VIRTUAL COURT HEARINGS: TOWARDS A PURPOSIVE INTERPRETATION OF STATUTES.

BY

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1. INTRODUCTION:

The advent of the COVID 19 pandemic has plunged the entire world into a catastrophe of monumental proportion. Every aspect of human endeavour has been adversely affected by the pandemic. Economic, political, religious and social activities have been disrupted. However, many of the key players in these sectors have risen up to the challenges with pragmatic measures. The pandemic is forcing many professionals to consider innovative and creative solutions for service delivery. A common measure which has been adopted is the deployment of technology to surmount the challenges.

Presently the active sectors that appear to be surviving in the midst of the pandemic are sectors that have leveraged on ICT to keep afloat. Commercial transactions are still going on in full swing online. Religious services are being conducted online including the collection of tithes and offerings. Effective political campaigns are being vigorously pursued on several social media platforms.

In the midst of the pandemic, the courts in advanced countries are embracing videoconferencing and other remote appearance tools in the administration of justice. This development could represent a turning point for the justice system.

However in Nigeria, the justice delivery sector is yet to embrace these innovative measures. The legal profession is in a dilemma on the deployment of digital technology to surmount the challenges foisted on us by the pandemic. We are still debating the possibility and legality of leveraging on information technology to activate the justice delivery sector. This is not all together surprising. The legal profession is quite a conservative one. We are almost immune to changes. We believe in the sacred doctrine of judicial precedent. We like to stand on decisions of superior

courts of ancient antiquity. So long as the decision has not been overruled, it is binding on us under the doctrine of ***stare decisis*** (stand by what was decided in the past).

Presently, the administration of justice is having some hiccups, we are almost in a stand still position. Most of the courts are not able to sit because of lockdown orders, restrictions on movement of people, social distancing etc., etc. Some of the few courts that are sitting are offering skeletal services. Most of the court staff have been directed to stay away for now to minimize the number of people in the court premises in line with the COVID 19 protocols on social distancing. This has impacted negatively on court proceedings. How do we get out of the present conundrum? This is where the practice of virtual hearing comes to play.

2.0 VIRTUAL HEARING:

A virtual hearing is a ***court hearing conducted by audio-visual means, where cases are conducted without the need for participants to attend the Court in person***.[1]

The hearing is conducted through the format of a ***virtual conference***. This is a digital procedure which enables remote participants to access live online meetings and events from their computers across the globe. A virtual conference is hosted on the internet. Participants have no need to get together in a conference room in order to partake in deliberations at the conference. They can access the meeting through a conference website or video conferencing tools designed specifically for the virtual experience.

In addition to the live events, virtual conference includes discussion forums, networking opportunities, a conference resource center, the ability to search for and chat with other conference participants, and other features. All of these are specifically designed to give virtual participants the same opportunity to get the same meeting experience as onsite attendees.

The basic requirements for a Virtual Hearing are as follows:

i. A device you can access an internet connection (PC, MAC, Laptop, Smart Phone, Tablet, etc.);
ii. The device must have a video conferencing software already installed;
iii. A fast and stable internet connection;
iv. A webcam or a built-in camera on your device that will allow the Judge to see you during the virtual hearing and a microphone to enable audio communication with other parties;
v. You must also have a valid email address to send and receive invitation links, meeting Id, password and other relevant details.

[1] www.supremecourt.vic.gov.au › law-and-practice › virt

There are three types of Virtual Conferences to wit: ***Video Conference, Teleconference, and Web conference.***[2] I will give a brief introduction on the three types.

2.1 VIDEO CONFERENCE:

A video conference allows participants to hear and see each other during a meeting with a computer video camera and microphone or the built-in camera of a mobile device. There are various kinds of video conference providers in the current market, such as ***Skype, Zoom, Webex*** and ***EzTalks***.

This type of virtual conference is often used for interviewing job candidates in faraway locations or delivering group online meetings for business. It is also used for meetings with employees who work at home and telecommute, as well as to connect to long-distance clients. Video conference is additionally beneficial in online training, for holding brainstorming sessions or for project-planning sessions.

2.2 TELECONFERENCE:

A teleconference connects meeting participants via phone lines. This can be accomplished through landlines or cellular devices, which allows numerous people to connect simultaneously from multiple locations.

The downside of teleconferencing is that there is no visual reference for meeting participants, and people have no access to identify who is speaking and cannot see each other. This format can be more effective if all teleconference participants are introduced beforehand, and if each person identifies himself before commenting.

2.3 WEB CONFERENCE

Web conference is an umbrella term used to describe the process of using the internet and a web browser to connect individuals or groups together from separate geographic areas for educational or training webinars, collaborative online meetings, video conferencing, or live presentations in real time.

Web conference allows real-time point-to-point communications as well as multi communications from one sender to many receivers. It offers data streams of text-based messages, voice, and video chat to be shared simultaneously, across geographically dispersed locations.

[2] https://www.eztalks.com/video-conference/what-is-virtual-conference.

3.0 VIRTUAL COURT PROCEEDINGS:

It is indisputable that the uncanny emergence of the COVID-19 pandemic may have altered the modus operandi of mankind in many aspects of life. The pandemic has ushered the world into a season of fear and frustration. The whole world is in a quandary, advanced nations of the world are helpless in the face of the menace. There is a palpable sense of uncertainty.

