

By Chijioke Emeka*

Abstract

The foundation of every other human right is, arguably, the right to freedom of movement. The right is one of the human rights considered basic. It is made fundamental in the Nigerian Constitution and other national basic laws. The content of the right as reflected in international conventions and national constitutions differs. In the Nigerian Constitution, for example, it is guaranteed to only Nigerian citizens. In the South African Constitution, it is guaranteed to everyone within the territory of South Africa. Also in South Africa, it expressly includes the right to hold a passport, while in Nigeria, passport is not guaranteed. That lacuna has however been filled by judicial decisions. From constitutional texts and judicial consensus, the right is not absolute. Common derogations relate to interests of defence, public safety, public order, public morality and public health. Extradition is a permitted derogation. The paper focuses on judicial perspectives to the right. It looks at immigration and the ambit of the right to hold a passport. The validity of State laws trenching on the rights of deposed traditional rulers, like the recent incident in Kano State, is questionable. The legal framework for derogation in times of public health emergencies, like the corona virus pandemic, is weak. It was not established that the textual content of the right significantly affects protection. It appears that a responsible legislature, an independent judiciary, a law-abiding executive and a people alive to their rights, are the catalysts for effective protection. This is not to say that constitutional provisions transparently spelling out the whole ambit of the content of the right are irrelevant. The paper concludes with a wide-range of recommendations for reform on the right to freedom of movement in Nigeria. This includes a mention of the next generation of the right, to wit, greater regional and sub-regional integration; from a successful ECOWAS Protocol on Free Movement of Persons, consummation of the much talked about 'African Passport', to a broader legal regime for cross-border migrations and integration through open African borders.

1.00 INTRODUCTION

The notion of an inherent need of human beings to move about is as old as creation. The *basic need* gave rise to the *basic right*. As an innate human factor, movement predates all modern concepts of human rights. Human beings have innately ingrained in them the tendency to move around basically for food, for social engagements, for commerce and for self-actualization needs. The last mentioned includes a gamut of needs including acquisition and impartation of ideas, religious learning and worship, association, education etc. It is therefore seen as one of the most important features of man with its primary meaning being physical movement from place to place. Thus it is an important extension of the right to personal liberty and one of the most jealously guarded rights regarded as the hallmark of the citizenship of any country¹.

It has also been argued that the right is closely related to, and often a prerequisite for the enjoyment of, other human rights, including the rights to life, liberty and security, to an adequate standard of living, including health, food and water, and property. It is closely related

* Emeka is a Legal Practitioner and the Managing Counsel of Auxano Law, a multiservice law firm in Lagos State

¹ Kehinde M. Mowoe, *Constitutional Law in Nigeria*, Malthouse Press Limited (2008), p. 487

to the right to seek asylum from persecution in another State². In *Rights International v Nigeria*³, the African Commission on Human and Peoples Rights found interconnectivity between the right to freedom of movement and other rights.

The Paper traces the development of the modern idea of the right to freedom of movement at international law. It then focuses on the scope of the right as it came to be guaranteed in the Constitution of the Federal Republic of Nigeria 1999 (CFRN 1999). It looks at the restrictions and derogations from the right. It also looks at the right within the contexts of the right to hold a passport and extradition. The basic methodology is examining the content and ambit of the right with emphasis on judicial approach to interpretation and enforcement of the provisions.

2.00 CONCEPTUAL BACKGROUND OF THE RIGHT TO FREEDOM OF MOVEMENT: DEVELOPMENT AT INTERNATIONAL LAW

The right to freedom of movement is arguably the foundation of the exercise of every other right. This is because movement is inherent in every activity of man. Without the ability to move about, there may be no opportunity for the guarantee of any other right. Like health and education, migration fulfils both autonomous and instrumental roles in human societies. It is a basic human instinct necessary for building human settlements and sustaining livelihood⁴.

Thus the ability to move freely and in safety within one's country is considered a basic right as well as a pre-condition for the enjoyment of many other rights⁵. It is therefore not surprising that it is one of the earliest recognized rights and one of those human rights that eventually gained international recognition⁶ and wide national recognition as fundamental right. For example, Article 42 of the **Magna Carta 1215** stated thus:

“It shall be lawful in future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and merchants, who shall be treated as if above provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy reserving always the allegiance due to us”

It thus gave every freeman the right to leave the realm at his pleasure in times of peace⁷. It is generally believed that the Magna Carter gave inspiration to the 1689 English Bill of Rights,

² Yinka Olomajobi, *Human Rights and Civil Liberties in Nigeria*, Revised Edition (2018) Princeton & Associates Publishing Co. Ltd. Ikeja, Lagos, p. 277

³ Communication 215/98, decided at the 26th Ordinary Session, Nov. 1999, 13th Annual Activity Report.

⁴ Chidi Odinkalu, 'The Protection of Human Rights in Africa', *Journal of African Law*, Vol. 47 No. 1 (2003), Cambridge University Press, School of Oriental and African Studies, pp. 29 - 30

⁵ Yinka Olomajobi, op. cit. p. 276

⁶ Kehinde M. Mowoe, op. cit.

⁷ See the version reissued by King Edward I in 1297, which entered the statute books as law, 6 *Halsbury's Statutes 3rd ed.*

the 1776 United States Declaration of Independence, the 1789 United States Bill of Rights, the 1789 French Declaration of the Rights of Man and of the Citizen, the 1948 United Nations Universal Declaration of Human Rights, and the rest of the International Bill of Rights.

Movement is recognised in all international law as a basic right. In the formal sources of these rights and in practice, the right to freedom of movement is one of those very few human rights whose terms are tied to citizenship and nationality⁸. The **Universal Declaration of Human Rights 1948**, declared the right to freedom of movement in a rather simplistic manner thus:

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country⁹.

This may be simple but however meant a lot at that critical juncture in world history when the resolution was adopted. It was a time the world was still reeling of the atrocities of Nazi Germany in Europe, which included mass transportations of Jews and other minorities across Eastern Europe, indefinite detentions and slave labour in concentration camps.

The **International Covenant on Civil and Political Rights 1966** contains binding provisions on the Right to Freedom of Movement, when it states in Article 12:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country¹⁰.

Other treaties that contain protection for the right include Article 10 of the **Convention on the Rights of the Child 1989**, Articles 5 and 8 of the **International Convention on the Protection of the Rights of All Migrant Workers and Members of the Families** and Articles 9 and 18

⁸ Chidi Odinkalu, op. cit. p. 30

⁹ See Article 13 of the Universal Declaration of Human Rights (UDHR). Note that the UDHR was a United Nations General Assembly Resolution (Resolution 217 A) proclaimed in Paris on 10th December 1948 as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected. Although it does not have the force of law but it became a milestone document in the history of human rights and had remained a signpost for all human rights documents since.

¹⁰ See Article 12 of the ICCPR. Note the restrictions in Article 12(3) which shall be treated later.

of the **Convention on the Rights of Persons with Disabilities 2006**, all contain special provisions on the right to freedom of movement for the classes of persons they deal with.

There is also a regional protection regime as contained in the **African Charter on Human and Peoples Rights 1981**. The full text is reproduced hereunder for ease of reference:

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups¹¹.

See **Article 2 of Protocol No.4 to the European Convention on Human Rights, 1963** for the treaty position in Europe.

The right to freedom of movement has been recognized by all post-independence democratic constitutions of Nigeria, subject to constitutionally allowed derogations, as a fundamental right¹². The Court of Appeal therefore observed in one case thus:

“Freedom of movement is guaranteed under our constitution and it is a right to which every citizen is entitled when he is not subject to the disabilities enumerated in the Constitution. That right inures to the benefit of every human being. It is because it is fundamental that it is entrenched in the Constitution, its mere entrenchment in the constitution does not make it fundamental. It is a natural right”¹³.

Thus beyond the international bill of rights and all international conventions and protocols which Nigeria may be signatory to or has ratified or acceded to, the right to freedom of movement has been entrenched in our national constitution as a fundamental right.

¹¹ See Article 12 African Charter on Human and Peoples Rights. See also Article 12 of the **African Charter on Human and Peoples Rights (Ratification and Enforcement) Act**. It is however to be noted that by virtue of Section 1(3) of the Constitution of the Federal Republic of Nigeria 1999, the extent to which Section 41(1) guarantees national protection of the right takes precedent before the national Courts.

¹² See section 27(1) Constitution of the Federation Act No. 20 of 1963; section 38(1) Constitution of the Federal Republic of Nigeria 1979; and section 41(1) Constitution of the Federal Republic of Nigeria 1979.

