

Critical Appraisal of the Implications of Restrictions in Court and Legal Reporting

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ABSTRACT:

Usually, the media participate in open court sessions. Such enables the media to have firsthand information on any matter before the court of competent jurisdiction on which they may wish to make a report. As well, it allows the media to keep the public abreast of the latest on the matter. Admittedly, this media practice enhances open justice. In contrast, it may interfere with the judicial process, foster media trial, and influence the subsequent outcome of the judicial matter. Then, to forestall such undue interference and ensure justice for all the parties on a given court case, reporting restrictions or publication bans are imperative. This paper, therefore, sets out to x-ray the positive implications of these publication bans. Besides, it takes cognizance of the negative indices of the phenomena. However, it maintains that the positive implications of publication bans far outweigh the negative aspects. Invariably, for the media to gather more news and sustain public trust and confidence in the law, reporting restrictions are an inevitable requirement.

Keywords: *Critical, implication, media, restrictions, legal*

1. INTRODUCTION

It is usual for journalists to attend open court sessions to report the court proceedings of the day. Such reportage ensures open justice - for the common law principle requires that justice should not only be done but manifestly or perceived to be done. Lord Thomas of Cwmgiedd (2016) described this species of the justice system as a hallmark of the rule of law and an essential requirement of the criminal justice system. Balule (2016) regards it as the primary tenet of the administration of justice in Botswana and, indeed, in democratic societies. Besides, Article 10 of the Universal Declaration of Human Rights (UDHR) explicitly expressed it. Likewise, Article 14 (1) of the *International Covenant on Civil and Political Rights* (ICCPR), Article 8 (5) of the American Convention of Human Rights (ACHR), and Article 6 (1) of the European Convention on Human Rights (ECHR) share the same conceptual/legal framework. For instance, Article 6.1 of the *European Convention on Human Rights* (ECHR, 2013) states: "...in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..." (p.9).

The open justice system is a shield against judicial bias, unfairness, and incompetence, by ensuring that judges are answerable in the performance of their duties. As well, it maintains and promotes public confidence in the fair administration of justice by making sure that judicial hearings are subject to public scrutiny (*The Queen on the Application of Guardian News and Media Limited v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 at para. 2). Interestingly, the media are one of the arms through which the court achieves open justice. Through the media outlet, necessary information on various court proceedings is made public. However, despite this significant role the media play to entrench and strengthen the open justice system, there is the possibility of barring the media or press from all or some aspects of the court proceedings through restriction ban or reporting restrictions. The restriction could be "...in the interests of morals, public order or national security

in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice" (ECHR, 2013, Article 6.1, p.9). Some of the publication bans are proceeding against young persons, reporting on divorce, reporting on indecent matters, court matters conducted in camera, committal proceedings, coroner's court, military court, remand, and the rest. One can group these varieties of reporting restrictions under three categories, namely: automatic, discretionary, and additional matters relating to court reporting (Judicial College, 2016; Esimokha, 2016, p.158). However, whichever form it takes, one glaring fact is that the publication ban has specific positive implications. Thus, this paper sets out to undertake a critical appraisal of these implications. Nonetheless, before undertaking such, it is vital to throw more light on the meaning and types of reporting restrictions.

2. MEANING OF REPORTING RESTRICTIONS

Reporting restriction, otherwise called publication ban, is a court order proscribing the media, and the likes, from publishing and spreading some particulars of court proceedings, to guarantee the security and reputation of all involved in the case, and to forestall media trial of the same. So, the reporting restriction aims at protecting all the parties to a given court case. Besides, it is a safeguard against the media trial of a case, as such can impede the cause of justice. This is all the more important as the media set the agenda for what people think about (Lippmann, 1922; Lang & Lang 1960, p.468; Cohen 1963, p.120; McCombs & Shaw, 1972) and also influence how they think about it (Bateson, 1955/1972; Price, Tewksbury & Powers, 1997, p.184). Therefore, any media house or persons that contravene the reporting ban are guilty of contempt of court. Of course, the offence attracts a substantial penalty, which could, subsequently, rock the media establishments.

