

RIGHT TO FAIR HEARING: A REFLECTION ON THE PROCEDURE FOR PROSCRIPTION OF TERRORIST ORGANISATION UNDER THE TERRORISM PREVENTION ACT, 2011 (AS AMENDED)

By

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Abstract

For about a decade now, Nigeria has suffered sustained attacks by terrorist organizations such as the *Boko Haram* in the North East, and IPOB in the South East. These attacks have led to huge loss of lives, properties and infrastructural facilities such as Schools, Hospitals, Electricity, roads etc. particularly in the North East where *Boko Haram* operates. The Nigerian Government has put measures to end such terrorist attacks, and one of such measures is the promulgation of Terrorism Prevention Act, 2011 which was later amended in 2013. Although the Terrorism Prevention Act provides measures to fight terrorism, it adopted procedure for proscribing a group as terrorist organization which negates the principle of right to fair hearing. The aim of this paper is to analyze the constitutional provisions that guarantee right to fair hearing in Nigeria, and the procedure for proscribing a group as terrorist organization in Nigeria. The paper specifically analyze these questions: What is the constitutional provision in Nigeria that guarantees the right to fair hearing and the limitation thereof? What is the legal instrument that regulates the fight against terrorism in Nigeria? What is the procedure for proscribing a group as terrorist organization in Nigeria? Is the procedure in accord with the right to fair hearing? The paper found that first;

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the Constitution of Nigeria guarantees the right to fair hearing along with other rights, but places no limitation to right to fair hearing in whatever circumstances. Second, Terrorism Protection Act is the legal instrument that regulates the fight against terrorism in Nigeria. Third, the Terrorism Protection Act provides for procedure for proscribing a group as terrorist organization that negates the right to fair hearing. The paper therefore, recommends that the Terrorism Prevention Act be amended to make proscription of a group as terrorist in tandem with right to fair hearing, or if national interest worth derogation from the right to fair hearing, the provisions of section 45 of the Constitution be amended to make a right to fair hearing among the rights to be derogated from in the national interest.

Key words: Terrorism, Terrorist and Proscription

1.1 Introduction

Apart from challenges of poverty, sectarian, economic and political crises and militancy in Niger Delta, Nigeria has also been grappling with monumental challenges of terrorist activities, of *Boko Haram* particularly in the States of North Eastern Region. Over the years we have witnessed the vulnerability of Nigeria to terror, criminality and instability which include but not limited to the bombing of Mosques, Churches, Police Stations, Schools and Prisons (now Correctional Service Center) in Bauchi, Borno, Yobe and Adamawa States.¹ Other parts of the Country were also not left out as *Boko Haram* bombing activities were also experienced in the Federal Capital Territory, Abuja, Kano, Plateau, and Kaduna States among others.² Notable among such bombings was the bombing of the United Nations Office in Abuja by the insurgents which made them to have international recognition and listed as terrorist organization by the United States of America (USA).

The emergence of *Boko Haram* and its terrorist activities in the North Eastern Nigeria in particular and in Nigeria in general has continued to change the security architecture and dynamics of the country. The insurgent activities of

¹ Felix Akpan, Okonette Ekanem and Angela Olofu –Adeoye, 'Boko Haram Insurgency and Counter Terrorism Policy in Nigeria' [2014] (10) (151) *Canadian Social Science*, Available at <<http://www.cscanada.net/index.php/css/article/view/4259DOI:http://dx.doi.org/10.3968/4259>> Accessed on 21st August, 2019.

² *Ibid*

Boko Haram group in its operational centers and strongholds in Nigeria have also been responsible for some instability and security challenges in the neighboring countries such as Niger, Benin Republic, Chad and Cameroon.³

In the spirited efforts of the Federal Government of Nigeria to contain the *Boko Haram* insurgency for the protection of lives and properties of the citizens of Nigeria and those residing within the Nigerian territory, she promulgated a legal instrument known as Terrorism Prevention Act, 2011 which was later amended in 2013. The Terrorism Prevention Act, provides measures for combating acts of terrorism and suppression of financing of terrorism, and also provides procedure for proscribing any violent group in Nigeria as a terrorist group so long as the violent act of such group falls within the definition of terrorism in the Act.