¹³ **Attorney-General of the Federation v Ajayi** (2000) 12 NWLR (Part 682) 509 D – E, per Aderemi JCA

3.00 THE SCOPE OF THE RIGHT TO FREEDOM OF MOVEMENT IN NIGERIA

The right to freedom of movement is one of the human rights made fundamental in Nigeria when the framers of the Constitution ‘enshrined’ it in Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 entitled ‘Fundamental Rights’¹⁴. By virtue of Section 41(1) of the Constitution of the Federal Republic of Nigeria, 1999,

“Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom”

The first point to note is the opening words of the constitutional provision. It marks a clear departure from the language of the international bill of rights and the African Charter on Human and Peoples Right. While the former gives the right to “everyone” or “every individual”, the Nigerian Constitution gives the right to “every citizen of Nigeria”¹⁵. The Constitution contains detailed provisions on who is a citizen¹⁶.

This does not mean that non-Nigerian citizens have no right to enter Nigeria or move freely in Nigeria or exit Nigeria. It means that these rights are not guaranteed them as a constitutional right as guaranteed to citizens of Nigeria. Their right to enter, reside in and move freely in Nigeria would be given subject to the laws under which they were granted entry into Nigeria¹⁷.

The Content of the Right in Section 41(1) CFRN 1999

By boldly asserting that every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and that no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom, section 41(1) CFRN 1999 thus declares the content of the right in the context of the Nigeria’s national Constitution to encompass the following:

- (a) The right of every citizen to *move freely* within Nigeria
- (b) The right of every citizen to *reside* in any part of Nigeria
- (c) The right of every citizen *not to be expelled* from Nigeria
- (d) The right of every citizen *not to be refused entry* into Nigeria
- (e) The right of every citizen *not to be prevented from leaving* Nigeria

¹⁴ See Section 41 CFRN 1999

¹⁵ See the provisions in Article 21(1)(g) of the Constitution of the Republic of Ghana 1992, which gives the right to “all persons”; Section 21 of the Constitution of the Republic of South Africa 1998, which divides the rights between “everyone” and “the citizen”; and Article 17(1) of the Constitution of the United Republic of Tanzania, which like the Nigerian Constitution preserves the right for “every citizen of the United Republic”.

¹⁶ See sections 25 – 32 CFRN 199

¹⁷ For example, the Immigration Act.

A. The Right of Every Nigerian Citizen to Move Freely Within Nigeria

Every citizen of Nigeria has the right to move freely within Nigeria. This right relates to the whole territory of Nigeria, which means the 36 States and the Federal Capital Territory. A citizen of Nigeria can move freely in any of part of Nigeria, without unlawful restriction.

During the political crisis of the First Republic, the ambit of the right to freedom of movement came up for interpretation in some cases as a result of the State of Emergency declared in the Western Region. For example in *Re Williams v Majekodunmi (No. 3)*¹⁸, the Federal Supreme Court examined the import of the guarantee in Section 26(1) of the Constitution of the Federation 1960, which is *in pari materia* with Section 41(1) CFRN 1999. It was held that a Restriction Order of 29th May, 1962 which limited Chief F. R. A. Williams within a distance of three miles from his house was an infringement of his right to move freely within Nigeria¹⁹.

In *Faith Okafor v Lagos State*²⁰ restriction of movement on monthly environmental sanitation days by Lagos State Government which led to the Appellant's arrest on an environmental sanitation day was declared null and void being an infringement of her right to move freely within Nigeria as guaranteed by Section 41(1) CFRN 1999²¹. The right to move freely within Nigeria, as a content of the right to freedom of movement, includes movement intra-State, inter-State and relates to all corners, nooks and crannies of Nigeria²².

The Courts have courageously pushed the frontiers of freedoms by sometimes stretching the right as far as it can go within the issues presented. This was the case in *Adewole v Alhaji Lateef Jakande & Ors.*²³ where it was held that a circular of the Lagos State Government seeking to abolish private primary schools constitutes an infringement of the right to freedom of movement of the pupils who would be forced against the choice to attend only public primary schools. Despite criticisms, it is submitted that the decision is correct as education is one of the self-actualization needs of man. Education not being capable of being obtained without movement, undue restriction to choice in education would amount to a curtailment on the right.

¹⁸ (1962) NSCC 268

¹⁹ See also *Adegbenro v A. G. Federation* (1962) WNLR 169

²⁰ (2016) LPELR-41066 (CA)

²¹ In this case, it was not shown that the restriction on movement on sanitation days was under a law which authorized a valid derogation from the right.

²² *Faith Okafor v Lagos State Government* (supra) p. 435, per Ogakwu JCA. See also Oyelowo Oyewo, *Constitutional Law in Nigeria*, 2nd Edn., Kluwer Law International B.V. (2019), p. 169

²³ (1981) 1 NCLR 262

In *Gorji-Dinka v Cameroon*²⁴, the Human Rights Committee found a violation of the right to freedom of movement where a person was arbitrarily put under house arrest.

B. The Right of Every Nigerian Citizen to Reside in any Part of Nigeria

The Constitution guarantees the right of every Nigerian to reside in any part of Nigeria. This means a citizen of Nigeria irrespective of his or her ethnicity or where he or she was born can choose his or her residence in any State or any part of the country he or she likes. Such right is guaranteed by the Constitution. In *Sudan Human Rights Organization and Anor. v Sudan*²⁵, the African Commission held that displacement by force and without legitimate or legal basis is a denial of the right to freedom of movement. In that case, thousands of civilians were forcibly evicted from their homes to make-shift camps for internally displaced persons. Can the Maroko mass evictions in Nigeria in 1990 and the more recent Rohingya forced evictions in Northern Myanmar be pigeon-holed into this aspect of violation?

Some recent events in the Nigeria may come in handy to illustrate the essence and ambit of the right to freedom of movement as it affects the right of a citizen to choose his or her residence in any part of Nigeria. There was a media uproar that 123 young men transported in a lorry allegedly from Jigawa State entered Lagos State with about 48 motorbikes. They were said to have been ‘intercepted’ by the Lagos State Environmental Sanitation Task Force and profiled based on security concerns²⁶. Arguments had arisen on the legitimacy of inter-regional migrations in Nigeria²⁷. Similar issues had come up on the heels of Covid-19 restrictions.

The law is that every citizen of Nigeria has a constitutional right to move to any State and reside there. Even if he commits a crime against the law of that State, he cannot be expelled from that State. He can only be tried and punished for his crime. That is the meaning of Section 41(1) CFRN 1999. It is therefore submitted that the 123 young men are within their constitutional right to seek economic refuge in Lagos State with their motor bikes without unnecessary profiling or discrimination. They have become ‘Lagosians’. They should just

²⁴ Communication No. 1134/2002, para. 5.5

²⁵ Communication No. 279/03

²⁶ ‘Lagos Taskforce Intercepts Truck with 123 men, 48 Bikes’, PM News, 30th August, 2019, <https://www.pmnewsigeria.com/2019/08/30/lagos-taskforce-intercepts-truck-with-123-men-48-bikes/>. Visited on 2-10-2019

²⁷ ‘Balarabe, Yakassai Disagree Over 123 Northern Youths Arrested in Lagos’. Nigerian Tribune, 1-9-2019 <https://tribuneonlineng.com/balarabe-yakassai-disagree-over-123-northern-youths-arrested-in-lagos/>. Visited on 2-10-2019

abide by the laws of Lagos State so they do not get punished. It appeared constitutional wisdom prevailed as the youths were reportedly later released by the police²⁸.

Earlier in 2014 there were reports that following some security scare, culminating in alleged detection of an Improvised Explosive Device (IED) in a church in Owerri, the State Government resolved to register and issue Identity Cards to ‘non-indigenes’ from Northern States²⁹. The policy was said to have been tagged “Know Your Neighbour”³⁰. The furore generated by the alleged plan eventually died down without an official confirmation³¹. However before the issue fizzled out, the Senate had stepped in and passed a resolution cautioning the Imo State government and urging it to drop the registration policy³².

