



EBSU JOURNAL OF INTERNATIONAL LAW & JURIDICAL REVIEW

VOLUME 3, 2014

ISSN 2141-4602

INTERNATIONAL LAW

The Approaches of the European Court of Justice and the English Courts to Parallel Proceedings in Different States Where the Matter Falls within the Scope of the Brussels Regulation I
Ojibara Hameenat Bukola

Domicile and the Determination of Personal Law: A Critique
L. A. Ayinla & G. H. Olusola

The Changing Frontiers of the Struggle for Group Rights in International Law: An Analysis
M. E. Nwocha Ph.D

Statelessness in International Law: An Aberration or Myth
P.E.O. Oguno, Ph.D & Chineze S. Obi-Okoye

JURISPRUDENCE & JURIDICAL ISSUES

An Overview of the Law, Practice and Prospects of the African Development Bank
Dr. Olokooba S.M, Dr. Olatoke J.O, Ibrahim Imam & NOA Ijaiya

Jurisprudential Aspects of Capital Punishment: Perspectives on the Retribution Theory
Akingbehin Emmanuel & Olugbenga Ph.D

Rethinking the Concept of Derivative Right to Passport within the Context of Freedom of Movement: The Universality of Judicial Attitude in Perspective
Ibrahim Imam

People Perish for Lack of Knowledge: Revisiting the Role of Custom in the Development of Nigerian Legal System
Dr. Babatunde Isaac Olutoyin

Fundamental Human Rights Enforcement Procedure in Nigeria: An Overview
G. A. Arowolo & J.O. Anwo

Application of the Precautionary Principle to Biodiversity Conservation in Kwara State, Nigeria
Ijaiya Bashir Leke

Rule of Law: Challenges in Nigeria and the Activities of Boko Haram
S.E. Kabo

An Appraisal of the Constitutionality of the Taxes and Levies Act (Approved list for Collection) Act, 2004
Nnaemeka B. Amadi

The Jurisprudence of Local Government Administration and the Challenges of Rural Development: The Nigerian Experience
U.D, Ikoni, Ph. D & Felicia Anyogu, Ph. D

An Overview of the Meaning and Effect of the Term "Oppression" in Relation to Confessional Statements
T.A. Yusuf

New Exceptions to the Without Prejudice Rule in Courts Litigation and Arbitration Practice
S.A.M. Ekwenzé

An Overview of Factors Affecting Foreign Investments and Corporate Taxation in Nigeria
D. C. John Ph.D

An Appraisal of Legal Development in Nigeria from a Feminist Perspective
Asikia Ige Ph.D

Executive Immunity, Abuse of Public Office and the Criminal Justice System in Nigeria: A Comparative Approach
B.O. Omoleye

The Concept of Unfair Dismissal in Nigerian Labour Law: An Appraisal
Dr. Rowland Alaba Akande

Can Child Labour be Eradicated? An Appraisal
Ibraheem Ojo Tajudeen

The Introduction of Clinical Legal Education into the Nigerian Law School: An Appraisal
Mercy Emetejife Onoriode

A Publication of the Department of International Law and Jurisprudence,
Faculty of Law, Ebonyi State University, Abakaliki

15/16

EBSU JOURNAL OF INTERNATIONAL LAW & JURIDICAL REVIEW

Rethinking the Concept of Derivative Right to Passport within the Context of Freedom of Movement: The Universality of Judicial Attitude in Perspective

Ibrahim Imam*

Abstract

Freedom of movement is considered a basic human right by majority of countries of the world. It encompasses the right to move internally within a country, the right to move abroad and the right to return from abroad. The relationship between freedom of movement and the protection of right of egress and ingress vide possession of passport has received a lot of attention from all over the world. However, relatively little has been said about judicial side of intervention in securing the promotion and protection of the right as concomitant to freedom of movement. This paper examines the universality of the right to freedom of movement on the one side, the derivative right to passport from freedom of movement (ingress and egress) and the judicial attitude in construing the right to hold passport as a contingent on the right of movement. The paper draws comparatively, experiences from few selected countries around the world as well as the right as protected under the regional and international conventions on Bill of Rights. The paper also examines the prerogative power of the government to impose restriction(s) on free movement.

