic originals and electronic certified true copies as time gets by, Section 89 and 90 ought to be amended to allow for same. Section 90(1)(c) should be amended to state that ‘*in paragraph (e) or (f), a certified copy of a document issued manually or electronically, but no other secondary evidence is admissible*’. In respect of Section 153¹²³ where the court is permitted to presume the electronic service to an identified address, an amendment of the section may be made to read thus: “*provided that in the case of service by electronic means made pursuant to a court order, the court is entitled to presume service in line with subsection 2 where the account of the recipient has been shown to the court to be active and belonging to the recipient before the court order for electronic service was granted*’

4.3 Amendment of Administration of Criminal Justice Act/Laws

Criminal cases commence by filing a charge/information and arraigning the defendant as this is an essential part of any criminal proceeding.¹²⁴ The combination of Section 271 and 356(8) suggest that the defendant must be placed unfettered in the dock during his arraignment unless

¹²⁰ Ibid

¹²¹ Evidence Act 2011, s. 89

¹²² Anthony Otaru, ‘CAC adopts electronic distribution of Company Certificates’ (*The Guardian*, 27 July 2020) <<https://guardian.ng/news/nigeria/national/cac-adopts-electronic-distribution-of-company-certificates/>> accessed 1 February 2022

¹²³ Evidence Act 2011, s. 153

¹²⁴ Ibid, s. 271, Administration of Criminal Justice Law of Lagos State 2011, s. 211

the court directs otherwise.¹²⁵ With RCP, and the absence of a physical dock, leave for electronic arraignment should be considered. In this wise, Section 356 (8) ought to be amended to state clearly that ‘*the defendant shall take his plea before a court*’ whilst the definition of an open court under Section 494 may be amended to read that ‘*open court means a room or place where a court sits to hear and determine matters virtually or physically*’. Also, Section 362 is recommended for amendment to allow for evidence to be given by all witnesses in criminal trial orally or by written deposition subject to the rules regarding cross examination. On the issue of service of hearing notices and summonses, the ACJA provides that service of same may be through a court officer, police officer or courier.¹²⁶ Service is effected personally¹²⁷ but where a recipient is unreachable, substituted by way of pasting of the duplicate of the summons at the home or residence of the recipient may be granted by the court.¹²⁸ With the introduction of RCP, Section 124 ought to be amended to permit service electronically and this may be by adding the phrase “ the serving officer may with leave of court serve by electronic means or affix one of the duplicates of the summons to some conspicuous part of the premises ” to that section. Section 127 should also be amended to include an affidavit of service of the police officer or court officer who effected the service as proof of service. Section 127 should thus read that ‘*in the case of an electronic service, proof of service by the police officer or court official stating that service was made to the active email of the recipient may be filed physically or electronically*’. These recommended amendments may also be duplicated under the respective ACJL as some of the provisions are similar. For instance, Section 122,123,124,271 of the ACJA and Section 86,87,88 and 211 of ACJL, Lagos are in tandem. Likewise Section 200 of ACJL Lagos is in tandem with Section 356 of the ACJA and Section 371 of ACJL Lagos is in sync with Section 494 of the ACJA. It is important to note that Section 200 of ACJL, Lagos¹²⁹ has been amended to permit hearing

¹²⁵ Administration of Criminal Justice Act 2015, s. 271, 356(8)

¹²⁶ Administration of Criminal Justice Act 2015, s. 122

¹²⁷ Ibid, s. 123

¹²⁸ Ibid, s. 124

¹²⁹ Administration of Criminal Justice Law of Lagos State 2011, s. 200

in open court but with a proviso that same will not stop any form of virtual hearing by the court.¹³⁰

4.4 Amendment of the Civil Procedure Rules/Practice Directions

Remote court hearing should be considered upon application of either party and after proper consideration of the availability of requisite infrastructure, whether such leave will not prejudice the adverse party and the circumstance of each case. However, this should not obviate the power of the court to order remote court hearing suo motu in specific circumstances.