Be that as it may, any policy which requires Nigerian citizens to register with any State and obtain ‘permits’ authorizing them to reside in any part of Nigeria would be an affront to Section 41(1) CFRN 1999 which protects a citizen’s inalienable right to reside in any part of Nigeria. Any law authorizing such would be void unless it passes the test in Section 45(1) CFRN. Note also that the practice would offend the guaranteed right to freedom from discrimination in Section 42(1) CFRN 1999 and trench on Sections 25 – 27 CFRN 1999 on citizenship and the declared political objective in Section 15(2) which provides thus:

“... national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited”

In *Ackla v Togo*³³ where the Author was under a prohibition from entering a certain area in his native village, the Human Rights Committee held that in the absence of an explanation from the State justifying the restriction, there had been a violation of the right as expressed in Article 12(1) of the ICCPR. Judicial decisions which upheld the right of every Nigerian to choose his residence in any part of Nigeria include the case of *Attorney-General & Commissioner for Justice, Kebbi State v Jokolo & Ors.*³⁴ where the Court of Appeal held that right of freedom

²⁸ ‘Breaking: Police Release 123 Northern Youths Arrested In Lagos’, Legit, <https://www.legit.ng/1257269-breaking-police-release-123-northern-youths-arrested-lagos.html>. Visited on 2-10-2019

²⁹ ‘Registration of Northerners: Senate Opposes Imo Govt’s Alleged Plan’. Channels TV <https://www.channelstv.com/tag/government-to-issue-identity-cards-to-northerners/> Visited on 2-10-2019

³⁰ ‘IDs for Northerners in Imo?’ Daily Trust 29th June, 2014, <https://www.dailytrust.com.ng/ids-for-northerners-in-imo.html>. Visited on 2-10-2019

³¹ EXCLUSIVE: Nigerian Senate’s resolution on Imo based on rumour; no evidence state planned IDs for Northerners. <https://www.premiumtimesng.com/news/headlines/167546-exclusive-nigerian-senates-resolution-on-imo-based-on-rumour-no-evidence-state-planned-ids-for-northerners.html>. Visited on 2-10-2019

³² Boko Haram: Forget Plans to Register Northerners In Imo- Senate Warns Okorochoa <https://dailypost.ng/2014/07/04/boko-haram-forget-plans-register-northerners-imo-senate-tells-okorochoa/> Retrieved 2-10-2019

³³ Communication No. 505/1992

³⁴ (2013) LPELR-22349(CA)

of movement was violated by an order banishing deposed Emir of Gwandu, to Lafia and then to Obi in Nasarawa State. The case of deposed rulers will be discussed in fuller details below.

C. The Right of Every Nigerian Citizen not to be Expelled from Nigeria

The Constitution also guarantees the right of every Nigerian citizen not to be expelled from Nigeria. This right means that a citizen of Nigeria cannot be forced to leave Nigeria or forced out of Nigeria into another country or into statelessness.

In *Shugaba v Minister of Internal Affairs*³⁵ the applicant, a member of the defunct Great Nigeria People's Party and the majority leader of the Borno State House of Assembly, was deported from Nigeria on 24th January, 1980 to Chad. His passport was seized. It was alleged that he was not a Nigerian. Interpreting a similar provision as Section 41(1) in the Constitution of the Federal Republic of Nigeria 1979³⁶, it was held that the *Shugaba Abdurahman Darman Deportation Order 1980* was inconsistent with the Constitution, ultra vires and void.

Every citizen of Nigeria has an absolute right not to be expelled from Nigeria. Once it is established that a person is a Nigerian citizen, this right cannot be denied³⁷. Mowoe argues that where there is uncertainty as to a person's nationality, the right is not absolute and can be denied³⁸. The 1979 Constitution differentiated between citizens by birth on the one hand and citizenship by registration or naturalisation on the other. Any citizen of Nigeria could forfeit his citizenship as a result of possession of dual nationality. A citizen by birth is however forfeited if only within 12 months of coming into force of the provisions of that chapter³⁹, or of its attaining the age of 21, whichever is later, he does not renounce the citizenship of that other country⁴⁰. However, the CFRN 1999 allows dual citizenship. Even citizens by naturalisation are expected to only renounce other citizenships except that of their birth⁴¹.

D. The Right of Every Nigerian Citizen not to be Refused Entry into Nigeria

This is known as 'the right to return'. It means the freedom of every Nigerian to enter Nigeria. Every Nigerian who is abroad is guaranteed the right to enter Nigeria. Thus it will amount to an infringement of the right of a citizen of Nigeria if he is prevented from entering Nigeria.

³⁵ (1981) 1 NCLR 25

³⁶ See Section 38(1) CFRN 1979

³⁷ See *Shugaba v Minister of Internal Affairs* (supra)

³⁸ Kehinde M. Mowoe, op. cit. p. 491

³⁹ **Constitution (Suspension and Modification)** Decree No. 1 of 1984

⁴⁰ See section 26(3) of the 1979 Constitution

⁴¹ See section 28(1)(2) of the 1999 Constitution

In *Rights International v Nigeria*⁴², the complainant alleged that he was abducted and threatened by persons believed to be agents of the government, an action which led to his fleeing the country for safety. He attests that his flight, as evidenced by the granting of refugee status to him by two countries, the United States and the Republic of Benin, was based on fear of persecution by Nigeria. It was his case that he had since been living in Nigeria as a refugee. It was held by the African Commission that these are violations of Mr. Wiwa's rights to freedom of movement and residence and his rights to leave and return to his country guaranteed under Article 12 of the African Charter on Human and Peoples Rights.

The Commission applied this provision in the technical sense in that there was no evidence that the Nigerian government directly refused Mr. Wiwa entry into Nigeria. However, it is a well-founded construction that a person who is so persecuted by his government as to receive asylum by two foreign states has technically been refused entry into his country by reason of the subsisting persecution, and unjustified ill-treatment which awaited him upon his return.

A Nigerian living abroad must not be barred from returning to Nigeria. The right cannot be restricted, for any reason, not even on grounds of public health. For example, an Immigration Officer has power to refuse non-citizens entry into Nigeria in certain conditions including medical reasons under Section 19(6) Immigration Act 2015. However, a Nigerian citizen cannot be refused entry into Nigeria even if it is medically inadvisable to do so.

E. The Right of every Nigerian Citizen not to be Prevented from Leaving Nigeria

Every Nigerian citizen has the right to leave Nigeria. The 'right of exit' means that no citizen of Nigeria should be prevented from leaving Nigeria. This right not to be prevented from leaving is a corollary to the right to return to Nigeria as both rights go hand in hand. A Nigerian has the right to leave Nigeria and return to Nigeria. Implicit in the right of a Nigerian citizen not to be prevented from leaving Nigeria is the right to hold a Nigerian passport. This is because a citizen of Nigeria will be unable to leave Nigeria and enter another country without a passport.

Unlike some compared Constitutions, Section 41(1) CFRN 1999 has not guaranteed the right of a Nigerian citizen to a passport. However, judicial decisions enforcing the right to freedom of movement with regards to the right not to be prevented from leaving Nigeria, have interpreted the right to a passport to be part and parcel of the right to not to be prevented from leaving Nigeria⁴³. Thus a guarantee by Section 41(1) of the right to leave is a guarantee of the

⁴² Op. cit.

⁴³ See for example *The Director of SSS V Agbakoba* (1999) 3 NWLR (Part 595) 314 and *AG Federation v Ajayi* (2000) 12 NWLR (Part 682) 509

right to carry a Nigerian passport. Both are fundamental rights, different sides of the same coin. We will deal with the right to hold a passport in fuller details later in this paper.

Note that in *Abdoufaied v Libya*⁴⁴, the Human Rights Committee found a violation of the right to leave a country where State agents had confiscated the Author's passport without justification upon his arrival in Libya, thereby preventing him from leaving Libya to Switzerland where he resided. This was also the case in *Marques de Morais v Angola*⁴⁵, where the Committee found a violation of the right to leave a country where the Author was prevented from leaving the country and his passport was subsequently confiscated without justification or legal basis.

The Status of Non-Citizens of Nigeria

As regards foreigners, there is no constitutional guarantee for the right to freedom of movement for non-citizens. This is because by deliberately naming citizens as the class of persons for whom the provision was made, it would be assumed that the intention of the framers is that non-citizens are not covered. One of the accepted canons of constitutional interpretation is *expressio unius est exclusio alterius* (deliberate expression of one excludes the other not mentioned)⁴⁶.

With regards to the right to move freely within a State, a citizen is always lawfully within his country. As for foreigners, their right to movement within a State is governed by domestic law. However, a foreigner who enters a State illegally, and whose status is regularized, must be considered lawfully within the territory and any restrictions on his or her freedom of movement or any treatment different from that accorded to nationals must be provided by law and must be necessary for public interest⁴⁷.