The World Health Organization recently speculated that even if we succeed in combating the COVID 19 pandemic, the virus may not be completely wiped out from the globe. According to their permutations, the disease may merely cease to be a ***pandemic*** and become ***endemic***. This is merely a lesser evil. Consequently, mankind may have to continue to harbor the virus and manage it the way we are managing malaria, typhoid fever, yellow fever, HIV and other dreaded diseases. The truth is that we may never go back to our normal way of living. Thus practices such as social distancing, the use of hand sanitizers, and restriction of large gatherings may become the norm.

With the change in lifestyle, there will invariably be the need to make some adjustments in the way we do things. According to the Latin maxim: ***tempora mutantur et nos mutamur in ilis*** (the times change, we also must change with the times).

The Nigerian judiciary and indeed, the legal profession must make some necessary adjustments to keep up with the times. This is why the deployment of information technology in the administration of justice has become imperative.

Initially, in a bid to stem the tide of the spread of the virus and "flatten the curve", The Chief Justice of Nigeria (CJN), Ibrahim Tanko Muhammad on the 23rd of March, 2020, issued Circular No. NJC/CIR/HOC/11631. The essence of the directive was to ensure the suspension of courts activities for an initial period of 2 weeks, save for urgent or time-bound matters.

Again on the 6th of April, 2020, His Lordship the CJN gave another directive, this time suspending court sittings *sine die*. His Lordship, however, noted again that courts were expected to sit particularly in respect of matters that are urgent, essential or time-bound.

In a publication dated the 22nd of May, 2020, titled: ***NJC GUIDELINES FOR VIRTUAL COURT HEARINGS: WHY THE TROUBLE***, a Legal Practitioner named ***Clinton Elochukwu Esq.*** observed thus: ***"Following the CJN's directive, an already frustratingly slow legal system was virtually grounded to a halt. The implication of shutdown of courts on the system were immense but more regrettable is the fact that the shutdown of the system could have been averted if the authorities were responsive enough in taking advantage of the efficient alternative offered by modern technology."***

In a bid to mitigate the dire consequences of the shutdown of the Courts, on the Nigerian justice system, notable voices in the legal profession made compelling and well intentioned arguments for the courts to take advantage of the ease and efficiency offered by modern technology in order for the Courts to adopt virtual sittings.

Subsequently the judiciaries of some states of the Federation started to issue some practice directions to introduce the practice of virtual hearing into the court proceedings. The Lagos State judiciary was among the initiators of this pragmatic innovation. The Chief Judge of Lagos State signed the ***"Lagos State Judiciary Remote Hearing of Cases (COVID-19 Pandemic Period) Practice Direction"*** which came into effect on the 4th of May, 2020. The essence of the Practice Direction is to ensure the hearing and determination of urgent and time-bound cases through digital platforms like Zoom, Skype or any other video and audio conferencing platforms approved by the Court.

Recently, the Lagos State judiciary had its first virtual sitting in a criminal matter in line with the Practice Direction. The Borno State judiciary has also recorded its first virtual sitting wherein a Judge delivered a judgment in a criminal matter. The Federal High Court and some other State judiciaries have equally issued similar Practice Directions on virtual court proceedings and have commenced the implementation of same.

3.1 NATIONAL JUDICIAL COUNCIL GUIDELINES FOR COURT SITTINGS AND RELATED MATTERS IN THE COVID-19 PERIOD:

Eventually on the 7th of May, 2020, His Lordship the Chief Justice of Nigeria issued a comprehensive set of Guidelines to be adopted by the courts in Nigeria to regulate proceedings during the COVID 19 pandemic period.

The Guidelines contain general provisions to regulate court sittings during the period of the pandemic. Paragraph E of the Guidelines deals with Virtual Court Hearings and provides as follows:

E. VIRTUAL OR REMOTE COURT SITTINGS

1. Physical sittings by courts in courtrooms should be avoided as much as possible during this COVID-19 period. Such physical court sittings must be limited only to time bound, extremely urgent and essential matters that may not be heard by the court remotely or virtually. Heads of Courts have the responsibility for determining the matters that fall within these set boundaries and shall publish the list thereof for the information of judicial officers, litigants, Counsel and members of the public. Such list may be reviewed by the Head of Court from time to time as necessary and required.

2. Virtual court sittings (alternately referred to as "remote court sittings" or "online court sittings") should be encouraged and promoted by the courts and

Counsel; the courts should insist on such remote hearings for matters that do not require taking any evidence. All judgments, ruling and directions may be delivered and handed down by the courts in and through remote court sittings.

3. Save for extremely urgent and time bound matters, contentious matters that require the calling of evidence in a physical courtroom setting should not be called up by the courts at this time.

4. As the courts and Counsel become proficient in virtual court sitting arrangements, the courts may, on a trial-run basis gradually experiment with taking witnesses and evidence virtually. This is important given the fact that no one can estimate with any degree of certainty how long the COVID-19 pall will hang over humanity or when exactly a therapeutic cure or vaccine may be found for the disease.