In respect of the service of processes, electronic service should be permitted as a means of substituted service rather than personal service and the party requesting for same should show the court by affidavit that the email address of the party to be served belongs to the latter and is active. Also recommended is that service of court processes should be done by court officials e.g. Sheriff rather than a counsel. In this wise, an affidavit of service of a sheriff of court should remain the recognized proof of service, whether filed physically or electronically. In addition the process for taking evidence orally and in documentary form should be explicit. The Court Rules could be amended to provide for the public listing of cases on court website, and publishing of registration link for persons seeking to join virtual hearing. Subject to such registration (which approval should not necessarily be withheld), the court hearing link may then be made available to registrants. Registration to attend virtual hearing should be subject to availability. To ensure proper tendering of evidence a schedule of documentary evidence sought to be tendered by the claimant could be submitted with the claim then the physical copies may be deposited with the court within a specified number of days before the court hearing. The schedule should state the nature of the documents i.e. whether photocopy, certified true copy, electronically generated evidence etc. The court may thereafter give a date and time for inspection of documentary evidence sought to be tendered by both parties. The adverse party may react to the documents contested during the virtual hearing with the parties referencing the document virtual through the share screen feature. Since it is critical for the court to evaluate the credibility of witnesses, the witness ought to turn on video camera while

¹³⁰ Lagos State Administration of Criminal Justice (Amendment) Law 2021, s. 21

giving evidence as is the case with the ICJ rules¹³¹. This is more so that such video can be played over and over again by the judge when evaluating evidence leading the court to notice any action, inaction or demeanour of the witness during hearing.

It is recommended further that participants login to the virtual court at least 15minutes before the court hearing and no participant should be admitted upon commencement of court hearing. In the same manner, devices are to be muted during court sitting and unmuting should be subject to the permission of the court. A technical officer ought to be available during virtual court hearing to attend to participants who have been logged out due to network problems and the contact of such technical officer ought to be made available prior to court sitting.

4.5 Other Recommendations

To implement admirable justice system that is technology driven, the development of Information Technology (IT) infrastructure is necessary, hence budgetary allocation would need to be made by government to cater for the courts in this regard. An intervening step would be the approval of the development of live streaming websites by Heads of Court, which websites should as a matter of necessity be sufficiently robust to allow for filing, service of court processes and streaming of live court proceedings. The website should be such that the litigants and/or their counsel can fill up the claim as an online form, make payment thereon and auto generate the claim directly to the litigant and the court registry for service on the defendant accordingly. Where video conferencing platforms are adopted, same must be standardized across all divisions of the court. This would imply that all video conferencing platforms adopted by the Federal High Court for instance must be the same across the different divisions such that a court is not using Skype whilst another is using WhatsApp or Zoom.

RCP trainings could be arranged for judicial officers and legal practitioners through the judiciary and the Nigerian Bar Association respectively. This is expected to bridge the technological divide and better technophobia amongst stakeholders, a challenge rightly identified by

¹³¹ Ibid, s. 17, Rules of Court of the International Court of Justice, 1978, Art. 62

Osiceanu.¹³² RCP trainings should also be introduced to form part of the moot court training for law school students as a possible preparation for the legal practice.

Nonetheless, RCP Rules would need to be integrated into the Civil Procedure Rules and the Administration of Criminal Justice Laws as applicable to the states as this may push parties to take more informed decisions when it comes to RCP and may limit the number of cases commenced by physical hearing.

5.0 Conclusion

Remote or virtual court is as possible in Nigeria as it is in other jurisdictions. However, the future of remote or virtual court proceedings in Nigeria is dependent on the ability of stakeholders to accept the innovation and work around the challenges it may pose over a period of time. A positive mindset is important in ensuring legal reforms and amendments that support technology in the legal industry. Therefore, accepting that infrastructure, legal reforms and amendments are essential for the proper adoption of virtual courts will be more beneficial for the country than an outright rejection.

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¹³² Maria - Elena Osiceanu , 'Psychological implications of modern technologies: "Technophobia" versus "technophilia"' (2015) 180 *Procedia - Social and Behavioral Sciences*, , 1137–1144.

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