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Ethnic Profiling in Terrorist Investigation in Nigeria: A Violation of the Fundamental Right of Freedom from Discrimination

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Abstract

Terrorism in Nigeria has assumed a frightening dimension. As an emerging crime, various methods of investigations are being adopted to check the ugly menace. One of such methods is the use of ethnic profiling in the course of investigation. This ethnic profiling involves stereotyping of individuals of a particular ethnic group and suspecting their involvement in terrorist activities just because of their ethnic origin even in the absence of any reasonable suspicion. In Nigeria particularly, people from the Northern part of the country are at the receiving end of such method. This work, therefore, looks at that method of investigation with a view to establishing that where such is adopted in the absence of any reasonable suspicion, it is a breach of the constitutionally guaranteed right to freedom from discrimination.

Keywords –Ethic Profiling, Terrorism, Discrimination, Fundamental Right, Investigation, Jurisprudence

1. Introduction

In June2014, the news world was awash with the arrest and detention of over 400 Northerners somewhere close to Aba on grounds related to terrorism (Eke, 2014). The arrest sparked off a swell of reactions and counter reactions. While some were of the view that the soldiers were right, others were of the opinion that the arrest and detention amounted to a breach of their fundamental rights. Earlier to this incident, there was an allegation that the Governor of Imo State, OwelleRochasOkorocha had intended to register all Northerners residing in the state. This yet again drew the ire of all and sundry including the members of the National Assembly (Agbakwuru, 2014). Indeed, there is this palpable but unspoken fear deep within the average Nigerian, that an average person of Northern extraction is a terrorist. This has given rise to several jokes on the social networks. The police have the authority to perform identity checks, stop and search vehicles, perform multiple checks in a crowd, make arrests, perform targeted searches for data, and carry out other surveillance measures. In the course of these activities, profiling methods are used in a targeted or preventative manner, which in some cases are based exclusively on ascribed ethnicity and, as a result, affect a disproportionate number of citizens. Those affected feel denounced, vulnerable and stigmatised as criminals. The feeling of marginalisation is especially present in cases where those involved are considered 'strangers' in their own country. This impedes co-operation in crime fighting between ethnic minorities and the police. It may also lead to a feeling of isolation amongst members of ethnic minorities with respect to the majority of the population. For the person at the receiving end of this attitude, it is no joke. It is as a result of these happenings that it becomes apt to take a look at this attitude especially as it comes from our security agencies and expose the action for what it is, that is, a breach of the fundamental rights of the individuals involved. To do this, therefore, we need to understand what ethnic profiling entails and the purport of the right to freedom from discrimination especially in the fight against terrorism, knowing that one of the causes of terrorist activities worldwide is injustice.

2. Meaning of Ethnic Profiling

Ethnic profiling is the use of racial, ethnic, national, or religious characteristics as a way of singling out people for identity or security checks. It refers to law enforcement and security officers making decisions about who is suspicious based on race, ethnicity, or ethnic identity rather than reasonable suspicion (Stone, 2014). Police ethnic profiling involves singling out people for checks because of their race or ethnicity. Ethnic profiling is unfair and discriminatory. It is also an inefficient way of fighting crime. Even as some people believe that ethnic profiling is a legitimate method of policing, Open Society has persistently stated that "Ethnic profiling is not only unfair but also unnecessary and counter-productive. Data show that racial profiling is a bad tool because when it is used, the rate of discovering unlawful conduct is lower than when law enforcement activity is not infused by race stereotypes" (Stone, 2014). However, some scholars support ethnic profiling and claim it is reasonable under certain conditions. It is argued that despite anomalies, the majority of terrorist organizations threatening humanity today are based on a form of Islamic ideology that is mostly prevalent in the Middle East and South-East Asia. Profiling is based on a reasoned assumption that it is people within these organizations, situated in these countries, who are the most likely suspects of terrorism. If a witness to a crime gave a policeman a description of a robber, the policeman would be doing a good job if he looked for suspects that matched the description. Why does the same not apply to terrorists?

It is pertinent at this point to state that ethnic profiling points irresistibly to the security agencies. It is a different thing from the *phobia* that is associated with some people. For instance, when a person who is not a security agent sees a man from the North and is afraid of him as a potential terrorist, which is phobia.However, when a security agent arrests a man or stops a man for search simply because he is from the North, without any reasonable suspicion, that is ethnic profiling. The concept of ethnic profiling has also been referred to as racial profiling. It is therefore imperative to note that both terms connote the same thing. It has also been defined as "Any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity" (Ramirez et al., 1999, p. 10).