5. The following guidelines shall apply for the determination of the location for the virtual court sitting:

a. Subject to the further guidelines hereunder, the judicial officer(s) and the court officials and security personnel shall, as a default arrangement, sit and be in the regular courtrooms for remote court sittings. Except with the leave of court, only the judicial officer(s) and the court officials and security personnel shall be the ones in the courtroom for any virtual court sitting.

b. Save with the consent of the court or the prior written agreement of the parties, it is not permissible for any of the parties to a matter that is being heard virtually to be in the courtroom with the judicial officer(s) during the virtual court sitting while the other party or parties to the same matter join the proceedings remotely.

c. Subject to the prior approval of each Head of Court, judicial officers may conduct virtual court sittings from their respective chambers. The further provisions of Item 5(a) above shall apply in pari materia to all such virtual court sittings that are hosted in chambers.

d. For the purposes of delivering judgments or rulings, the judicial officer(s) may liaise with the court officials and conduct the virtual court sitting from whichever location the judicial officer may be, provided that the facilities specified in Item E.6 below are available in such locations. This provision addresses in particular judicial officers who may need to deliver time-bound judgments and/or rulings but are marooned in locations away from their usual stations consequent upon the present national lockdown and travel restrictions pursuant to COVID-19.

e. Further to sub-paragraph (d) above, where virtual hearing is not possible, a judicial officer that is marooned outside his station, may upon obtaining the fiat of his Head of Court, deliver the judgment or ruling of his court that is time bound or urgent in the courtroom of any of the Divisions of his Court closest to his location. The provisions of this Guideline in regard to physical sittings of the

courts shall apply in all respects to such sitting of the court for the delivery of the judgment or ruling.

6. In order to host online court sittings, the courts shall ensure the availability of the following facilities in the locations or respective locations where the judicial officers and the court officials may be located:

a. Fast-speed, pervasive and reliable Internet connectivity;

b. End-user Hardware/Devices (i.e. desktops, laptops, tablets, smart phones – any one of these or a combination thereof);

c. Collaborative Platform (e.g. MS365 [which incorporates Microsoft Teams], Zoom, Google Meetings, etc.). These require payments of subscription fees to the software manufacturers and subsequent installation of the software in the end-user hardware devices. Some of the software have provision for multiple or group user subscriptions. These may be cost-efficient for standalone judiciaries – Federal or State (e.g. the Supreme Court, each Division of the Court of Appeal, Divisions of the National Industrial Court or the Federal High Court, etc.); and

d. Electricity power for, amongst others, the end-user device and ancillary equipment for the duration of the court sitting.

7. Litigants and their Counsel shall be responsible for ensuring that they have the facilities stipulated in Item E.6 above that would enable them to join and participate in the remote court sittings from their respective locations.

8. The provisions of Item D in regard to the service of hearing notices by the court on parties shall apply in pari materia to virtual court sittings and the contents of such hearing notices shall be the same as if the hearing notices were for physical court sittings provided that the following additional details and information shall be contained and prominently stated in the said hearing notices:

a. The hearing notices must expressly state and inform the parties that the court sittings, or hearings shall be conducted virtually, and that, save as stipulated in Item E.5(b), Counsel and their clients are not expected in the courtroom.

b. The time for the remote hearing and the details that would enable the parties and their Counsel to join and participate in the court sitting or hearing should be prominently set out in the hearing notice.

c. The details of the channel or social media platform through which there would be live streaming of the virtual court proceedings for public viewing in the terms of Item E.11 hereof shall be specified in the hearing notice.

9. Further to the preceding provisions in Item E.8, each shall publish for the attention of the general public on a weekly basis the matters that would be heard remotely by the court for that week. The publication shall be effected in the usual manner that the court publishes information about its weekly sittings including publishing on the court's notice boards. The publication shall include the information and details set out in Items E.8(a) to E.8(c).

10. The court shall be in charge and in control of the virtual court sitting proceedings – not any different from the control and management that judicial officers exercise in a physical court hearing or setting– and the following additional guidelines shall apply to any such proceedings:

a. The courts may enlist the assistance of a technically proficient and trained court personnel to assist in handling and managing the end-user device/hardware (see Item E.6(b) above) and the technical issues related to the conduct of the virtual court sitting.

b. The court shall have discretion in the allotment of time to Counsel for making submissions or adopting addresses, subject, in all respects to the provisions of the Court Rules and not any different from what obtains during the regular physical courtroom sittings.

c. The collaborative platforms (MS365, Zoom, Google Meetings, etc.) are equipped with electronic recording functionalities for recording virtual court proceedings. The Courts shall make use of those functionalities for the recording of the proceedings in addition to any other recording methods that the court may wish to deploy.

d. The court shall, based on any party's application, provide to the parties certified true copies of the record of any virtual court sitting or proceedings. The parties shall be bound by such courts' records.

e. Without prejudice to the preceding provisions, Counsel may apply to the court and the court may permit the recording of any virtual court sitting or proceedings by such Counsel for his personal use and records, using the electronic recording functionality in the Counsel's end-user device. Where the court permits any Counsel in any proceedings to carry out such electronic recording of its virtual sitting, all the other Counsel in the proceedings shall be deemed to have been also given the same authorization by the court and the court's records shall at all times record the application of Counsel for such independent recording and the consequential grant of the application by the court.