1. Introduction

Human rights represent demand or claim which individual, group, association or community make on society, some of which are protected by laws and have become part of *lex lata* while others remain aspirations to be attained in the future.¹ Human rights, therefore, are the right one holds by virtue of being a human person, that is, the right naturally inhering in the human being.² It remarkably arises from no special undertaking beyond membership in human race. To enjoy human rights, one does not have to be anything other than a human being and neither does one do anything rather than be born a human.³ Understandably, human rights thus connote something of which no one may be deprived without great affront to justice.⁴

This paper reviews national security and public order restrictions on freedom of movement and how such right covers or is contingent upon holding an International Passport, right to ingress and egress as well as how court through its interpretative power construes the right to hold passport within the right to freedom of movement under the domestic and international law. In particular, this paper examines provisions constitution from other jurisdictions around the world as well as the regional and international conventions on fundamental human rights particularly, relevant provisions on citizens' right of movement. The aim being to establish the typical universality of freedom of movement, the commitment of countries around the world to the protection and promotion of human rights as well as judicial disposition to expounding freedom of movement to include the right of citizen to passport in recognition of the fact that the enjoyment of right of movement especially to travel abroad is contingent upon passport or other travel documents.

* Lecturer, Department of Public Law, Faculty of Law, University of Ilorin, Kwara State.

¹ Osita Eze, *Human Rights in African: Selected Problems* (Macmillan, Lagos, 1984), p. 5

² See Jack Donnelly, *Human Rights and Human Dignity: An Analysis of Human Rights* (1982) 76, *American Political Science Review*, p.305, see *West African Examination Council v. Adesanya* (2008) All FWLR (pt 428) 206

³ *Ibid*, pp. 305-306

⁴ Cranston M., "Human Rights: real and Supposed", Raphael (ed.) *Political Theory and the Right of Man* (Bloomington, 1967) p. 52, see *Dokubo Asari v. FRN* (2008) All FWLR (pt 433) 1384 CA

It is pertinent to state that the universality of human right cannot be overemphasized, because the international and regional conventions and countries with written constitutions incorporated in their provisions, a Bill of Rights for the promotion and protection of citizens' rights. Human rights are rights which should not be violated or invaded, something which is sacred and enable the individual to maintain his independence in a free society.⁵ This paper analyses the implications and limitations of this guarantee in relation to national security and public order and the freedom of individual to enjoy same. The paper further explores the way the courts within selected countries around the world struck a balance between the guarantee of freedom of movement on the one breath, and national security and public order concerns, on the other; how courts employ their interpretative power to expound the scope of fundamental right to freedom of movement to found a protection against unlawful denial of the right of ingress and egress. This paper explicates relevant judgments of Nigeria and other jurisdiction within this spectrum.

To empirically ground this paper's argument, it draws on evidence based on comparative example from other jurisdiction around the world on the judicial attitude in its interpretative powers on construction of freedom of movement and its extension to right to hold passport as contingent to free ingress and egress. The pivotal scenario resulting from interpretative surgeon of courts is explored in detailed and also explicates the constitutional basis for the interpretation. The judicial proprietary rights in responding to violation of freedom of movement and the notion of prerogative powers of the executive to deny or withdraw citizens' right to passport vis-à-vis the individual freedom to move in and out of the country would be established. The paper draws its inspiration from the Nigerian Supreme Court position in the cases of *DSSS v. Agabakoba*⁶ and the Indian case of *Menaka Ghandi v. Union of India*⁷ and experience from other jurisdictions around the world (i.e. Ghana, Zambia, Niger, South Africa, United States) to argue in favour judicial inference of right to hold passport as derivable from freedom of movement. The paper contends that allowing government to interfere with these significant rights is undemocratic and may cripple the spirit and letters behind the constitutional, regional and international protect of fundamental human rights.

It instructive to note that countries operating constitutional democracy, the Regional and International Conventions are committed to promotion and protection of human rights however, the rights are not absolute. Thus, fundamental human rights may be subject of restriction(s) for the purpose of safeguarding national security, maintain peace or public order.⁸ This paper contends that such restrictions are only legitimate if they are genuinely and clearly exercise in respect of rule of law and fundamental rights. Particularly, there must be a sufficient nexus between the restriction of movement and the risk of harm to national security, peace or public order. Thus, the guarantee of freedom of movement should imply that sanctions for breach of these restrictions may not be disproportionate to the contemplated harm to be caused.