To further explain the term, ethnic profiling has been implied to mean that racially-biased policing occurs when law enforcement inappropriately considers race or ethnicity in deciding with whom and how to intervene in an enforcement capacity and yet to some others, it is the consideration of race, ethnicity, or national origin by an officer of the law in deciding when and how to intervene in an enforcement capacity (*Free Dictionary*, 2014). In the literature to date, there appear to be at least two clearly distinguishable definitions of the term 'racial profiling': "a narrow definition and a broad definition. Under the narrow definition, racial profiling occurs when a police officer stops, questions, arrests, and/or searches someone solely on the basis of the person's race or ethnicity while under the broader definition, racial profiling occurs whenever police routinely use race as a factor that, along with an accumulation of other factors, causes an officer to react with suspicion and take action"(Jim, 2000).

Scholars have remarked that racial profiling occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating (Goldini, 2013). The essence of racial profiling is a global judgment that the targeted group is more prone to commit crime in general, or to commit a particular type of crime, than other racial or ethnic groups (Gross & Livingston, 2002).

Ethnic or racial profiling is not a new addition to policing in the world. For instance in the United States, it has been stated that the issue of ethnic profiling is not a recent addition to police powers of investigation rather it was stated to have existed in1693 when, Philadelphia's court officials gave police legal authority to stop and detain any Negro (freed or slaved) seen wandering around on the streets (Staples, 2011). However, incidents of ethnic profiling appear to have assumed a frightening dimension following the event of September 11, 2001. Since September 11, 2001, new forms of racial profiling have affected a growing number of people of color in the U.S., including members of Muslim, Arab, Africans and South Asian communities.

In Nigeria, the issue of ethnic profiling has taken the front burner as a result of the escalation of terrorist activities in the Northern part of the country. Indeed, it is not unheard of that a man has been arrested as a result only of the fact that he is from the Northern part of the country. The security agencies saddled with the responsibility therefore seem to have failed in this regard as the fight against terrorism need not create additional terrorists. Ethnic profiling with regard to terrorist investigation exists in traffic stops, arrests and invasion of the privacy of particular individual as a result of his looks or place of origin without any reasonable cause. Profiling, however, must be led by the principles of the presumption of innocence and of impartiality, in order to fulfill the demands placed by the rule of law. Consequently, the indicators used to create profiles of suspects and perpetrators must be based on evidence or other sufficient information related to a specific crime. If, however, profiling is not based on substantiated assumptions, but only on the use of unchangeable characteristics such as skin color or an alleged immigrant background, it represents a form of discrimination. In such a scenario, the terms 'ethnic profiling' and 'racial profiling' are used, synonymously (Buro, 2014).

3. Live Instances of Ethnic Profiling in Nigeria

Sometime in July 2014, the Governor of Imo State, OwelleRochasOkorocha was alleged to have muted plans to register Northerners in Imo State. Despite the fact that this purported registration was denied, there has been an unending fuss over the said proposal. The first to express disgust over the purported policy was the Deputy Senate Leader, Senator Abdul Ningi from Bauchi Central who brought a motion to that effect to condemn the policy. In his motion titled: "The Issuance of Identification Card to Northerners residing in Imo State – Urgent Call for Policy Reversal", he argued that the policy contravenes the provisions of section 41(1) and 42(1) of the 1999 Constitution of the Federal Republic of Nigeria as amended which guarantee amongst others, free movement of Nigerians from any part of the country to the other and right of residence without any inhibition or condition whatsoever" (Agbakwuru, 2014). As a follow up to this, Senate Leader, Victor Ndoma-Egba, in support, described the policy as wrongheaded, unconstitutional and discriminatory and lampooned the governor for even contemplating such a policy at this level of our nationhood (Agbakwuru, 2014).

Prior to the above incident, the Nigerian soldiers had earlier invaded a Mosque in Aba, Abia State where they arrested 13 persons. According to *Daily Trust*, **over 50 soldiers from the 144 Army Barrack, Asa, near Aba stormed the Central Mosque, Aba and arrested the Chief Imam, Alhaji Bashir Idris and 12 other northerners for allegedly hiding weapons in the mosque (Adibe, 2014). Before then, The Nation Newspaper had reported that over 486 northerners travelling together had been arrested in a town near Aba (Eke, 2014). Apart from these reported incidents, there was the killing of over 10 northerners in an uncompleted building in Abuja (Adebegba, 2013). According to the report from the DSS, the spokesperson Marylin** Ogar said with respect to the killing that, "No sooner had the team commenced digging for the arms, than they came under heavy gunfire attack by other *Boko Haram* elements within the area, which prompted immediate response from the security team. As a result, some persons were injured and 12 others have been arrested in connection with the incident, and are making useful statements (Adebegba, 2013). However, one of the survivors of the incident stated "We are not Boko Haram members; that is a great blackmail, it is not true. How can over 200 people living in an uncompleted building be Boko Haram members? Among us are Keke (tricycle) drivers and operators, shoemakers, and many others. Some of us are married with children (Adebegba, 2013). The question at this point is: What prompted the arrests, the raids, and the killings? It is a possibility that there is an element of ethnic profiling in who to arrest, where to raid and who to shoot at even in the absence of any other reasonable suspicion in the circumstances highlighted above.