f. Counsel shall ensure that their respective remote locations from where they participate in the virtual court sitting are devoid of distractions and interferences to the proceedings. Counsel shall be responsible to the courts for ensuring that their clients comply with this provision in the event that the clients join and participate in the proceedings from different locations.

g. Except with the leave of the court and a party's Counsel, the fact that a party may join a virtual court sitting from a different location and using a different end-user device does not confer on the party the right to be heard where he or she has a Counsel and the Counsel is present for the court sitting.

h. Except with the leave of court or as may be directed by the Court, Counsel shall be properly robed for any and all virtual court sittings and shall at all times address the Court on his or her feet.

11. In regard to virtual court sittings by appellate courts, the following additional guidelines shall apply:

a. Each of the Justices in the panel may participate in any virtual court sitting from Their Lordships' respective chambers particularly where it is not possible for the Justices to maintain the required 2-meter or 6-feet social and physical distances in the courtroom between themselves and also between Their Lordships and the court registrars.

b. In the event of travel restrictions which result in several Justices of the appellate courts being marooned in various locations away from their stations(as in the present circumstance), the appellate courts may explore the possibility of constituting panels for the dispersed Justices to sit virtually from their respective locations provided that:

i. The Justices have technically proficient personnel who can assist the Justices in coordinating and managing the collaborative platform and the technical requirements of the Justices and the remote court sittings; and

ii. The Justices have in their respective locations

1. the facilities specified in Item E.6 hereof and are able to participate in the remote court sitting;

2. requisite court official(s) or support personnel that would assist the Justices for the remote sitting; and

3. the files, Records of Appeal, and other processes for an effective and comfortable participation in the virtual hearing.

12. In order to satisfy the requirements for public hearing of matters:

a. Heads of courts shall ensure that there is live streaming of all virtual court proceedings through a publicized Uniform Resource Locator ("url" or "web address") or the court's or any other social media channel so that members of the public can observe the proceedings.

b. The details of the virtual court sittings shall be published in the usual manner that the court generally publishes its regular sittings provided that such publications shall specify the nature of the sitting – i.e. remote proceedings instead of the regular physical courtroom sitting– and shall indicate the web address or social media channel where there would be live streaming of the proceedings.

13. The Heads of Courts may publish such additional guidelines and/or Practice Directions for the conduct of online court sittings as the circumstances and exigencies of each judiciary may dictate.

Essentially, through the above guidelines, the National Judicial Council endorsed the practice of virtual court proceedings for courts across the country. Initially, the guidelines were received with much applause by members of the legal profession. However, in spite of the initial applause some cynics have openly criticized the introduction of these measures. Some critics have questioned the constitutionality of the practice of virtual court hearings.

3.2 CONSTITUTIONALITY OF THE PRACTICE OF VIRTUAL HEARINGS:

The thrust of the arguments of the antagonists of the practice of virtual court hearings is that the procedure is in breach of ***sections 36(3) & (4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)*** which provide 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…"

In a recent publication dated 20th of May, 2020 titled: ***Virtual Court Hearing Does Not Pass The Test For Proceedings Conducted in Public: There is need for Constitutional Amendment***, a senior advocate, ***Chief Adegboyega Awomolo, SAN*** advanced some arguments to challenge the constitutionality of virtual proceedings. According to him, the requirement for public hearing and determination of cases in Nigeria is mandatory as the operative word in sections 36(3) & (4) of the Constitution is "shall". He maintained that the law is settled that, where the word "shall" is used in a statute, it means a command to do or not to do a particular thing and there is no room for discretion. He referred to the case of ***Edibo v. The State (2007) 13 NWLR (Pt. 1051) p. 306*** where the appellant's plea was taken in the chambers of the trial Judge. At the Supreme Court his conviction was set aside on the ground that the taking of the appellant's plea in the Judge's chambers was irregular and fundamentally defective thus rendering the entire proceedings null and void. The rationale of the Supreme Court for nullifying the decision of the trial court was that, a Judge's chambers is not a public place which permits unrestricted ingress and egress for the general public.

The learned senior advocate also referred to the case of ***Oviasu v. Oviasu (1973) 11 SC 315,*** where the judge conducted hearing of a petition for dissolution of marriage in his chambers. On appeal, the Supreme Court set aside the decision of the trial court and held that, the hearing of the petition in the Judge's chambers occasioned a fundamental irregularity as same was not conducted in public. The Court defined "public" to mean "open to everyone without discrimination. Similarly,

he referred to the case of ***Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd. (1995) 8 NWLR (Pt. 413) 257*** where judgment was given in the Judge's chambers. Relying on its decision in the Oviasu's case (supra), the Supreme Court set aside the decision of the trial court and held that the delivery of the judgment in the Judge's chambers occasioned an irregularity which touched on the legality of the whole proceedings.

Relying on the above decisions, the learned silk concluded that virtual proceedings do not meet the constitutional requirement of sitting in public.