2. The Interest of the Municipal Constitutions, Regional and International Conventions on Freedom of Movement

Global campaign for promotion and protection of fundamental human rights is a common phenomenon, universal in nature and character because, they are mostly established rights under the Constitution, the organic instruments which confers powers and creates rights and limitations.⁹ However, the extent of such powers, rights and limitations and their implications may be sought to be interpreted and explained by the court in cases properly brought before it.¹⁰ The significance of the right to movement under consideration transcends intrastate movement especially, in the modern world where convenient transport is available to most parts of the world by road, rail, air and sea, and a great many

⁵ See Chris Maina Peter, Fundamental Rights and Freedom in Kenya, (1991) 3(1), *African Journal of International and Comparative Law*, pp. 66-98 at 67

⁶ (1999) 3 SC 59

⁷ AIR (1978) SC 507

⁸ See generally, Kirby M. D., Harare Declaration on Human Rights (1989) 15(3), *Commonwealth Bulletin*, pp 99

⁹ *Balonwu v. Governor of Anambra State* (2009) 12 MJSC (pt ii) 40 at 61

¹⁰ Cranston M., *Human Rights Real and Supposed*, p. 52

people routinely take advantage of this for purposes of study, research, business, vacations, family visits, medical treatment, weddings, funerals, migrant workers, refugees, journalists and many others.¹¹

Therefore, a great part of the right to free movement or the denial within national and international borders can have profound effects upon other basic human rights as outlined in the various Human Rights conventions and treaties.¹² For instance without the right to leave ones home, an individual may be politically repressed, prevented from observing his/her chosen religion, prevented from enjoying the basic right to marriage or family life, or blocked from a job or an educational pursuit that ultimately could enhance his/her quality of life.¹³ Thus, while free movement may seem on the surface to be a fairly insignificant and obvious human right, it is actually one of the most basic rights that in many nations around the world, when violated; cause numerous problems and cases of suffering.¹⁴ The inalienability of right to movement like any other fundamental rights extends to all citizens globally. Thus, it may seem that this right is meant to apply to individuals in any country, immigrants, economic migrants, students, refugees and asylum seekers etc. the next part of the paper shall focus on the instrument regulating freedom of movement globally.

3. Constitutions, International and Regional Instruments on Freedom of Movement

Given the above explanations, it is important to note firstly that international legal instruments take the form of a treaty (also called agreement, convention, or protocol) that binds the contracting states to the negotiated terms.¹⁵ When negotiations are completed, the text of a treaty is established as authentic and definitive and is "signed" by the representatives of states.¹⁶ A state can agree to be bound to a treaty in various ways. The most common are ratification or accession. A new treaty is ratified by those states that have negotiated the instrument. A state that has not participated in the negotiations may, at a later stage, accede to the treaty. The treaty enters into force, or becomes valid, when a pre-determined number of states have ratified or acceded to the treaty.¹⁷

When a state ratifies or accedes to a treaty, that state may make reservations to one or more articles of the treaty, unless reservations are prohibited by the treaty. Reservations may normally be withdrawn at any time.¹⁸ In some countries, treaties take precedence over national law;¹⁹ in others, a specific law may be required to give a ratified international treaty the force of a national law. Practically, all states that have ratified or acceded to an international treaty must issue decrees, change existing laws, or introduce new legislation in order for the treaty to be fully effective on the national territory.²⁰

Instructively, the first international document that recognizes explicitly the right to freedom of movement of persons is the Universal Declaration of Human Rights (UDHR), 1948. This declaration stipulates that everyone has the right to freely move around within the borders of their state and in addition everyone has the right to leave their country for any reason concerning them, but at the same

¹¹ *Patson v. the Attorney-General* 2008 (2) BLR 66 (HC)

¹² These rights may include .Right to Personal Liberty, Right to Privacy etc

¹³ Gasiokwu M.O.U, *Human Rights History, Ideology and Law*, (Printed and Published Nigeria Ltd, 2003) pp. 40-51

¹⁴ Nwabueze B. O., *Constitutional Democracy in Africa*, vol. 2, Chapter 1 (Spectrum Books Limited, 2003), pp. 65-76. He extensively discuss issues on human rights and significant of promoting and protecting the rights.