4. Ethnic Profiling and the Rights of Individuals: The Case of Freedom from Discrimination

Since ethnic profiling entails the arrest of an individual on the basis of his tribe other than on the basis of reasonable suspicion, it is therefore clear to state that ethnic profiling infringes on the fundamental rights of individuals in Nigeria. Ethnic profiling forces individuals who have engaged in no wrongdoing to endure the burdens of law enforcement in order to prove their innocence. For each criminal or terrorist apprehended through ethnic profiling, many more law-abiding innocent citizens are treated through profiling as if they are criminals or terrorists. Defenders of ethnic profiling argue that profiling is necessary and useful in the effort by law enforcement authorities to combat terrorism. The opposite is true: ethnic profiling is in all contexts a flawed law enforcement tactic that may increase the number of people who are brought through the legal system, but who are actually innocent while the guilty escapes the hammer of justice. Ethnic profiling is a tactic that diverts and misuses precious law enforcement resources in Nigeria. When ethnic *profiling becomes common practice in law enforcement, the success of law enforcement agencies through community policing is put in jeopardy. When one group is targeted by police, this erodes the basic elements of the relationship police need to have with that group. It replaces trust with fear and suspicion which cut off the flow of communication. Information from the community is the one essential ingredient of any successful effort to get ahead of terrorists; using profiling against these communities is therefore counterproductive.*

To clearly understand this, the question to be asked is what is fundamental right? Universal rights are enabling qualities of human beings attaching to a human being wherever he appears, without regard to time, place, color, sex, parentage or environment (Lien, 1973). The rights to equality before the law and freedom from discrimination are found in both the International Covenant on Civil and Political Rights (ICCPR) (Article 2), and the International Covenant on Economic, Social and Cultural Rights (ICECSR) (Article 2). In 1989, the United Nations Human Rights Committee issued a General Comment relating to discrimination under the ICCPR that defined 'discrimination' in the Covenant as:

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. (UN General Assembly, 2005)

Discrimination can be either direct or indirect. Direct discrimination can involve treating people differently who are the same

or treating people the same who are different. Indirect discrimination is said to occur when an apparently neutral practice or condition has a disproportionate and negative effect on one of the groups against whom it is unlawful to discriminate, and the practice or condition cannot be justified objectively (Jayawickrama, 2002). Freedom from discrimination is not just the formal recognition of equal rights in law, but means substantive equality and ensuring that everyone has the opportunity to enjoy rights equally. It follows that not all distinctions or different treatments constitute discrimination, and equality does not mean treating everybody the same (UN General Assembly, 2005). In Canada, for instance, discrimination based on 17 different personal attributes – called grounds – is against the law under the *Code*. The grounds are: citizenship, race, place of origin, ethnic origin, color, ancestry, disability, age, creed, sex/pregnancy, family status, marital status, sexual orientation, gender identity, gender expression, receipt of public assistance (in housing) and record of offences (in employment) (Ontario Human Rights Commission, 2014). To establish discrimination under Ontario'sHuman Rights Code, for instance, a claimant must show that:

1. He has a characteristic protected by the Code (e.g. race)
2. He experienced adverse treatment/impact within a social area (for example, in accessing a service, housing or employment)
3. The protected characteristic was a factor in the adverse treatment or impact. (Ontario Human Rights Commission, 2014).

Be that as it may, in most national constitutions, some human rights have often been referred to as "fundamental rights," which are those rights recognized and supported by a state. Eso J.S.C in *RansomeKutiv AG of the Federation*[(1985) 2NWLR (pt. 6) 211]defined fundamental rights as "a right which stands above the ordinary laws of the land and which is antecedent to the political society. It is a precondition to civilized existence...." Brunell(2003) notes that human rights "specify the minimum conditions for human dignity and a tolerable life" (p. 251).