This paper seeks to analyze the procedure for the proscription of a group as terrorist organization under the Terrorism Prevention Act 2011 (as amended) in relation to the right to fair hearing under the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The paper is structured in to six parts. Part one captured the introduction as setout above, part two analyzed the concept of terrorism, part three examines the procedure for proscribing a group as terrorist organization under the Terrorist Prevention Act viz-a-viz the right to fair hearing under the Constitution of the Federal Republic of Nigeria, 1999 (as amended), and part four is observations, part Five recommendations and part Six conclusion.

1.2 The Concept and Nature of Terrorism

The term terrorism has no definite definition. Put it differently, there has have been a lot of controversies among the legal luminaries and jurists as to the meaning of the term terrorism, and many definitions of terrorism have been offered. There is little agreement on what constitutes terrorism and who practices terrorism even among academics notwithstanding the myriad of militaries, judicial systems, intelligence agencies and governmental organizations that deal with the term terrorism from their perceptions.⁴

Terrorism has been defined to mean the use of various violent means for political purpose; to unleash deliberate violent attacks on civilians, police, military and other security formations coupled with massive destruction of government facilities and civil properties such as oil and power installations,

³ Guy Goyei, 'Nigeria's Boko Haram and its Security Dynamics in the West-African Sub-Region' [2018] (9) *Journal of Language, Technology & Entrepreneurship in Africa* ; 103.

⁴ Emeka Adibe, 'Revisiting the Problem of Definition of Terrorism as a Criminal Act: A Critical Analysis' [2016] (1) *African Journal of Criminal Law and Jurisprudence* ;141

Police formations, Prisons, Churches, Mosque etc, with intentions to intimidate or coerce a civil society, to influence the policy of government by intimidation or coercion, and affect the conduct of government by assassination or kidnapping.⁵

Article 1 (3) of the African Union Convention on the Prevention and Combating of Terrorism, 1999 defined terrorism to mean:

- (a) Any act which is a violation of the criminal laws of a state Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
 - (i) Intimidate, put in fear, force coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandoned a particular standpoint, or to act according to certain principles; or
 - (ii) Disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
 - (iii) Create general insurrection in a State.
- (b) Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).

It is submitted that, act, commission or omission which qualifies as terrorist act is listed in the above legal instrument of the African Union, and any person natural or artificial that commits or threatened to commit any of the acts listed therein will be considered as terrorist and liable to be punished accordingly on conviction. However by the provisions of the same AU Convention notwithstanding the provisions of Article I above, any struggle or movement by the people in accordance with the principles of international law for their

⁵ J O.Abimbola and S A Adesote, 'Domestic Terrorism and Boko Haram Insurgency in Nigeria, Issues and Trends: A Historical Discourse' [2012] (4)*Journal of Arts and Contemporary Society* ;14

liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts or acts of terrorism.⁶ According to Francis Ojeih and Segun Adesanya this proviso or differentiation is necessary because of the dynamic nature of the African continent where call for accountable and responsible government May likely lead to demonstrations and self-determination.⁷

The Nigerian Terrorism Prevention Act⁸ (TPA) also gives a conceptual definition of terrorism when it provides that:

In this section, “act of terrorism” means an act which is deliberately done with malice, aforethought and which:

- (a) may seriously harm or damage a country or an international organization;
- (b) is intended or can reasonably be regarded as having been intended to-
 - (i) unduly compel a government or international organization to perform or abstain from performing any act;
 - (ii) seriously intimidate a population,
 - (iii) seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization, or
 - (iv) otherwise influence such government or international organization by intimidation or coercion; and
- (c) involves or cause, as the case may be-
 - (i) an attack upon a person’s life which may cause serious bodily harm or death;
 - (ii) kidnapping of a person;
 - (iii) destruction to a government or public facility transport system, an infrastructural facility including an information system, a fixed platform located on the

⁶ African Union Convention on the Prevention and Combating of Terrorism 1999, Art. III (2)

⁷ Francis Ojeih and Segun Adesanya, ‘The Need For Human Security Approach in Combating Terrorism in Nigeria’[2018] (38) (2) *Ahmadu Bello University Law Journal* ;1

⁸ Terrorism Prevention Act 2011 (as amended), s. 1(2)