A foreigner who is lawfully in Nigeria enjoys the right to freedom of movement, but not as a constitutional or fundamental right. This legal right is however protected subject to the terms of the law and permit granted him or her to enter Nigeria, reside in Nigeria or leave Nigeria. The extent of his right depends on Nigeria's domestic law. For example, an Immigration Officer has power to refuse a non-citizen entry into Nigeria in certain conditions including medical reasons under Section 19(6) Immigration Act 2015.

⁴⁴ Communication No. 1782/2008, para. 7.8

⁴⁵ Communication No. 1128/2002, para. 6.9

⁴⁶ *Whitman v Sadler* (1910) AC 514 at 527., per Lord Dunedin. See also *Attorney-General of Bendel State v Aideyan* (1989) SCNJ 80 at 95, per Nnaemeka-Agu JSC

⁴⁷ Human Rights Committee, *General Comment No. 27: Freedom of Movement (Article 12)*, 1 November 1999, para. 4

The Case of Deposed Traditional Rulers

One of the earliest known curtailments of the right to freedom of movement is with regards to deposed traditional rulers. The deposition and banishment of traditional rulers is of colonial antiquity. In 1887, the British Vice Consul, Henry Hamilton Johnston, invited King Jaja of Opobo for 'negotiations' over his trade protectionism. Jaja was deported to Gold Coast, tried and declared guilty of 'actions inimical to British interests'. He was ultimately banished to Saint Vincent Island in the West Indies. He died in 1891 at Canary Island⁴⁸.

Similarly, the Bini king, Ovonramwen Nogbaisi, was also a trade protectionist at the height of British trade encroachments along the Benin river. Following the British punitive expedition of 1897 against Benin, the Oba was eventually deposed by the British and exiled to Calabar where he eventually died in January 1914⁴⁹.

In colonial Nigeria, Eshugbayi Eleko was deposed as Oba of Lagos. He challenged this in Court. His application for habeas corpus was refused by a Full Court prompting an appeal to the Judicial Committee of the Privy Council. Thus in *Eshugbayi Eleko v Officer Administering Nigeria*⁵⁰, the Privy Council allowed the appeal and granted his application for habeas corpus on grounds that the government's action was subject to judicial review.

Exiling of deposed chiefs continued under military dictatorships and democratic eras. Emir of Kano, Sir Muhammadu Sanusi I, was dethroned in 1963 and banished to Azare. His fate was believed to be as a result of the power tussle between him and his distant cousin, Ahmadu Bello, the Sardauna of Sokoto and Premier of the Northern Region. This was also the case of the Olowo of Owo, Sir Olateru Olagbegi II. He was deposed on 14th February, 1968, by Western State military governor, Adeyinka Adebayo and banished to Okitipupa. He however returned in 1993, 25 years later and regained his throne. In 1996, Alhaji Ibrahim Dasuki, the 18th Sultan of Sokoto, was deposed by the military administrator of Sokoto State, Yakubu Muazu, and exiled to Jalingo. In 2016, Dasuki died in exile at Abuja.

Similarly, Alhaji Umaru Abba Tukur was deposed as the Emir of Muri. He was placed under house arrest in Yola for 32 days then banished to Mubi. When he was released by order of a Federal High Court in Kano, he had spent 161 days in detention. In *Tukur v. Government of*

⁴⁸ 'Jaja of Opobo ... Resilience of a slave boy turned king', The Guardian (Sunday Magazine) 19th May, 2019, <https://guardian.ng/sunday-magazine/jaja-of-opobo-resilience-of-a-slave-boy-turned-king/>. Visited on 17-10-2019

⁴⁹ 'Ovonramwen King of Benin', *Encyclopaedia Britannica*, <https://www.britannica.com/biography/Ovonramwen>. Visited on 17-10-2019

⁵⁰ (1931) AC 662

*Gongola State (No.2)*⁵¹ it was argued that being a traditional ruler does not derogate from the right to freedom of movement guaranteed under Section 38(1) of the Constitution of the Federal Republic of Nigeria 1979. The right to freedom of movement was enforced. Regrettably the decision was overturned at the Supreme Court on grounds that the Federal High Court lacked jurisdiction over chieftaincy matters, which was held to be the principal claim. The dichotomy between principal and ancillary claims in fundamental rights enforcement regime in Nigeria has been criticized as being defeatist by scholars⁵².

In *Attorney-General & Commissioner of Justice, Kebbi State v. Jokolo & Ors*⁵³ the Court of Appeal held that the banishment of Al-Mustapha Jokolo, the 19th Emir of Gwandu after he was dethroned was a violation of the right guaranteed under Section 41(1) CFRN 1999. On 3rd June, 2005 the Governor of Kebbi State, Adamu Aliero, dethroned Jokolo and banished him to Lafia and subsequently to Obi in Nasarawa State. On 29th March, 2006 at about 1:30am he was forcefully removed from the National Hospital Abuja, presumably by agents of the Governor of Kebbi State from his sick bed, handcuffed and taken to Lafia, then to Obi. The Federal High Court enforced his right to freedom of movement and Kebbi State appealed the ruling.

According to the Court of Appeal, although Jokolo founded his action *inter alia* on section 41(1) CFRN 1999, the lone issue for determination was whether the granting of unrestricted freedom of movement by the lower Court that he should return to Kebbi State and Gwandu Emirate would not lead to a breach of peace and insecurity. Thus the main issue was the source of the power of the Governor of Kebbi State to banish and restrict the Appellant to Lafia and subsequently Obi in Nasarawa State after he was dethroned. The other issue was if the Federal High Court has powers to grant the Appellant unrestricted freedom of movement. In affirming the decision enforcing the Appellant's right to freedom of movement, TUR JCA, held:

“My answer to the lone issue is that the learned Federal Judge in the Court below had constitutional authority and power to have granted the 1st respondent unrestricted freedom of movement in Kebbi State and indeed, in any State of the Federation as there was no iota of evidence that his free movement threatened or would threaten the peace and security of Kebbi State”⁵⁴

Kebbi State governor was said to have acted pursuant to the state's Chiefs Law. Although the practice of dethronement and banishment of traditional rulers are of colonial antiquity, several

⁵¹ (1989) 4 NWLR (Part 117) 517

⁵² See for example E. S. Nwauche, 'The Dubious Distinction between Principal and Accessory Claims in Nigerian Human Rights Jurisprudence', *Journal of African Law*, Vol. 52, No. 1 (2008), School of Oriental and African Studies. https://www.jstor.org/stable/27607998?readnow=1&refreqid=excelsior%3A2bb53b8b2ff09c26deab41198eff6291&seq=7#page_scan_tab_contents. Visited on 10-10-2019

⁵³ (2013) LPELR-22349(CA)

⁵⁴ At page 49 A- B

State Chieftaincy laws contain a replica of such colonial laws with which dethroned traditional rulers are exiled from their place of residence.

In *Eshugbayi Eleko v Administrator of Government of Nigeria*⁵⁵, the Privy Council considered section 2 of **Deposed Chiefs Removal Ordinance 1917 (as amended in 1925)**. **Section 39** of the **Obas and Chiefs of Lagos State Law**⁵⁶ contains similar but slightly mitigated provisions. The Governor of Lagos State may in the interest of public safety or public order ban a deposed Oba from the Administrative Division in which his area of jurisdiction is located⁵⁷. This is for a period of six months which can be extended for a further six months⁵⁸. **Section 39(4)** creates a crime punishable by six months without an option of fine. After serving the mandatory jail term, the deposed oba would still proceed on exile as stated in the order. **Section 27** of the **Chiefs Law of Oyo State**⁵⁹ contains similar but even more frightening provisions for the “deportation” of a suspended or deposed chief. The Governor of Oyo State may order for the “deportation” of a suspended or deposed chief if he “*shall consider that in the interests of public safety or public or public order*” an order of “deportation” to any place in the State should be made⁶⁰. Such a deportation order may be for a specified time or indefinite, and may require the “deported” chief to be reporting himself to the nearest “administrative officer” or police officer at prescribed intervals⁶¹. It is a criminal offence to ignore the “deportation order” or reporting order. This may be punished with imprisonment for six months followed by deportation under the old order or a new order⁶².