Again he argued that before virtual communication of any kind can take place, the following must be available: appropriate technology gadget (like smart phone), access to internet and registration with a virtual communication service provider. He said that according to a February, 2020 report, only about 25% to 40% of Nigerians have a smart phone. Furthermore, he cited another report published in January, 2020, to show that only 42% of Nigerians have access to the internet. In the light of the foregoing, he concluded that it is clear that, unfettered access to virtual court proceedings in Nigeria will not be feasible to a larger percentage of the Nigerian public.

Furthermore, he posited that virtual court proceedings will be open to only the Judge, the litigants and their counsel and that limiting virtual court proceedings to only these people would defeat the spirit of Section 36 (3) and (4) of the Constitution, as any "justice" arrived thereat, would be cloistered justice.

Finally the learned senior advocate maintained that while the adoption of virtual court proceedings by the Nigerian judiciary is desirable, certain extant laws including the Nigerian Constitution must first be amended to avoid a situation where justice is slaughtered on the altar of modern trends.

In a bid to counter the views of the critics, some members of the legal profession have aired their views in defence of virtual hearings.

In his article published sometime in May, 2020 in ***Techpoint Africa Newsletter***, one ***Timi Olagunju Esq.*** a technology lawyer and policy consultant articulated his views.

First he posited that Section 36 (3) of the Constitution cited by the antagonists must be read alongside Section 36 (1) which seeks to ensure fair hearing for persons ***within a reasonable time***.

He contended that fair hearing within a reasonable time as stipulated in Section 36 (1) during the COVID-19 pandemic cannot be achieved without embracing remote hearing.

On the requirement of Section 36 (3) that 'court proceedings' and 'decisions' should be in public, he posited that the word ***'public'*** is not synonymous with ***'physical'*** He said that both words are mutually exclusive.

He said that the Oxford English dictionary defines the word public as ***"done, perceived or existing in open view"***. He said that literally speaking, the use of video conferencing does not prevent proceedings from holding in open view. That to argue otherwise is to limit our court to a place only, rather than ***'a place' and 'a service'*** – ***the service of justice***.

The learned writer explained that videoconferencing can always be made available for 'open view'. That when seminars or workshop are held on Zoom or Microsoft Team, participants can watch online or participate if allowed.

According to him, the big challenge here is the urgent need of training for lawyers, judges, and judicial officials in the use of technology, as well as the need for infrastructure to support remote sittings.

He contended that the COVID-19 pandemic has redefined the subject of accessibility. He said that video-conferencing is more accessible to people (with internet) than physical access, because under the COVID-19 regime, there is restriction in public gatherings. Thus remote hearing is more compliant to Section 36 (3) of the Constitution than physical court sitting at this time.

A critical analysis of the arguments in favour and against virtual proceedings will reveal clearly that it boils down to a matter of the interpretation of the provisions of ***sections 36(3) & (4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)*** on the meaning of the word ***public*** as stated therein.

According to the antagonists of virtual proceedings the word public is restricted to a physical place to wit: a physical court hall. On the other hand the protagonists believe that the word public should include a virtual court. Therein lies the controversy. So we are faced with the challenge of the proper interpretation of the constitution.

3.3. THE INTERPRETATION OF STATUTES:

In recent times there has been a shift in favour of a more dynamic and liberal approach to the interpretation of statutes to deal with the complexities of modern society. Various canons or rules of statutory interpretation have evolved over the years to guide the courts in the discharge of their onerous duty of construction and interpretation of statutes. I will examine some of the main canons of interpretation.

(i) The Literal Rule

This is to the effect that only the words of a statute count and those words must be construed or interpreted according to their literal, ordinary, grammatical meaning. The rule postulates that the intention of the legislature which passed the enactment should be considered in construing the statute. Accordingly, where the words are plain, clear or unambiguous, this intention is best found in the words.

However, the literal rule alone is insufficient to deal with the varied problems of interpretation. For instance, where the words are ambiguous – if they are reasonably susceptible to more than one meaning – or if the provision in question is contradicted by or is incompatible with any other provision of the enactment, then the court may depart from the literal rule.

Another limitation of the literal rule is that it fails to involve a consideration of the object or purpose of a legislation or its surrounding circumstances in the construction of a statute which may be relevant even where there is no ambiguity. Lord Denning, the learned Master of the Rolls once lamented:

"A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used and what was the object, appearing from those circumstances, which Parliament has in view…"[3]

(ii) The Mischief Rule

According to this rule, in the interpretation of a statute, the court should consider the law as it stood before the legislation in question was enacted, the mischief and the defect that gave rise to the legislation, the remedy provided by the legislation and the rationale for the legislation. It is clear that under this rule, the court must consider not only the mischief that led to the passing of the statute but must give effect to the remedy as stated by the legislation in order to achieve the purpose of the legislation.

(iii) The Golden Rule

This rule justifies a departure from the ordinary, literal meaning of the words of a statute in order to prevent a result which is absurd. Under this rule, if the literal interpretation of a statute would lead to a result which the legislature would never have intended, the courts must reject that interpretation and seek for some other interpretation. This rule has been criticized as capable of resulting in a situation where judges assume the function of the legislature in trying to prevent absurdity or manifest injustice.