- continental shelf, public place or private property likely to endanger human life or result in major economic loss;
- (iv) the seizure of an aircraft, ship or other means of public or goods transport and diversion or the use of such means of transportation for any of the purpose in paragraph (b) (iv) of this subsection;
 - (v) the manufacture, possession, acquisition, transport, supply or use of weapons, explosive or of nuclear, biological or chemical weapons, as well as research into, and development of biological and chemical weapons without lawful authority;
 - (vi) the release of dangerous substance or causing of fire, explosions or floods, the effect of which is to endanger human life;
 - (vii) interference with or disruption of the supply of water, power or any other fundamental natural resources, the effect of which is to endanger life.
- (d) An act or omission in or outside Nigeria which constitute an offence within the scope of a counter terrorism protocols and conventions duly ratified by Nigeria.

However the Terrorism Prevention Act, 2011 is amended in 2013 by Terrorism (Prevention) (Amendment) Act, 2013 which widens the scope of terrorism or offences under the Act. It provides that a person or body corporate that knowingly in or outside Nigeria directly or indirectly does, attempts or threatens any act of terrorism, commits an act preparatory to or in furtherance of an act of terrorism, omits to do anything that is reasonably necessary to prevent an act of terrorism, assist or facilitates the activities of persons engaged in an act of terrorism or is an accessory to any offence under the act, participates as an accomplice in or contributes to the commission of any act of terrorism or offences under the Act, assists, facilitates, organizes or directs the activities of persons or organizations engaged in any act of terrorism, is an accessory to any act of terrorism, or incites, promises or induces any other person by any means whatsoever to commit any act of terrorism or any of the offences referred to in the

Act, commits an offence under the Act and liable on conviction to maximum of death sentence.⁹

Therefore, deducing from the above provisions of Terrorism Prevention Act, 2011 (as amended) not only the activities of *Boko Haram* insurgents, but also the activities of arm banditries in the Zamfara State, the militants in Niger-Delta and other related groups come under the definition of terrorism.

1.3 The Procedure for Proscription under the Terrorism Prevention Act: A Negation of Right to Fair Hearing

The term proscription has been defined to mean the act of prohibiting; the state of being prohibited. It also means a prohibition or restriction.¹⁰ The terrorism Prevention Act defined a proscribed organization to mean an organization which has been declared to be a proscribed organization under section 2 of the Act, and includes a group which has been declared to be an international terrorist group under section 9 of the Act; traceable to a terrorist act and includes funds irrespective of the person in whose names such proceeds are standing or in whose possession they are found.¹¹

Even before the coming in to force of the Terrorism Prevention Act on the 3rd day of June, 2011, there was incidences of proscription of some organization by the Federal Government of Nigeria. There was for instance proscription of Academic Staff Union of Nigerian Universities (ASUU) by the military administration of General Babangida in 1987.¹² Also the Federal Government once proscribed the National Union of Nigerian Students (NUNS) but it was later metamorphose in to the present National Association of Nigerian Students (NANS)¹³

After the coming in to force of the Terrorism Prevention Act, there was proscription of the Independent People of Biafra (IPOB) as a terrorist

⁹ Terrorism (Prevention) (Amendment) Act 2013, s 2(c)

¹⁰ Bryan A. Garner, *Black's Law Dictionary* (Thomson Business 2004) 1341

¹¹ TPA 2011 (As amended), s. 40

¹² Ogbette Amefuna Samuel, Eke Israel Emenike and Oro Ogbanaya Eze, 'Causes, Effects and Management of ASUU Strikes in Nigeria 2003-2013' [2017] (3)(3) *Journal of Research and Development*; 15. Available at

https://www.researchgate.net/publication/325546327_Causes_Effects_and_Management_of_ASUU_Strikes_in_Nigeria_2003-2013. Accessed on 29th September, 2019.