Oputa(1989) observes that "we talk of fundamental human rights or the in alienable rights of man because each human being has intrinsic worth". According to him "the rights are inalienable because they attach to man or woman as a result of his or her humanity; without it, there is automatically a diminution of his humanity (Oputa, 1989). In *Minister of Internal Affairs v Shugaba* [(1982) 3 NCLR, 915],Karibi Whyte J.C.A (as he then was) notes the connection between protection of fundamental rights and democracy/civilization:

> The recognition of the protection of the rights of individuals as against state action in this freedom regarded as fundamental to civilized and decent living is the epitome of our democratic way of life and ensures a balancing of the interest of the individual and those of the state and it is component with our federation.

In *Uzoukwuv EzeonuII*[(1982) 3 NCLR, 915], the court holds fundamental rights to mean "the civil rights popularly called which are ordinarily enforceable by and justiceable in the constitution." They are rights "chosen out of the civil rights and elevated to the level of fundamental rights in the constitutions" [*UzoukwuvEzeonuII*(1982) 3 NCLR, 915]. Again, in *Fajemirokunv C.B. Nigerian Ltd* [(2009) 5NWLR (pt. 1135) 488], the fundamental rights in the constitution can be classified into two categories for the purpose of their observance and enforcement. They include the rights which must be observed whenever the occasion for their observance has arisen and the fundamental rights as rights enforceable by the Courts. It is the rights which were enshrined in the Constitution of the Federal Republic of Nigeria since independence.

On yet another development, legal scholars and courts have tried to draw a distinction between fundamental rights and human rights *simpliciter*. Igwe(2004) underscores this distinction:

> Rights can be considered fundamental both as a function of value as well as nature. The right to free education and the right to travel abroad may both be important values in society, but a higher premium may be set on the former because by its very "nature" and in the "view" of society, the only context for the real existence or exercise of the right to travel abroad and derive meaning out of the activity ultimately lie in the acquisition of good education. Which means that not only are "value" and "nature" interconnected, but also that the specific "nature" of a right (such as the right to life) might make its prior existence an indispensable condition for the exercise of other rights (such as the right to free speech). Therefore, the differentiation between fundamental and other rights is logical and objective, although in a well-developed democratic order, the simultaneous cultivation of all rights is correctly viewed as more ideal sometimes also more civilized than their selective applications.

Falana(2004) states that "fundamental rights are generally regarded as those aspects of human rights which have been recognized and entrenched in the Constitution of a country." They were specially provided for to enhance human dignity and liberty in every modern state. The fundamental rights are referred to as such because they were entrenched into our Constitution and termed as such. Fundamental human rights or the inalienable rights are so because each human being has intrinsic worth. They attach to man as a result of his humanity, without them; there is automatically a diminution of his humanity. "Human rights are those rights which every individual born into the world possesses right from the moment of birth until death. It is universal because all human beings all over the world are deemed to possess them. These rights existed before the state, and are independent of it; it is inalienable, fundamental, God given or divine. The rights are not a gift of any ruler, because a ruler cannot give that, which does not belong to him" (Falana, 2004, p. 4).

Achara(2003) notes that fundamental human rights are attached to every human being by virtue of that very fact. They are rights inherent in the essence of man. It is because of this attachment to human nature that some argue that the term "fundamental human right" is tautologous since to be "human", in this case, really means to be "fundamental to man" For these scholars therefore, to use "fundamental" and "human" together is a mere surplusage. For others however, "human rights" without the word "fundamental" is generic; but adding "fundamental" they become specific ones deemed to be more central. In the presidential constitutions (1979 and 1999) of Federal Republic of Nigeria, the term "Fundamental Rights" is used. The "Human" is presumed.

Hence, it has often been the position that fundamental rights and human rights are used interchangeably however both of them differ. According to Okafor (2011), fundamental rights are part of human rights but what distinguishes fundamental rights from human rights is because fundamental rights have been recognized and encapsulated into the domestic laws of a country. It is imperative therefore to state that both fundamental rights and human rights belong to the individual on the basis of his existence as a human being. In*Kuti and others v AG Federation* (1985) 8 NWLR (pt. 6) 211],Oputa JSC emphasized that:

> Not every civil or legal right is fundamental right. The ideal and concept of fundamental rights both derive from the premise of the inalienable rights of man - life, liberty, and the pursuit of happiness. Emergent nations with written constitutions have enshrined in such constitution some of these basic human rights, each right that is thus considered fundamental is clearly spelt out.

In Nigeria therefore, the fundamental rights of the individuals are contained in Chapter IV of the 1999 Constitution. Among these fundamental rights is the right to freedom from discrimination. For ease of comprehension, the said right to freedom from discrimination as contained in section 42 of the Constitution is reproduced herein *verbatim et literatim*.