In *Abubakar Umaru Abba Tukur v Government of Taraba State & 2 Ors.*⁶³ (which was a latter attempt to secure justice in the Emir of Muri saga) issues were joined over the appropriate provision for handling the Tukur deposition. This was with regards to **Chief (Appointment and Deposition) Law**⁶⁴, Section 1(1)(d) of **Decree No. 17 of 1984** or **Ex-Native office Holders of Removal Law**⁶⁵. Section 2 of the last said law is in *pari materia* with the 1917 Ordinance and other State laws considered above. Regrettably, like the first attempt which was botched by approaching the wrong Court, this second attempt to hear the case on the merits

⁵⁵ Supra

⁵⁶ Law No. 6 of 1981 Cap. O2, Laws of Lagos State 2015

⁵⁷ See section 39(1)

⁵⁸ See section 39(2)

⁵⁹ Cap. 28 Laws of Oyo State of Nigeria 2000

⁶⁰ Section 27(1)

⁶¹ Section 27(3)

⁶² Section 27(5)

⁶³ (1997) LPELR-3273(SC)

⁶⁴ Cap. 20 Volume 1 Laws of Northern Nigeria, 1963 (applicable to Gongola State)

⁶⁵ Cap.41 of Laws of Northern Nigeria, 1963 (applicable in Gongola State)

also ended in fiasco having been brought in the right Court under the wrong procedure. The Supreme Court rejected the practice of bringing claims other than fundamental rights enforcement claims under the enforcement procedure Rules.

On 9th March, 2020, the Emir of Kano, Sanusi Lamido Sanusi (Muhammadu Sanusi II) was deposed by the governor of Kano State, Abdullahi Ganduje. Sanusi is a grandson of Muhammadu Sanusi I deposed by Ahmadu Bello in 1963 and banished to Azare. Sanusi was banished from Kano State and forcibly taken to Loco in Nasarawa State from where he was eventually settled at Awe, also in Nasarawa State. He got an interim relief from a Federal High Court sitting in Abuja following an application for enforcement of his fundamental right to freedom of movement among others. He then relocated to Lagos State, his preferred abode⁶⁶.

It is submitted that any Chiefs Law in Nigeria which provides for restriction on the right to freedom of movement of a deposed traditional ruler by banishing, exiling or “deporting” him to any place within or outside the State which is not his choice of residence, is an unjustifiable infraction of the provision of Section 41(1) CFRN 1999. Such law would not, in our respectful view, pass the derogation test⁶⁷.

4.00 FREE MOVEMENT OF PERSONS AND THE RIGHT TO A PASSPORT

In order to leave Nigeria and enter another country, a citizen of Nigeria requires a Nigerian passport. Although the Constitution has not expressly guaranteed the citizen’s right to hold a passport, judicial decisions have converged that the right to hold a passport is an important content of the right to freedom of movement. Immigration Act requires every passenger who departs Nigeria to satisfy an immigration officer that he is a holder of “valid travel document”.⁶⁸

In *Shugaba v Minister of Internal Affairs*⁶⁹, the Applicant was deported to Chad on grounds that he was not a Nigerian citizen. In the course of his ordeal, his Nigerian passport was also seized. It was held that the seizure of his passport was a violation of his right to freedom of movement as the seizure would affect his freedom to exit from Nigeria.

Denying a citizen the means of exit from the country such as his passport is a violation of the right of movement⁷⁰. To enter another country, a person must have a passport. So once a person

⁶⁶ <https://www.thisdaylive.com/index.php/2020/03/14/sanusi-lands-in-lagos-as-abuja-court-frees-him-from-detention/>. Accessed on 24-8-2020.

⁶⁷ A fuller discussion on the issue of derogation is available at paragraph 5.00 below.

⁶⁸ See section 17(1) of the Immigration Act 2015

⁶⁹ Supra

⁷⁰ Yinka Olomjobi, *op. cit.*, p. 286

is denied of his passport, the person is also denied the right of exit⁷¹. See *Agbakoba v Director of State Security Service*⁷² (Court of Appeal) and *Director of State Security Service v Agbakoba*⁷³ (Supreme Court). Agbakoba, a legal practitioner, was invited by the Netherlands Organisation for International Development and Cooperation to participate in a conference at The Hague. At the Lagos airport, officials of the State Security Service (SSS) confiscated his passport. No reason was given. He was directed to report the following morning at their headquarters. When he reported, he was informed that the director was unavailable. He then applied to enforce his fundamental right to freedom of movement.

The High Court dismissed the application on grounds that the applicant did not show that he has a legal right to his passport since the passport contains a caveat: “THIS PASSPORT REMAINS THE PROPERTY OF THE NIGERIAN GOVERNMENT AND MAY BE WITHDRAWN AT ANY TIME”. The Court of Appeal disagreed and held that inherent in the right to freedom of movement enshrined in the Constitution is the right to hold a passport, which is necessary to the exercise of the right to movement. Thus the statement on the passport would not mean that a passport would be arbitrarily impounded as done by the SSS.

The Supreme Court held that the right to hold a passport goes together with the right to freedom of movement⁷⁴. It considered section 5 of the now defunct **Passport (Miscellaneous Provisions) Act**⁷⁴ on ‘cancellation and withdrawal of passport’, which provides thus:

“5(1) The Minister may, at any time, cancel or withdraw any passport issued to any person if –

- (a) the passport is obtained by fraud;
- (b) the passport has expired;
- (c) a person unlawfully holds more than one passport at the same time;
- (d) it is in public interest to do so.

(2) The number of the passport, name and particulars of the holder of any passport withdrawn or cancelled pursuant to the provisions of sub-section (1) of this section shall be published in the Federal Gazette.”⁷⁵

⁷¹ J. O. Akande, *Introduction to the Constitution of the Federal Republic of Nigeria 1999*, MIL Publishers (2000) p. 103

⁷² (1994) 6 NWLR (Part 351) 475

⁷³ (1999) 3 NWLR (Part 595) 314

⁷⁴ Cap. 343, Laws of the Federation of Nigeria 1990. The law was originally promulgated as Decree No. 15 of 1985, effective 8th August, 1985. It is Cap. P1, Vol. 12 Laws of the Federation of Nigeria 2010. Note that the law was repealed by the Immigration Act 2015, which is the extant law.

⁷⁵ Section 114 of the Immigration Act 2015 has repealed the Passport (Miscellaneous Provisions) Act. Section 13 of the Act substantially re-enacts section 5 of the repealed Act but dropped sub-paragraphs (b) and (d) on ‘expiration’ and ‘public interest’. This is a welcome development since it is unreasonable to withdraw a passport on grounds of expiration when the practicable step is to renew it. Also ‘public interest’ as a ground for withdrawal is quite vague and prone to abuse by authorities.

The Supreme Court disagreed that the action of the SSS could be justified under this provision. The relevant minister is the Minister of Internal Affairs. The SSS do not work under the minister and so what happened was a seizure and not a cancellation or withdrawal. Also even if the passport was seized by Immigration officials who work under the Minister, there must have been a clear and unambiguous delegation of the minister's power to them⁷⁶. The Supreme Court was also of the view that since the State Security Service Act does not authorize the SSS to seize a citizen's passport, the action could not be legally justified.

On the relationship between the right to freedom of movement and the passport, the Court of Appeal, per Ayoola JCA (as he then was) in *Agbakoba's Case*⁷⁷, held thus:

“The legal nature of and incidents of the passport had been noted. Without it the citizen will normally not be able to leave the country and is subjected to enormous handicap such as would effectively make foreign travel impossible. He would be deprived of an internationally accepted document evidencing his nationality and identity with the consequence that he would normally be refused entry into other countries. He would be denied the assurance while abroad, of the protection of his state as a citizen of Nigeria.... The right of free movement, particularly not to be refused entry and exit from Nigeria, will be empty without a concomitant right not to be deprived of the document which makes such movement possible”

The facts of *Attorney-General of the Federation v Ajayi*⁷⁸ are similar to *Agbakoba's Case*. In that case, the Respondent, a lawyer, was billed to attend the 8th Biennial Conference of the International Bar Association at Edinburgh, Scotland. On 7th June, 1995, while waiting for his flight at the airport in Lagos, an operative of the State Security Service approached him and demanded for his passport. He obliged and the operative seized the passport as a result of which he was unable to attend the conference which took place between 10th and 15th June, 1995.

The respondent brought an application at the Federal High Court to enforce his right to freedom of movement under section 38 of the 1979 Constitution and Article 12(2) of the African Charter. The Court, per Odunowo J, enforced his right but awarded ₦2 million as damages instead of ₦10 million claimed. Dismissing the appeal, and allowing the cross-appeal by increasing the damages to ₦5 million, the Court of Appeal, per Aderemi JCA (as he then was) held thus:

“A necessity of the exercise of that natural right by a person particularly with respect to moving from one country to another, is the possession of a passport. The right to freedom of movement and the right to freedom to travel outside Nigeria are both guaranteed by the Constitution to the citizens – see: Section 38(1) of the Constitution of the Federal Republic of Nigeria, 1979 (as amended)”⁷⁹.