¹³ FG's Proscription of IMAN. Available at <https://tribuneonline.ng/fgs-proscription-of-imn/> accessed on 30th September, 2019

organization by the Federal Government of Nigeria.¹⁴ So also sequel to the violent activities of the Islamic Movement in Nigeria (IMN) led by Sheikh El-Zakzaky, and the recent faceoff between the security agencies and the said Islamic Movement of Nigeria (IMN), the Federal Government of Nigeria, proscribed IMN as a terrorist organization.¹⁵ This was pursuant to the Court order secured by the Office of the Attorney General of the Federation by virtue of the provision of the Terrorism Prevention Act. The Act¹⁶ laid down procedure for proscription of an organization as terrorist as follows:

- (1) Where two or more persons associate for the purpose of or where an organization engages in –
 - (a) Participating or collaborating in act of terrorism;
 - (b) Promoting ,encouraging or exhorting others to commit an act of terrorism; or
 - (c) Setting up or pursuing acts of terrorism, the judge in Chambers may on the application made by the Attorney General, National Security Adviser or Inspector General of Police on the approval of the President; declare any entity to be a proscribed organization and the notice should be published in official gazette.
- (2) An order made under sub-section (1) of this section shall be published in official gazette, in two national newspapers and at such other places as the judge in Chambers may determine.
- (3) A publication made under sub-section (2) of this section shall contain such relevant particulars as the judge in Chambers may specify:
 - (i) A person who belongs or professes to belong to a proscribed organization commits an offence under this Act and shall on conviction be liable to imprisonment for a maximum term of 20 years;

¹⁴ Zzccheaus Adanger, 'Proscription of the Indigenous People of Biaffra (IPOBi and the Politics of Terrorism in Nigeria' [2018] (10)(1) *The Journal of Jurisprudence and Contemporary Issues*.

Available at

https://www.researchgate.net/publications/332241912_PROSCRIPTION_OF_THE_POLITICS_OF_TERRORISM_IN_NIGERIA. Accessed on 29th September, 2019 at 9:20 pm.

¹⁵ FG's Proscription of IMN. Available at <https://tribuneonline.ng.com/fgs-proscription-of-imn/> Accessed on 30th September, 2019 .

¹⁶ *Ibid*, s. 2

- (ii) For the avoidance of doubts, political parties should not be regarded as proscribed organizations and nobody should be treated as such because of his or her political beliefs.

It can be inferred from the provisions of Terrorism Prevention Act above, that when the government intend to proscribe any organization which its activities fall within the definition of an act of terrorism under the Act is for any of the Attorney General of the Federation, the National Security Adviser or Inspector General of Police subject to or with the approval of the President to apply to a judge in Chambers (i.e. *ex parte*), behind or without notice to the organization sought to be proscribe. This is a flagrant violation of the right to fair hearing of such organization and its members thereof guaranteed by the Constitution of the Federal Republic of Nigeria.

The Constitution of Nigeria provides and guaranteed right to fair hearing thus:

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitle to a fair hearing within reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.¹⁷

Although the Constitution of the Federal Republic of Nigeria, 1999 (as amended) guaranteed fundamental rights in the sections of Chapter IV,¹⁸ it upholds any law that derogates and places some limitations on some of those guaranteed fundamental rights in the interest of defense, public safety, public order, public morality or public health or for the purpose of protecting the right of others, but it places no limitation to right to fair hearing.¹⁹

The provision of section 45 provides that:

- (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-

¹⁷ Constitution of the Federal Republic of Nigeria 1999 (as amended), s.36 (1)

¹⁸ The provisions of sections 33 provides for right to life, sections 34 provides for right to dignity of human person, sections 35 provides for the right to personal liberty, section 36 provides for the right to fair hearing, sections 37 provides for the right to family and private life, section 38 provides for the right to freedom thought, conscience and religion, section 39 provides for the right to freedom of expressions, section 40 provides for the right to peaceful assembly and association, section 41 provides for the right of movement, sections 42 provides for the right against discrimination, and section 43 provides for the right to own immovable property.

¹⁹ Ibid. s.45

(a) In the interest of defense, public safety, public order, public morality or public health; or

(b) For the purpose of protecting the rights and freedom of other persons. (2) An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 33 or 35 of this Constitution; but no such measures shall be taken in pursuance of any Act during any periods of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:

Provided that nothing in this section shall authorize any derogation from the provisions of section 33 of this Constitution except in respect of death resulting from acts of war or authorize any derogation from the provisions of section 36(8) of this Constitution.

(3) In this section, a "period of emergency" means any period during which there is in force a Proclamation of state of emergency declared by the President in exercise of the power conferred on him under section 305 of this Constitution.