Types of reporting restrictions

As indicated previously, there are different kinds of reporting restrictions. For convenience purposes, they are grouped into three, such as automatic reporting restrictions, discretionary reporting restrictions, and additional matters relating to court reporting.

Automatic reporting restrictions

In the case of automatic publication bans, the court does not need to make an explicit restriction on the case concerned. The prohibition is inherent in the case as already provided by the constitution. Cases under automatic publication bans have their backings already in the constitutional provisions. They are "statutory exceptions to the open justice principle" (Judicial College, 2016, p.11). Instances of cases incurring automatic reporting restrictions are:

- i. The strict liability rule,
- ii. Victims of sexual offences,
- iii. Victims of female genital mutilation (female circumcision),
- iv. Rulings at pre-trial hearings,
- v. Preparatory hearings,
- vi. Dismissal proceedings,
- vii. Allocation and sending proceedings in Magistrates' Courts,
- viii. Prosecution appeals against rulings,

- ix. Youth Court proceedings,
- x. Special measures and other directions,
- xi. Alleged offences by teachers against pupils,
- xii. Furthermore, indecent material calculated to injure public morals (Judicial College, 2016).

Discretionary reporting restrictions

Here, the reporting restriction aims at a specific case and its circumstances (Esimokha, 2016, p.159). When a case already enjoys statutory exceptions to the open justice principle, it is unnecessary imposing discretionary reporting restrictions. The court should apply this species of publication ban with caution, balancing it against its "...relevant statutory conditions.., public interest in open justice and freedom of expression" (Judicial College, 2016, p.18). It is also crucial to indicate that discretionary reporting restrictions should be handed down to the media in writing. Some examples of discretionary reporting restrictions are:

- i. Procedural safeguards common to all discretionary reporting restrictions,
- ii. Protection of under-18s
- iii. Protection of adult victims and witnesses,
- iv. Names and other matters withheld in court,
- v. Postponement of fair and accurate reports,
- vi. Quashing of acquittal and retrial: restriction on publication in the interests of justice,
- vii. Postponement of derogatory remarks made in mitigation,
- viii. Furthermore, Injunctions and criminal behaviour orders (Judicial College, 2016).

Additional matters relating to court reporting

As the name implies, this category deals with other matters that concern court records. Hence, it centres on the restrictions regarding:

- i. The availability of court lists, court registers, and reporting restrictions,
- ii. Access to documents held on the court file,
- iii. Media access to prosecution materials,
- iv. Identification of those involved in court proceedings,
- v. Committal for Contempt of Court,
- vi. Unauthorized recording of court proceedings,

- vii. Live, text-based communications from court,
- viii. Jury's deliberations,
- ix. Jigsaw identification (Judicial College, 2016).

3. THE POSITIVE IMPLICATIONS OF RESTRICTIONS IN COURT AND THE LEGAL REPORTING

A publication ban has two consequences: negative and positive. The positive implications are those values that the practice adds to the legal system. In contrast, the negative implications stand as the ways the practice has watered down the justice system. However, in this paper, the stress is on the constructive or positive implications, namely: protection of human dignity, the right to fair hearing, socio-economic, religious, and moral implications, respectively. Hence, it is crucial to discuss them here at some length.

4. PROTECTS HUMAN DIGNITY

The right to dignity of persons is one of the fundamental rights of every human being. It is "a characteristic that belongs permanently and inherently to every human as such" (Gewirth, 1982, pp.27-28). Interestingly, the *Universal Declaration of Human Rights* subsists as one of the legal documents that explicitly articulated this right. Afterward, the constitutions of other nations adopted and adapted the same legal framework. Of course, Nigeria is not an exception to this. The Nigerian Constitution, among other things, underpins the right to dignity of the person as one of the fundamental and inalienable rights of every Nigerian (34:1). Other inalienable rights identified by the Nigerian Constitution include the right to life, freedom of expression and the press, peaceful assembly and association, freedom of movement, freedom from discrimination, right to obtain and own fixed property anywhere in Nigeria, compulsory acquisition of property, respectively [Sections, 33:1, 39:1, 40, 41:1, 42:2, & 44:1]. Thus, as a fundamental human right, the protection of human dignity is not an option. Instead, it is inevitable. It is not selective protection. Ipso facto, every human being should be taken into consideration. Subsequently, "upholding 'human dignity' or the 'dignity of the species' without upholding the dignity of each one and of all is not to uphold dignity in its universal significance" (Iglesias, 2001, p.13). Instead, it is imperative to uphold and protect the dignity of every human being: children and adults alike.