(iv)The Purposive Approach

This approach evolved from the mischief rule. Lord Denning was by far the strongest and the most persistent advocate and exponent of this approach during his time at the Court of Appeal. In the case of ***Seaford Court Estates Ltd v. Asher***[4], Lord

[3] Escoigne Properties Ltd. V. I.R.C. (1958) A.C. 549, 565

[4] (1949) 2 K.B.481. 498.

Denning advocated this purposive approach in the interpretation of statutes in the following words:

"It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down by the resolution of the judges in Heydon's case, and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden. …Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."

In the subsequent case of ***Northman v. Barnet Council***[5] the Master of the rolls adopted the same approach to do justice. Declaring the literal method to be completely out of date, the Law Lord urged judges to adopt the purposive approach. He declared: ***"Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach". In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision. It is no longer necessary for the judges to wring their hands and say: "there is nothing we can do about it"***

Again in the House of Lords, in the case of ***Pepper (Inspector of Taxes) v. Hart,*** Lord Griffiths declared: ***"The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts must adopt a purposive approach which seeks to give effect to the true purpose of the legislation."***

The purposive approach is the modern approach to the mischief rule, but it is wider in scope than the mischief rule as the approach extends to applying an imputed intention of the Legislature. It enables the court to consider not only the letter but also the spirit of the legislation.

In Nigeria, the courts have embraced this pragmatic approach. In the case of

[5] (1978) 1 W.L.R. 220

PDP v. MOHAMMED & ORS (2015) LPELR-40859 (CA) the Court of Appeal adopted the approach when they exposited thus:

"It is trite that in the interpretation of statutes, a Court must not give an interpretation that would defeat the intention and purpose of the law makers, and it should adopt a holistic approach and interpret the provisions dealing with a subject matter together to get the true intention of the law makers - Abia State University, Uturu Vs Otosi (2011) 1 NWLR (Pt 1229) 605, Ayodele Vs State (2011) 6 NWLR (Pt 1243) 309, National Union of Road Transport Workers Vs Road Transport Employers Association of Nigeria (2012) 10 NWLR (Pt 1307) 170, Attorney General, Federation Vs Attorney General, Lagos State (2013) 16 NWLR (Pt 1380) 249. Also, inclusive in the principles governing construction of statutes is the need for Courts to adopt a purposive and creative approach. Courts must interpret statutes by implication to give effect to the true intention of the law makers - Abdulraheem vs Olufeagba (2006) 17 NWLR (P 1008) 280 at 355, Peoples Progressive Alliance vs Saraki (2007) 17 NWLR (Pt 1064) 453. The purposive approach is an approach to statutory and constitutional interpretation under which common law Courts interpret an enactment in the light of the purpose for which it was enacted. It is essential that in interpreting the words of a statute, the Court must consider the object of the statute - Elabanjo vs Dawodu (2006) 15 NWLR (Pt 1001) 76 at 138H. The Court must guide itself with the essence of a provision in giving meaning to words of that provision. Once an interpretation meets the purpose of the provision of an enactment, then it is fine, and it is irrelevant that other possible interpretations of the provision exist - Rivers State Government vs Specialist Konsult (2005) 7 NWLR (Pt 923) 145." Per ABIRU ,J.C.A (Pp. 33-34, paras. B-E).

In the case of ***MTN v. ABIA STATE GOVT & ORS (2019) LPELR-46652(CA)*** the Court of Appeal relied on the earlier decision of the Supreme Court in the case of ***Attorney-General of Bendel State v. Attorney-General of the Federation (1981) 10 SC. 1; (1981) 1 FNLR 179*** where ***Obaseki JSC*** emphasised that ***"Words of the Constitution are therefore not to be read with stultifying narrowness"***

In the old case of ***Rabiu v. Kano State (1980) 8 - 11 SC 130 at 149, SIR UDO UDOMA, JSC*** stated, *inter alia* thus: ***"My Lords, it is my view that the approach of this Court to the construction of the Constitution should be, and so it has been, one of liberalism probably a variation on the theme of the general maxim ut re magis valeat quam pereat. I do not conceive it to be the duty of this Court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words sense of such provisions will serve to enforce and protect such ends."***

The sum total of the foregoing authorities is that in the interpretation of statutes, a Court must not give an interpretation that would defeat the intention and purpose of the law makers. The court must avoid any slavish adherence to the literal rule of interpretation which would defeat that intention. Courts should adopt a holistic approach and interpret the provisions dealing with a subject matter together to get the true intention of the law makers. In doing this, there is the need for the judge to interpret the statute in the context of present realities and to address current situations.

According to Lord Denning, faced with a practical situation, "***a judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."*** This is the essence of the purposive approach to the interpretation of statutes.