⁷⁶ See section 3 of the Minister's Statutory Powers and Duties (Miscellaneous Provisions) Act

⁷⁷ (1994) 6 NWLR (Part 351) 475

⁷⁸ (2000) 12 NWLR (Part 682) 509

⁷⁹ *Supra* at page 536 E

Again the Court of Appeal considered the terms of cancellation and withdrawal of a passport spelt out in section 5 of the **Passport (Miscellaneous Provisions) Act** and relied on the decision of the Supreme Court in *Director of SSS v Agbakoba* to come to the conclusion that seizure of a passport by SSS does not come within the terms of those provisions. This is in our respectful view, a correct interpretation of that statutory provision. It would amount to leaving the provision vagrant and unrestrained for every whimsical act of a state agency to be excused under that provision. If the minister exercises his power, he ought to state his reasons and publish same in the Federal Government Gazette⁸⁰. This in our view will enable a person affected to seek judicial review if he feels the power was wrongly exercised.

In *Abdoufeid v Libya*⁸¹ and *Marques de Morais v Angola*⁸², the Human Rights Committee found violations of Article 12(2) of the ICCPR on the right to leave one's own country where States confiscated the Authors' passports without lawful justification and prevented them from leaving. This was also the approach taken by the Committee in *Bahamonde v Equatorial Guinea*⁸³ and *El Dernawi v Libya*⁸⁴ where passports were seized under similar circumstances. In *El Ghar v Libya*⁸⁵ the Committee held that *laissez-passer*⁸⁶ cannot be considered a satisfactory substitute for a valid passport that would enable a person to travel abroad.

In the Nigerian jurisdiction, by its statutory definition a 'passport' means –

“with reference to the person producing it a travel document furnished with a photograph of such person and issued to him by or on behalf of the country of which he is subject or a citizen and for a period which according to the laws of that country has not expired and includes any other similar document approved by the government establishing the nationality and identity of the person to whom it refers to the satisfaction of an immigration officer”⁸⁷

The power to issue a Nigerian Passport is vested in the Comptroller-General of Immigration⁸⁸. Nigerian Passports can only be issued to bona fide Nigerians, within and outside Nigeria⁸⁹. For the purpose of application for a Nigerian Passport, 'passport' is defined to mean -

⁸⁰ See section 13(2) of the Immigration Act 2015. The provision is a partial re-enactment of the repealed section 5(2) of the Passport (Miscellaneous Provisions) Act, which was considered in the *Agbakoba* and *Ajayi* Cases.

⁸¹ Supra

⁸² Supra

⁸³ Communication No. 468/1991, para. 9.3

⁸⁴ Communication No. 1143/2002, para. 6.2

⁸⁵ Communication No. 1107/2002, para. 7.2

⁸⁶ A diplomatic travel document issued by the United Nations under Article VII of the 1946 Convention on the Privileges and Immunities of the United Nations in its offices in New York and Geneva, as well as by the International Labour Organization (ILO)

⁸⁷ See section 116 of the Immigration Act 2015

⁸⁸ Section 9(1)

⁸⁹ Section 9(2)

“A document of protection and authority to travel issued by the Nigeria Immigration Service to Nigerians wishing to travel outside Nigeria, and includes as defined in section 10(3) and (4) of this Act, the following –

- (a) a standard Nigerian passport;
- (b) a Nigerian Diplomatic Passport;
- (c) a Nigerian Pilgrim’s Passport; and
- (d) a Seaman’s Passport or Seaman’s Certificate of Identity”⁹⁰

The right to hold a passport is bound up together with the right to freedom of movement. Thus if a citizen is unjustifiably barred from leaving Nigeria, his right to freedom of movement would have been unconstitutionally curtailed. Since a citizen needs his passport to leave Nigeria, to deny him of the use of his passport is, on the face of it to deny him the freedom of moving from one country to another⁹¹. Where high price of obtaining a passport and bureaucratic bottlenecks associated with it pose as obstacles to procurement of passports by citizens, that would be a curtailment on the right.

5.00 LIMITATIONS AND RESTRICTIONS ON THE RIGHT TO FREEDOM OF MOVEMENT

The right to freedom of movement is not absolute. Like most rights, it has claw-backs. The right therefore has constitutionally recognized restrictions. This is not peculiar to Nigeria as will be seen in the next segment when select constitutions are compared on the subject.

Limitation and Restrictions to the Right to Movement in International Law

In international law, the right is restricted and not absolute as Article 12(3) of the **International Covenant on Civil and Political Rights** provides thus on the right to freedom of movement:

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Similarly, Article 12 of the **African Charter on Human and Peoples Rights** provides thus:

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

⁹⁰ Section 9(5)

⁹¹ *Attorney-General of the Federation v Ajayi* (supra) @ 537 C –D, per Aderemi JCA

The underlined words in the considered international law instruments point to a universality of restrictions on and derogations from the right to freedom of movement.

Limitations in Section 41(2) CFRN 1999

Section 41(2) CFRN 1999 contains a special limitation clause which provides thus:

- “(2) Nothing in subsection (1) of this section shall invalidate any law that is reasonably justifiable in a democratic society –
- (a) imposing restrictions on the residence or movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria; or
 - (b) providing for the removal of any person from Nigeria to any other country to:-
 - (i) be tried outside Nigeria for any criminal offence, or
 - (ii) undergoing imprisonment outside Nigeria in execution of the sentence of a court of law in respect of a criminal offence of which he has been found guilty:

Provided that there is a reciprocal agreement between Nigeria and such other country in relation to such matter.”

Restriction on the Right to Leave Nigeria

Section 41((2)(a) is a limitation on the right to exit from Nigeria and would for example justify the judicial seizure of an accused person’s passport while he is undergoing trial or a convict undergoing punishment or their incarceration within Nigeria. Thus where a citizen is standing trial for a crime for which he has been charged, there can be a constitutionally permissible derogation from his fundamental right to leave Nigeria.

On the limitation on the right to leave Nigeria, the Court of Appeal held in *Kalu v Federal Republic of Nigeria & Ors.*⁹², per Eko JCA, thus:

“And Section 41 (2)(a) of the Constitution says that the right to freedom of movement may be deprived under a law that is reasonably justifiable in a democratic society that imposes restrictions on the "movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria". An application for enforcement of a party's fundamental right presupposes the right has been, is being or is likely to be violated otherwise than in accordance with the procedure permitted by law. That argument will be defeated when it is apparent that the right has been deprived of in accordance with the procedure permitted by law”

⁹² (2012) LPELR-9287(CA) @ p. 45 B - E

Extradition: A Restriction on the Right not to be Expelled from Nigeria

Section 41(2)(b) CFRN 1999 provides for another limitation on the right to freedom of movement in Nigeria. This can be regarded as a limitation on the right not to be expelled from Nigeria. The provision justifies the extradition of a suspect to another country which requires him to answer attend and respond to an allegation of commission of an offence or to serve punishment for an offence for which he has been convicted. This is known as extradition of suspects or fugitive offenders to another country for trial or punishment. Extradition is therefore one of the constitutionally permitted limitations to the right of a citizen not to be expelled from Nigeria against his wish.

The term refers to a process whereby, under a treaty, or on the basis of reciprocity, a state surrenders to another, on its request, an accused person or convict for crimes committed against its laws, for trial. This applies only to where the crime was committed in the requesting state. Extradition processes are carried out through diplomatic channels, and the rationale for its principles is so that serious crimes may not go unpunished, especially when the state where the criminal is cannot try him because of technical rules as to jurisdiction thus the maxim, '*aut punire aut dedere*' (to punish or to deliver). Also the state in which the crime was committed is best equipped in terms of evidence, facilities and interests, to try the accused⁹³.

Extradition can only arise when there is a bilateral treaty between the requesting and the host states⁹⁴. This is called the Mutual Legal Assistance Treaty. The Nigerian Constitution stated this in the proviso to section 41(2)(b). The constitution thus excludes any form of extradition to states which do not share bilateral treaties with Nigeria on extradition. When there is a Mutual Legal Assistance Treaty between Nigeria and the requesting State or vice versa, extradition can be explored, otherwise there is no binding duty to release the requested subject. Once the treaty is in place the extradition procedure is a matter for the municipal law.