The above provisions allow for the derogation from the respect and protection of the most cherished fundamental human rights of private and family life, right to freedom of thought, conscience and religion, right to freedom of expression, right to freedom of peaceful assembly and association, and right to freedom of movement and right to personal liberty by any law that is reasonably justifiable in a democratic society in the interest of defense, public order, public safety, public morality or public health.

In the case *F.R.A Rotimi Williams v. Majekodunmi (No 1)*²⁰ there was declaration of state of emergency in the Western Region in 1962, the Defendant was appointed Sole Administrator of the Western Region after the removal of Chief Akintola as Premier Western Region, and pursuant to Emergency Powers Act, 1961 some regulations were made which included Emergency Powers (Restriction Orders) Regulations that empowered the Defendant to caused Restriction Orders to be issued and served on individuals restricting their movement to a defined area to be stated in the Order. The Plaintiff was served with restriction Order restricting his movements to a distance of three miles from

²⁰ (1962) ALL NLR 410.

a certain address in Abeokuta. It was in the light of this fact that the Plaintiff went Supreme to Court seeking for injunctive order against the Defendant, and a declaration that the Emergency Powers (Restriction Orders) Regulation 1962 was ultra vires, illegal and unconstitutional.

The Supreme Court declared that the restriction order of 29th May, 1962 which ordered the Plaintiff to remain within a distance of three miles from No 3 Abeokuta Road in the township of Abeokuta was not reasonably justifiable.

Therefore, pursuant to the provisions of section 45 of the Constitution above, Terrorism Prevention Act shall not be invalidated on the ground that it provided for measures that derogates from those rights specified by the section on the ground of public safety, public order etc. However, having a cursory look at the provisions of section 45, while it specified the fundamental rights to be derogated which includes the right to life which is not only important but the mother of all rights, no mention was made of the right to fair hearing. This signifies without doubt that the right to fair hearing guaranteed by the Constitution of Nigeria is not amenable to derogation in whatever situation.

1.4 Conclusion

This article examined the nature and concept of terrorism, the right to fair hearing, and procedure for proscribing a group as terrorist organization under the Terrorism Prevention Act, 2011(as amended) pursuant to which Indigenous People of Biafra (IPOB) and Islamic Movement in Nigeria (IMN) were proscribed, and the right to fair hearing guaranteed by section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It is found that the right to fair hearing is not one of the rights to be derogated in the interest public safety and public order in Nigeria in whatever circumstances. Therefore, for the right to fair hearing to be derogated in the cause of fighting terrorism or the purpose of public safety and public order in Nigeria, the Constitution of the Federal Republic of Nigeria, 1999 (as amended) has to be further amended, to allow such derogation otherwise the right to fair hearing cannot be 1derogated.

It is observed that the procedure for proscribing a group as terrorist or terrorist organization under the Terrorism Prevention Act, 2011 (as amended) is by application, made *expert* or behind the organization sought to be proscribed to the Judge of the Federal High Court, by either the Attorney General of the Federation, National Security Adviser or the Inspector General of Police. This is in flagrant disregard to the right of fair hearing of such group or organization guaranteed by the Constitution of the Federal Republic of Nigeria. The provisions of section 45 of the Constitution of the Federal Republic of Nigeria, 1999 (as

amended) provides for derogation of some of the fundamental rights in the interest of defence, public safety, public order, public health or public morality, but does not allow derogation in respect of the right to fair hearing.

It is in view of the aforesaid that this paper recommends that: The provision of section 2 of the Terrorism Prevention Act, 2011 be amended to make procedure for proscribing a group as terrorist organization by motion on notice by either the Attorney General of the Federation, National Security Adviser or Inspector General of Police before the Federal High Court. This is to ensure that the group sought to be proscribed is given opportunity, to show because why the order of proscription should not be granted thereby protecting the right to fair hearing of such group. The hearing of the matter should also be made time bound so that there should not be a delay being matter that has to do with national security; or If it is deem that the national security worth derogating the right to fair hearing, the provisions of section 45 of the 1999 Constitution be amended, to include the right to fair hearing among those rights that can be curtail derogated from in the interest of defense, public order, public safety, public health and public morality.