Sometimes it may not be easy to apply the purposive approach of interpretation when the wave of public opinion is heavily skewed in favour of the application of the literal approach. This is where the courage and sagacity of the judge comes to play. In the old English case of ***Candler vs. Crane Christmas & Co. (1951) 2 K.B.164, Lord Denning MR*** classified judges into two categories. According to him, ***"on the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required."***

In the interpretation of the provisions of ***sections 36(3) & (4) of the Constitution of the Federal Republic of Nigeria, 1999*** on the meaning of the word ***public*** as stated therein, the timorous souls are likely to adopt the literal interpretation of the word and restrict it to a ***physical place such as a court room*** or court premises. However the bold spirits will adopt a liberal approach and interpret the word ***public*** to include a ***virtual court***. The focus would be on the access of the members of the public to the proceedings and not to the physical courtroom. This is the purposive approach to the interpretation of the aforesaid provisions.

In his classical work on remote court hearings, one of the world's leading exponent of virtual court hearing ***Professor Richard Susskind*** emphasised that the court is no longer a ***place*** but a ***service***. He exposited thus: ***"Initially I ask whether court is a service or a place. Do we really need to congregate physically to resolve all our differences, especially if they are relatively minor? I argue not and call for the introduction of 'online courts', a state-provided dispute management and resolution service. This is not electronic ADR. It is a reconceptualization of our public courts as a digital service, overhauling a system that dates directly to reforms of more than 150 years ago. By contrast, online courts were neither***

possible nor conceivable until the birth of the World Wide Web in the early 1990s."[6]

I am inclined to accede to the expert opinion of Professor Richard Susskind as expressed above. I think that in this digital dispensation a court can no longer be confined to a physical place. The emphasis now should be on the work of the court, the services being rendered by the court to wit: the administration of justice. This is not peculiar to the courts alone. Most human transactions such as banking, examinations, lectures, sale of goods, stock broking, insurance, birthday parties etc., etc. are now conducted online. There are some people who have never stepped into any banking hall since the beginning of this year yet they have been enjoying the banking services almost on weekly basis. This is where the world is right now.

We now live in a digital world where most transactions are being conducted in cyberspace across a network of computers. Digital technology is being introduced and integrated into our court system. Some courts have introduced E-Filing, E-Recording, E-Swearing and other online platforms in the justice delivery process. With these innovations, it is obvious that the word ***public*** must be interpreted in the context of these digital developments. It cannot be interpreted in the context of the dispensation of the old cases of ***Edibo v. The State (2007) 13 NWLR (Pt. 1051) p. 306*** and ***Oviasu v. Oviasu (1973) 11 SC 315***. That was an entirely different world. We are in a brand new word.

The COVID 19 pandemic has even made matters more complex with the lock down orders and restriction of movements. Can we really allow the administration of justice to grind to a halt because of such stringent measures? The bold spirits must adopt a purposive approach to the interpretation of the Constitution to prevent any clog in the wheel of progress in the administration of justice.

From the foregoing exposition I am inclined to adopt the purposive approach in the interpretation of the word ***public*** as enshrined in ***sections 36(3) & (4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).*** As a disciple of the purposive approach I must ask a pertinent question at this stage:

"***If the framers of the Constitution had themselves come across this controversy on the meaning of public, how would they have interpreted it?"***

I sincerely think the framers of the constitution would have been more concerned with people having access to the court proceedings. That would be the paramount consideration. I hold the view that virtual hearing offers greater access to public hearings than hearings conducted in a physical court room. By its very nature, virtual proceedings are conducted on the internet with a greater capacity to accommodate a multitude of viewing public. At best, an average court room cannot accommodate more than a hundred people at a time. Contrariwise, about five

[6] Online Courts- A Summary https://www.law.com/legal-week/2019/11/22/why-we-need-online-courts/.

hundred people can log in to view a virtual court proceedings, with each participant having access to interactive features to communicate with one another online during the proceedings. The parties and their witnesses can testify from afar off in virtual proceedings, counsel can address the court online, the court can deliver its rulings and judgments online and parties can download copies of the judgments and rulings without coming into the court premises. The parties cannot get such vast access to justice in a physical court arrangement. As a matter of fact all forms of virtual proceedings can be accessible to the general public at large depending on the configuration of the website. If the site is not password protected, anyone can login and view proceedings without filling in any login details.

It is worthy to note that presently in this COVID 19 era, not everyone can enter the court premises. If you are not wearing a face mask or your temperature is abnormally high, you will be turned back at the gate. This is a major drawback to access to justice.

The antagonists of virtual court proceedings are relying on some decisions of courts where the trials were nullified because the judges conducted the proceedings in the privacy of their chambers. However, they have not cited a single case where the trial was nullified because part of the proceeding was conducted online. As a matter of fact if they carefully study the NJC Guidelines on remote hearing, they would observe that the Guidelines made adequate provisions to secure the right to public hearing. ***Rules 12 and 13 of the Guidelines*** stipulate as follows:

"***12. In order to satisfy the requirements for public hearing of matters:***

a. Heads of courts shall ensure that there is live streaming of all virtual court proceedings through a publicized Uniform Resource Locator ("url" or "web address") or the court's or any other social media channel so that members of the public can observe the proceedings.

b. The details of the virtual court sittings shall be published in the usual manner that the court generally publishes its regular sittings provided that such publications shall specify the nature of the sitting – i.e. remote proceedings instead of the regular physical courtroom sitting– and shall indicate the web address or social media channel where there would be live streaming of the proceedings.