Only the National Assembly can make law on extradition⁹⁵. Section 41(2)(b) thereof justifies a law which derogates from the right to freedom of movement for the purposes of extradition. Also by virtue of section 251(1)(i) thereof, all civil causes and matters regarding extradition are within the exclusive original jurisdiction of the Federal High Court. The same Court has

⁹³ Kehinde M. Mowoe, *op. cit.* p. 496

⁹⁴ **Udezor v Federal Republic of Nigeria** (2007) 15 NWLR (Part 1058) 499 @ 522 B

⁹⁵ See Item 27 of the Exclusive Legislative List, Part 1, Second Schedule, CFRN 1999

criminal jurisdiction over extradition by virtue of Section 251(3) CFRN 1999. Appeals lie from that court to the Court of Appeal and the Supreme Court.

The key domestic statute governing extradition in Nigeria is the Extradition Act⁹⁶. The original legislation was a decree promulgated on 31st December, 1966 and took effect on 31st January, 1967. It repealed all previous extradition laws made by or applicable to Nigeria and provided for a more comprehensive legal regime with respect to extradition of fugitive offenders⁹⁷. According to Momodu⁹⁸, one of the reasons for the enactment of the Extradition Act 1966 was Chief Anthony Enahoro's extradition case, which revealed the inadequacies of the Fugitive Offenders Act 1881.

The Act vests jurisdiction on Magistrate Courts. In *Orhunu v Federal Republic of Nigeria*⁹⁹ the Court of Appeal held that the Federal High Court has jurisdiction over extradition subject to modifications of the 1966 Act by virtue of section 315 CFRN 1999. On 23rd December 2014, President Goodluck Jonathan issued the **Extradition Act (Modification) Order 2014**¹⁰⁰. The Executive Order modified the Act to conform with the Constitution by modifying the forum from the Magistrates Court to the Federal High Court.

Extradition runs on the principle of reciprocity. Thus where a treaty or any extradition agreement has been made by Nigeria with any other country for the surrender, by each country to the other, of persons wanted for prosecution or punishment, the President may by order published in the Federal Gazette apply the Act to that country¹⁰¹. In *Attorney-General of the Federation v Kingsley Edegbe*¹⁰² the Federal High Court struck out an application for extradition to the Netherlands on grounds that there was no mutual treaty between Nigeria and the Netherlands. The application did not comply with section 1(1) of the Extradition Act.

⁹⁶ Decree No. 87 of 1966, effective 31st January, 1967; retained as Cap. E25, Laws of the Federation of Nigeria 2004

⁹⁷ See the Long Title to the Act

⁹⁸ Momodu Kassim-Momodu, 'Extradition of Fugitives by Nigeria', *International and Comparative Law Quarterly*, (1986). Volume 35, Number 3. (July 1986), (Cambridge University Press on behalf of the British Institute of International and Comparative Law) p. 514

https://www.jstor.org/stable/759768?readnow=1&refreqid=excelsior%3A41b9f3d5df82a0b8ff182842fc0bb85f&seq=6#page_scan_tab_contents. Visited on 29-10-2019

⁹⁹ (2004) LPELR-5880 (CA). Also reported in (2005) 1 NWLR (Part 906) 39

¹⁰⁰ S.I. No. 41 of 2014, published Gazette No. 119 in Vol. 101 of 24 December, 2014

¹⁰¹ Section 1(1) Extradition Act

¹⁰² Suit No. FHC/ABJ/CS/907/2012, Judgment delivered on 1st July, 2014, per Mohammed J (See Case No. 3, *Cases and Materials on Extradition in Nigeria*, United Nations, United Nations Office on Drugs and Crime (Abuja, 2016), pp. 476 - 489)

Extradition would be refused if the subject will be punished for his beliefs and opinion in a discriminatory manner.¹⁰³ In *George Udeozor v Federal Republic of Nigeria*¹⁰⁴, the Court of Appeal restated that extraditable crimes must be those commonly recognized as *malum in se* (acts criminal by their very nature) and not those which are *malum prohibitum* (acts prohibited as crimes by statute). Note that the Attorney General of the Federation and the Court are empowered by the Act to prevent extradition for a non-extraditable offence¹⁰⁵.

Limitations in Section 45(1) CFRN 1999

Section 45(1) CFRN 1999 contains general provisions on limitation on the right to freedom of movement and some other fundamental rights. Section 45(1) states thus:

- (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
 - (a) in the interest of defence, public safety, public order, public morality or public health; or
 - (b) for the purpose of protecting the rights and freedom of other persons

This provision justifies, *inter alia*, restrictions on the freedom of movement and thus personal liberty of suspects and convicts, in terms of detention, imprisonment and preventive detention as allowed by the Constitution¹⁰⁶. It can also be used to justify imposition of curfew and has been used to justify restriction of a person's movement to a particular place¹⁰⁷, or restriction on exit of citizens to "enemy" countries¹⁰⁸. In *Lovelace v Canada*¹⁰⁹, the Human Rights Committee interpreting the claw-back clause in Article 12(3) of the ICCPR, held that it is permissible to restrict the categories of persons entitled to live on tribal reserves, for the purpose of protecting the resources and preserving the identity of the tribe.

While according judicial recognition the effect of the restriction clauses of the Constitution on the right to hold a passport, the Court of Appeal said thus in *Agbakoba v Director of SSS* thus:

“Admittedly, freedom of movement is not absolute. There may be circumstances of derogation. But as this case is not concerned with any circumstance of derogation, the question posed will be addressed without consideration of the nature and scope of any restriction to the freedom of movement or to any concomitant of the right not to be refused exit from the country, cannot be made subject to any limitation not

¹⁰³ Section 3(2)(a)

¹⁰⁴ (2007) 15 NWLR (Part 11058) 449

¹⁰⁵ Section 3(1) Extradition Act

¹⁰⁶ See section 35 CFRN 1999

¹⁰⁷ See *Oba G. I. Orioge v The Governor of Ondo State* (1982) NCLR 349

¹⁰⁸ Kehinde Mowoe, *op. cit.* at p. 497

¹⁰⁹ Communication No. 24/1977

*sanctioned by the derogation clause of the Constitution even though issuance of passports may be subject to reasonable regulations sanctioned by law*¹¹⁰.

When the question is whether a particular derogating law is reasonably justifiable in a democratic society, it is a question for the Courts to decide¹¹¹. The restrictions however mean that the right to freedom of movement is not absolute. There are two major ways the Courts have approached derogation. A law which derogates from a fundamental right may be approved and upheld as being a reasonably justifiable limitation. A law or an executive order also be struck down or set aside as being unconstitutional for unjustifiably derogating from the right¹¹².

In *Director of SSS v Agbakoba*¹¹³, the Supreme Court rejected the Respondent's contention that his passport was withdrawn in public interest under section 5(1) of the Passport (Miscellaneous Provisions) Act. It reasoned that the expression could only mean the same as the words used in section 41(1) CFRN 1979 (in pari material with section 45(1) CFRN 1999). The question whether the power to withdraw or cancel a passport in "public interest" was avoided on grounds that the SSS was not the minister authorized to withdraw or cancel, and since they did not purport to act pursuant to section 41(1). With respect, the second ground is a common error ran into by the Courts. A restriction pursuant to sections 41(2) and 45(1) CFRN 1999 can only be legislated. It is submitted that an act or an omission cannot be justified under the provisions. Justifiability of acts and omissions do not come under the restrictions. Only a legislation can come under the provisions, *id est* a written law¹¹⁴.

However, in *Attorney General of the Federation v Ajayi* it would appear that the power of the minister to cancel or withdraw a passport in the public interest was upheld by the Court of Appeal. Aderemi JCA held thus-

*"But the right to hold a passport is subject to the provisions of the Passport (Miscellaneous Provisions) Act Cap. 343 Laws of the Federation of Nigeria, 1990"*¹¹⁵

This statement was made obiter. Yet, when married with the statement of the Supreme Court in *Agbakoba's* case on the status of the conditions stated in the Passport Act, it should be enough to assume that the conditions in the successor legislation, the Immigration Act 2015, are reasonably justifiable under section 45(1) CFRN 1999. All the minister needs to do is to

¹¹⁰ (supra) at p. 497, per Ayoola JCA (as he then was)

¹¹¹ See *Federal Minister of Internal Affairs & Ors. v Shugaba A. Darman* (1982) 3 NCLR 349

¹¹² See for example the approach of the Court of Appeal in *Chief Arthur Nwankwo v State* (1985) 6 NCLR 645. In *Re Williams v Majekodunmi (No. 3)*(supra) the Restriction Order curtailing the Appellant's movement was set aside.