Undoubtedly, restrictions in court and the legal reporting help to protect and preserve the dignity of all the parties to a case. For instance, they ensure that an accused is presumed innocent until convicted by the court. By so doing, they safeguard the media from breaching the principle of 'presumption of innocence' and the *sub judice* rule - which factually means 'under judicial consideration. It does not imply that the media should not report on such cases at all. Instead, it implies that the reportage must accord with the extent the court wishes the case to be made public. Resultantly, publication bans shield an accused from unwarranted assaults, insults, and loss of reputation. In the case of children, the publication ban ensures that their cases are not tried in the open court. The fundamental goal of juvenile court is correctional and deterrence on the part of erring children. It is neither punitive nor for revenge. Instead, it aims at making them better and responsible citizens. Then, when this intention is forgotten and the media is allowed to report issues on juvenile court, the children in question may be affected psychologically. Eventually, it may subject them to an inferiority complex, which might have a lasting effect on them. Subsequently, publication bans protect them from anything that may tarnish their public image or constitutes a stigma on their persons. The bans shield them from negative indices that could form unpalatable accompaniments, which they must later live with all through their lives. The same logic applies in the area of reporting cases of divorce. Reporting such a case without any restriction whatsoever could create a scenario that may negatively affect the integrity and public image of the individuals involved. A scenario of that nature may permanently expose the parties to public spectacle and subsequently hunt them for life.

The enormity of the harm inflicted by such reportage is very obvious when placed against the backdrop of the Igbo concept of public disgrace. One Igbo maxim adequately captures this, namely: *mmebo emeboro ogaranya ka ogbugbu egburu ya* (a public disgrace meted out on the rich is more painful and devastating than the death of the rich). Precisely, it means that the rich prefer death to public disgrace. The reason is simple: *ezi aha ka ego* (good name is better than money). Human beings prefer to maintain their good names and public images both as individuals and organisations. For this purpose, organisations employ various image-making and rebranding techniques such as adverts, services of public relations officers, to name but a few, to present their best sides for public consumption. All these show that human dignity is a precious possession of everybody. All want to protect, preserve, and promote it. Of course, Maslow (1943) underscored this fact when he projected self-esteem as one of the strata in the hierarchy of human needs [p.395]. So, as restrictions in court and the legal reporting tend toward the preservation and promotion of self-esteem need, there is no gainsaying its positive implications for human beings.

5. PROTECTS THE RIGHT OF FAIR HEARING

The principle of fair hearing is another fundamental human right. It is called rules of natural justice, the mother of all rights, and the core of justice (Orie, pp.74-77). It is grounded on the divine and eternal law and vividly exemplified in God-Adam encounter after the fall of man. In this encounter, God never condemned Adam without first hearing from him. So, the right to a fair hearing is very fundamental in all judicial matters. When it is lacking, whatever decision reached at the end of the case is null and void, *ultra vires* (beyond the powers), and can never be *intra vires* (within the powers).

Right to a fair hearing is categorized into two, basically:

- i. The doctrine of *Nemo iudex in causa sua* - which states that a person cannot assume to be a judge in his/her case.
- ii. The doctrine of *Audi alterem partem* - which underscores that the other party must be heard.

In sum, the right to a fair hearing is one of the significant conditions that must be fulfilled before a judge decides on a case. Section 36(1) of the constitution of the Federal Republic of Nigeria provides that a person should be heard in his case within a reasonable period, in a court of competent jurisdiction and comprehensively and not partially. In the case between Isiyaku Mohammed and the Kano Native Authority (1968), Adetokunbo Ademola noted that a fair hearing presupposes a fair trial. Resultantly, a fair trial of a case comprises the whole hearing. He went on to define what consists of the real test of fair hearing. He describes it as the impression of a reasonable person who was present at the trial. Hence, he argued that fair hearing is said to have taken place if this person can observe that justice has been done in the case. Besides, in the case between Gaji and the State (1975) 5 S.C 61, the Supreme Court threw more light on the test of fair hearing. It described it as a fair observation of a dispassionate visitor to the court who happens to have observed the entire court processes. Also, it held that fair hearing is said to have taken place if an un-officious by-stander or a reasonable human being would upon examination of the record of court proceedings ascertain that parties to the case received justice.