13. The Heads of Courts may publish such additional guidelines and/or Practice Directions for the conduct of online court sittings as the circumstances and exigencies of each judiciary may dictate."

The purport of the above provisions is that while virtual proceedings are going on, you can login to the Court's website and watch the proceedings on the live streaming portal. For example, on the day that the Lagos State Judiciary conducted their maiden virtual proceedings, somebody called me from the United States and told me to login and watch the proceedings online. Nothing can be more public than that!

The antagonists of the practice do not quite understand the dynamics of this digital age. It is an age of great technological innovations. Those who are trying to restrict court proceedings to the physical court room are clearly out of tune with the current digital dispensation.

According to ***Tapscott***: ***"The digital age is "not an age of smart machines but of humans, who through networks can combine their intelligence, knowledge and creativity in the creation of wealth and social development. It is an age of vast new promise and unimaginable opportunity***."[7]

In my presentation at the 2009 LAW WEEK OF THE BENIN BRANCH OF THE NIGERIAN BAR ASSOCIATION titled: ***LEGAL RESEARCH IN A DIGITAL AGE***, I predicted the current dispensation when I stated as follows:
"In this digital age, we are witnessing the emergence of a paperless society. This is the process of migration from the material world, to the electronic or digital world, popularly referred to as cyberspace. Most transactions are now being executed on the electronic platform. The common slogans now are: e-mail, e-book, e-commerce, e-voting, e-money, e-payments, e-dividend, e-allotment and very soon it will be full scale e-government. The legal profession is not exempted from this e-revolution. Already some states have started to implement e-filing. Very soon the rules of courts will be structured to accommodate proceedings on the electronic platform. There will be e-filing, through e-payments. There will be e-pleadings, e-submissions and of course e-judgments and e-execution of judgments. All these are the coming challenges for the legal profession in this digital dispensation."[8]

The above predictions are being fulfilled before our very eyes. It appears the COVID 19 pandemic will serve as a catalyst to finally launch the legal profession into the full digital dispensation.

4.0. CONCLUSION:

It is an indisputable fact that the COVID 19 pandemic has changed the landscape of the entire world. The protracted periods of lockdowns, social distancing and all forms of restrictions are already taking a negative toll on all spheres of human endeavour. Sadly, the spread of the virus is not abating, so the government is very reluctant to lift the restrictions.

But in the face of such rigid measures, we must be determined to forge ahead. There is the saying that ***when the going gets tough, the tough get going.*** These are extraordinary times and extraordinary times require extraordinary measures. We cannot insist on only physical court hearings at a time like this when many people

[7] Tapscott, 1995

[8] See: http://edojudiciary.gov.ng/wp-content/uploads/2016/10/Legal-Research-In-A-Digital-Age-2.pdf.

are afraid to mingle with members of the public. Incidentally their fears are not unfounded. In the ***New York Post of the 28th of April, 2020***, it was reported that nearly 170 employees from New York's court system have been infected with coronavirus and four have succumbed to the bug — including a judge who passed away. State Supreme Court Justice Steven Milligram, 66, who had just been elected to his seat in Orange County in November 2019 is the third Empire State judge to die from COVID-19.[9]

Even here in Nigeria, it was reported that a policeman attached to the Magistrate Court in Akure, Ondo State, has tested positive for Coronavirus. According to ***Sahara Reporters***, the officer tested positive after having contact with one of the suspects in the murder of Mrs Funke Olakunri, daughter of Pa Reuben Fasoranti.[10]

With these scary developments, it is evident that we must adopt a more pragmatic approach in the dispensation of justice to reduce the risk of infections during this COVID 19 period. Members of the legal profession must be ready to embrace radical measures to combat the pandemic. We cannot afford to wait indefinitely for things to return to normal before we continue our court proceedings.

There is a possibility that things may never fully return to normal. We may be entering into a brand new world that will be highly regulated by digital technology. We must embrace the use of digital tools as a way of life. That is a major approach to surmount the disabilities imposed by these restrictions. The use of virtual conferencing facilities by the courts is a step in the right direction and should be supported by the bench and the bar at a time like this.

On a final note, the point must be made that Virtual Court Hearings are not meant to replace our conventional court hearings in our physical court rooms. Rather they are alternatives to physical hearings in the era of the COVID 19 pandemic. We can regard virtual hearings as a backup procedure to surmount the current challenges in the administration of justice.

Furthermore, I advocate that for now, the procedure should be restricted to non-contentious proceedings such as the adoption of Written Addresses and Briefs, interlocutory applications, delivery of judgments and rulings. For contentious proceedings which involve the calling of witnesses and tendering of exhibits, virtual court proceedings may not be quite appropriate at this stage. The application of the practice may face some difficulties in the area of tendering of exhibits in substantive trials. It may be expedient to amend the provisions of our present Evidence Act to liberalize our rules of evidence to accommodate the tendering of exhibits online.

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[9] NEW YORK POST: https://nypost.com/2020/04/28/coronavirus-in-ny-3-judges-die-almost-170-court-workers-infected.

[10] http://saharareporters.com/2020/05/01/police-orderly-attached-ondo-judge-tests-positive-coronavirus

While we await such amendments, the practice should be restricted to the aforementioned areas.