> (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-
>
> (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject; or
>
> (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.
>
> (3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria.

One essential factor to admit at this point is that the above provisions apply strictly to citizens of Nigeria. If the citizens of Nigeria are therefore so protected, is it not clear therefore that the act of ethnic profiling is a violation of these provisions? Section 42 is emphatic when it states that no Nigerian of a particular *community, ethnic group, place of origin, religion* (emphasis supplied), sex, or political opinion shall by reason of such be subjected either expressly or in the practical application of any law in force in Nigeria or executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities are not made subject to. By implication, the constitution is saying that what is good for the goose is sauce for the gander. It is further to be noted that fundamental rights are not absolute. There are valid restrictions and derogations as the case may be. The question again here is whether or not it will be lawful for Nigeria to incorporate ethnic profiling in the course of investigation. According to the Nigerian Constitution, the only derogation or restriction acceptable under section 42 of the Constitution is the one contained in subsection 3 of the said section 42 and which is to the effect that Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria. This restriction is, no doubt, limited to issues of appointment. That is to say, nobody has really any fundamental right to be appointed to any office whatsoever. Besides matters of appointment, there is no other derogation from fundamental right to freedom from discrimination. This is why section 42 is not included among the sections mentioned in claw back provision of section 45 of the Constitution. It means that not even the reason of defense, public safety, public order, public morality, public health, or protection of other people's rights and freedom can justify any form of breach of a citizen's right to freedom from discrimination.

Hence, for a Nigerian, the requirement needed for the enjoyment and protection of the right contained in section 42 of the Constitution is citizenship. Once the person is a confirmed citizen of Nigeria, the enjoyment of the right to freedom from discrimination is supposed to be available to him/her. The above non-discriminatory provision is also made a cardinal objective

of state policy by virtue of section 15 (2) of 1999 Constitution which prohibits discrimination on the bases of place of origin, sex, religion, status, ethnic group, linguistic association, and ties. It is therefore imperative to hold that the act of ethnic profiling on the ground of ethnic group, place of origin or religion is wrong in law and therefore offends the provision of the constitution. The source of any power directing ethnic profiling for whatever reason is immaterial as any law or regulation inconsistent with the provision of the Constitution is invalid to the extent of its inconsistency. More still, the Constitution is binding on all persons and authorities in Nigeria (1999 Constitution).

5. Conclusion

Ethnic profiling for the purpose of crime prevention represents an inappropriate means of conducting police work. To counter this, it is imperative that a person's ascribed ethnicity should not be employed as the sole or decisive criterion for a police check. In the analysis above, it is certainly clear that ethnic profiling is offensive to the Constitution of the Federal Republic of Nigeria 1999 (as amended) with particular reference to section 42. Since this is so, it is our strong view that the practice be deprecated. The security agents involved in such actions should be sanctioned. Profiling is not wrong, what is wrong is the ethnic coloring of the profiling. It is also imperative that if rights are to be meaningful in the context of a people struggling to stay afloat under very adverse economic and political conditions, they have to be concrete in the sense that their practical import is visible and relevant to the condition of existence of the people to whom they apply, and most importantly, concrete in the sense that they can be realized by the beneficiary. The Courts on their own must wake up from their slumber in a bid to protect the rape of the Constitution. It is therefore very wrong for the courts to assume that issues of national security outweigh the rights of individuals as was held in the case of *AlhajiMujahidDokuboAsari v Federal Republic of Nigeria* [[2007] 12 NWLR Part 1048] where the Supreme Court held:

> Where National Security is threatened or there is real likelihood of its being threatened, Human Rights or the individual rights …take second place. Human Right or individual rights must be suspended until the National Security can be protected or well taken care of. The corporate existence of Nigeria as a united, harmonious indivisible and in dissoluble sovereign Nation is certainly greater than any citizen's liberty or right. Once the security of this Nation is in jeopardy and it survives in pieces rather than in peace the individual's liberty or right may not even exist.

The above position of the court is wrong because the abuse of individual rights should be seen as a greater threat to national integration and corporate existence of Nigeria as a country. With due respect, our courts and other authorities should mind the implications of sections 42 and 45 (1) of the Constitution. Save and except a minor restriction in relation to appointments, the right to freedom from discrimination should be construed as absolute in Nigeria. The derogations allowed due to defense, public safety, public order, public morality, or public health as provided for in paragraph (a) of section 45 (1) of the Constitution do not extend to the right to freedom from discrimination. The violation of this right in Nigeria today in the purported interest of national safety and defense is, therefore, unfortunate.

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