Therefore, to sustain the principle of fair hearing, it is crucial to checkmate whatever interrupts the judicial procedure of a court of competent jurisdiction. Unarguably, media trial is one of such. Often, before a court decides a case, the media have given varied interpretations of the case. At times, such interpretations are meant to derail the court's judgment on the issue. Then, to forestall such trial, restrictions in court and the legal reporting are necessary. Publication bans would help the court deal with those media practices that undermine the course of justice, restricting the extent of media reportage. So, the bans are protection against the media's engagement in pre-emptive judgment with its attendant subversion of justice. With publication bans in place, each member of the parties to a particular case receives a fair hearing. In this case, the plaintiff has enough time to lay his/her claims. As well, the defendant has ample time to defend himself/herself. At the same time, the court has a reasonable time to go through the different submissions and then give its verdict. Consequently, guided by reporting restrictions, the media only report in tandem with the statutory provisions of the case at hand. Ipso facto, publication bans have a positive undertone for the principle of fair hearing.

6. SOCIO-ECONOMIC IMPLICATION

Allowing the media to disseminate information about court proceedings freely is riddled with a lot of social and economic implications. The social implication obtains in a situation the media depict somebody as a convicted criminal even before a court gives a verdict on his/her case. Indeed, the reading public as well takes such a person from that pedestal. That as well affects the person's relationship with those who knew him/her. Besides, it may force the person to withdraw from society.

As well, it may affect the victim's immediate and extended family. Likewise, even when the person concerned tries to mix up with the others, some may resist him/her. Mainly, this is obvious when the case has to do with questions of trust, moral probity, an incidence that involves life, to name but a few. Then, in the economic realm, people may refrain from engaging in business transactions with such individuals. By so doing, they bridge the economic circle of the community concerned. Hence, unrestrained media reportage of court processes impacts negatively on the social and economic relations in society. It destabilizes the socio-economic equilibrium of society. In contrast, a restriction in court and legal reporting does the opposite.

7. THE RELIGIOUS AND MORAL IMPLICATION

There is a significant relationship between media and attitudinal change. Klapper (1960) pointed this out when he opined that media reinforce attitudes. However, this is not to say that media is the only opinion and attitude moulder in society. Yet, it is undeniable that the media set the agenda for the discursive engagements of an audience, by influencing what the public thinks about.

So, when there are no restrictions on the extent of court proceedings the media can disseminate, the chances are that the media may publish the one that could injure the religious and moral sense of some members of the public. For instance, in the case of indecent matters, if the information on such is allowed to circulate freely, it might pollute society with obscene pictures, writings and words, and so threaten her moral and spiritual base. So, there is no gainsaying the relevance of restrictions in court and legal reporting.

8. CONCLUSION

The media play an inevitable role in society. As well, this role is evident in judicial issues. Through the media, the public is aware of legal proceedings. Such awareness helps to entrench public confidence in the court. Likewise, it serves as deterrence and provides the media with the opportunity for more news. Nonetheless, allowing the media to operate without any constraint or restriction can lead to abuse in reportage, hence, the reporting restrictions. Publication bans have numerous positive implications on the media reportage of court proceedings. These include the protection of human dignity and the right to fair hearing, socio-economic, religious, and moral implications, respectively.

Despite the above positive values, reporting restrictions exhibit some negative implications. These comprise age falsification, incubation of corruption, deceleration of justice, to name but a few. For instance, youths that are above eighteen years can falsify their age to escape punishment due to their offence. Such is possible since an open court does not deal with cases concerning minors.

Likewise, since under the rule of *sub judice*, the media do not report court proceedings freely, and the accused are presumed innocent, some people may attempt to delay their court cases. Delay of this nature gives room for incubation of corruption, and deceleration of justice. Of course, people say that delayed justice amounts to justice denied. However, the above negative implications notwithstanding, there exist overwhelming positive implications of publication bans.

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