¹¹³ (Supra) at p. 359 E

¹¹⁴ *Faith Okafor v Lagos State Government*(supra) at p. 429 C – H; p. 439 A, per Ogakwu JCA

¹¹⁵ (Supra) at p. 536 – 537 F – H

follow due process in cancellation or withdrawal. It must not be done arbitrarily and the minister must give reasons for his action in line with the provisions of the law¹¹⁶. It is submitted that actions taken by the minister under the law are subject to judicial review.

It is therefore submitted that the statement obiter by Aderemi JCA that “*the exercise of such powers by the Minister derogates from the provisions of section 38(1) [now section 41(1)] of the Constitution. I shall not want to go further*”¹¹⁷, is, with due respect, wrong. His lordship declined to elucidate, obviously because the issue was not before him. It is however clear from the deductions made from the *Agbakoba* and *Ajayi* cases, and the recognition of limitation that the conditions for withdrawal of a passport set out in the defunct Passport Act are justified under section 45(1). The conditions are substantially re-enacted in the extant legislation¹¹⁸.

In *Faith Okafor v Lagos State Government*, the High Court held that the Environmental Sanitation Edict of Lagos State was reasonably justifiable under section 41(2) CFRN as to derogate from the right to freedom of movement. The Court of Appeal overturned this decision on grounds that there was nothing in section 41(2) that justifies restricting movement for environmental sanitation¹¹⁹. It turned out that there was indeed no provision of that law limiting the right. The restriction was apparently based on a mere directive by the governor (not even a proper Executive Order). However, neither the High Court nor the Court of Appeal mentioned or considered the ‘public health’ element in section 45(1) CFRN, even if as an obiter. This again might have been academic in the absence of a legislation to that effect.

The interest of defence can arise from laws prohibiting people from moving around or having their residence in security-sensitive places. Public health interest can arise under laws restricting movement, be it entry or exit in some places, or establishing and enforcing quarantines in the event of outbreak of infectious disease like in the case of Ebola virus outbreak of July, 2014 in Lagos and Port Harcourt, and the recent nationwide outbreak of corona virus. In cases of serious public health emergencies, laws and regulations derogating from section 41(1) would be reasonably justifiable¹²⁰. This research shows that Nigeria lacks a modern legal regime for infectious disease surveillance and control. The outbreak of corona virus saw Federal and State governments struggling in confusion over legal frameworks to limit the right to movement and other fundamental rights in combating the pandemic.

¹¹⁶ See *Director of SSS v Agbakoba* (supra) at p. 358 D, per Ogundare JSC

¹¹⁷ At p. 537

¹¹⁸ See section 13(1) of the Immigration Act 2015. There are now only two conditions, namely if a person obtained the passport by fraud, or a person unlawfully holds more than one passport at the same time.

¹¹⁹ See p. 429 A – B, per Ogakwu JCA

¹²⁰ See sections 2 and 3 The Quarantine Act 1926; section 2(j) National Health Act, sections 1, 2 and 4(c) National Centre for Disease Control and Prevention (Establishment) Act 2018

The Quarantine Act 1926 is an archaic piece of colonial legislation which has since become unrealistic. There is need for urgent legislative interventions in the public health sector. The existing regime lacks coherent ability and capacity to provide a solid legal framework for necessary derogation from the right to freedom of movement or even personal liberty in times of infectious disease outbreak in Nigeria or a part of it. The Nigeria Public Health (Quarantine, Isolation and Emergency Health Matters Procedure) Bill, designed to intervene in the existing archaic legal framework, has been lying before the National Assembly for years now.

There have been some knee-jerk efforts to set up a legal framework in the midst of the pandemic. The House of Representatives introduced Control of Infectious Diseases Bill 2020. The Senate has also introduced the National Health Emergency Bill 2020 to replace the Quarantine Act 2020. Both bills have been met with suspicion and opposition from some sections of the public who are calling for full public hearings.

Derogations are like claw-back clauses in international treaties. Some scholars have criticised uninhibited use of claw-back clauses in regional human rights enforcement. For example, Mapuva argues that claw-back clauses that litter the African Charter give easy escape route to States to violate the same rights sought to be protected by the charter¹²¹. However, it is submitted that since the right to freedom of movement is not absolute, effective judicial review by an independent judiciary will continue to act as a check so that lawful derogations do not in effect render the right meaningless.

Permissible derogations cannot be so absolute in themselves as to take away the right itself. The laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution. Such laws must not impair the right itself. Furthermore, the law must not reverse the relation between right and restriction, and between norm and exception¹²².

To meet minimum standards, restrictions must meet the following criteria: (a) they must be necessary to protect the permissible purposes; (b) they must conform to the principle of proportionality; (c) they must be appropriate to achieve their protective function; (d) they must be the least intrusive instrument amongst those which might achieve the desired result; and (e)

¹²¹ Loveness Mapuva, 'Negating the Promotion of Human Rights Through "Claw-Back" Clauses in the African Charter on Human and People's Rights', published in *International Affairs and Global Strategy*, www.iiste.org ISSN 2224-574X (Paper) ISSN 2224-8951 (Online) Vol.51, 2016, <https://iiste.org/Journals/index.php/IAGS/article/view/34503/35504>. Visited on 30-10-2019

¹²² Human Rights Committee, General Comment No. 27: Freedom of Movement (Article 12) 1 November 1999, para. 13, <https://digitallibrary.un.org/record/366604>. Visited on 30-10-2019

they must be proportionate to the interest to be protected. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law¹²³.

6.00 CONCLUSION AND RECOMMENDATIONS

- 6.1 The right to freedom of movement stems from a basic physiological. It is the engine for social interactions and the advancement of innate drive for self-actualization goals. It is therefore at the centre of all rights. As important as the right to life is, a person can preserve his life if his right to movement is guaranteed; and a person can lose his life if he is unable to exercise his right to movement.
- 6.2 The Constitution permits derogations from the right which can sometimes be excessively exploited by authorities. The wide scope of the derogation clauses is noted. The paper is however of the view that the last recourse is and would be to continue to look up to judicial reviews by an independent judiciary to act as a check so that the sanctity of the right can be protected derogations remain within constitutional confines.
- 6.3 The right to hold a passport, being a major component of the right to freedom of movement, can be violated by the high costs associated with obtaining a passport, including cut-throat bureaucratic bottlenecks sometimes involved in the process of a obtaining a passport or renewing a passport.
- 6.5 While there are constitutional provisions which can be interpreted to have dealt with the indigene/settler dichotomy in Nigeria, there is need for a stronger legal framework to give every Nigerian the legal protection to reside in any part of Nigeria and be everything he or she can be without unlawful limitations or discrimination.
- 6.6 All State laws that provide for exiling, banishment or confinement of deposed traditional rulers needs to be amended to remove those provisions. When presented with appropriate cases, the Courts should strike down such legislations as they do not represent a valid restriction for 'public safety' or 'public order'. They are outlandish colonial laws which have no place in a democratic order.
- 6.7 The paper recommends that the right of a Nigerian citizen to hold a passport should be expressly stated in a constitutional amendment. This will put the right of exit in bold

¹²³ Raphael Kamuli, 'The Right to Freedom of Movement in Tanzania', https://www.academia.edu/39251756/THE_RIGHT_TO_FREEDOM_OF_MOVEMENT_IN_TANZANIA. Visited on 29-10-2019

relief. It will be a warning to officials who still recklessly impound passports. It will also constitute a legal burden on the Nigeria Immigration Service on the high cost of procuring a passport. The attendant bureaucratic bottlenecks in processing acquisition or renewal passports following the 'official way' will be put on trial.

- 6.8 All health bills proposed by the National Assembly should be harmonized and passed to streamline lawful restrictions in case of public health emergency. Clearly the Quarantine Act of 1926 no longer represents a trustworthy legal regime to clarify and guide fundamental rights issues associated with national health emergency situations.
- 6.9 A vibrant and independent judiciary is needed to liberally interpret the Constitution and laws imposing restrictions. Such bold and courageous judiciary is necessary to continue to act as check for arbitrary laws and violations by state actors.
- 6.10 The next generation of the right is sub-regional and regional integration. The ECOWAS Protocol on Free Movement of Persons and the much talked about 'African Passport' should be successfully implemented. Then a broader legal regime for cross-border migrations and integration through more open borders will be the African focus in the next decade. As a natural leader in Africa, Nigeria should be seen to quickly resolve local challenges and take the lead in the drive for Pan-African free movement of persons, goods and services. With Africa's internal borders still cast in 'iron curtain', the much-celebrated African Continental Free Trade Agreement (AfCFTA) can only blow a muted trumpet.

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