¹⁵ Kathryn E. William., *Freedom of Movement at Stand Still? Towards the Establishment of Fundamental Rights to Interstate Travel*, (2010) 90, *Boston University Law Review*, pp. 2461-78

¹⁶ Eze O C, *Procedural Rules and Admissibility under the African Charter on Human and Peoples Rights, Legal Practice Notes : Human Rights Law, No1*, (Helen Roberts, 1997) p 3

¹⁷ Sylvester S. S., *International Institutions for the Promotion and Protection of Human Right*, (2002), 2, *New Vistas in Law*, Faculty of Law University of Jos, Nigeria 117 190

¹⁸ Osita Eze, *Human Rights in Africa: Selected Problems* (Macmillan, Lagos, 1984) p. 5

¹⁹ *Ekanem v. Assistant of Inspector General of Police* (2008) All FWLR (420) 775, where the court held that fundamental rights are the realm of domestic law and they are fundamental because they have been guaranteed by the Constitution

²⁰ Perret D L., *The Logic of Fundamental Rights in Fundamental Rights (Volume of Essay, London (1973) p.8*

time they have the right to return to that country if they so choose.²¹ According to the Universal Declaration of Human Rights, all people are entitled to the recognition of inherent dignity and certain inalienable rights, which are the foundations of freedom and justice in the world.²² Freedom of movement is part of the liberty of man thus making it one of the most basic human rights. The African Charter on Human and Peoples' Rights (AFCHPR) on freedom of movement is *mutatis mutandis* similar in letters and wordings of the Universal Declaration of Human Rights (UDHR), the AFCHPR which provides:

Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and return to his country.²³

Nwabueze, noted that the African Charter on Human and Peoples' Rights manifest a commendable concern for the promotion of respect for human rights as is borne out by the fact that promotion of Human and Peoples' rights constitute a major part of the function of commission set up under its provision.²⁴ Another famous international instrument for the protection of human right is the International Convention on the Protection of Rights of All Migrant Workers and Members of their families, 2003. The covenant establishes the basic rights of migrants, refugees and others who are not nationals of the country in which they reside.²⁵ Thus, it stipulates that "no restrictions can be placed on the freedom of movement of non-nationals. They cannot be forced to leave the country nor can they be prevented from moving around and choosing a residence within the borders of the country they are currently occupying".²⁶ In the same spectrum, the Convention²⁷ recognises the need to bring about the international protection for the rights of all migrant workers and members of their families who in many cases have not been given adequate standards of living in the states they have chosen to migrate to and from. Migrant workers and their families shall have the right to move freely in the territory or state of their employment and subsequently have the right to choose their residence. These rights are not to be tampered with unless there is a legitimate threat posed to national security, public order, health, morals, or the rights and freedoms of others.²⁸

At the countries level, the Kenya Constitution²⁹ of 1963 demonstrates commitment to protection of free movement, it provides that; "No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya".³⁰ Like Kenya, Section 21(1) of Ghana Constitution of 1992 enshrine a provision guaranteeing its citizens' right to freedom of movement wherein it provides that; "All person shall have right to freedom of movement, which means the right to move freely in Ghana, the right to leave and enter Ghana and immunity against expulsion from Ghana. The South African³¹ and Uganda³² Constitutions follow suit by committing a provision for freedom of movement to the extent that, everyone has a right to leave in the Republic, right

²¹ Article 13 UDHR 1948, see also, Kirby M. D., Declaration on Human Rights 96 and Ogbuche Samuel, Democracy Rule of Law and Human Rights Juxtaposed: An Analysis of Exploit of the Third Republic, (2009) 8(1) *University of Jos Law Journal*, pp. 216-251

²² Agbede I. O., The Rule of Law and Preservation of Individual rights, Ajomo and Owosanoye (eds.), Individual Rights under the 1989 Constitution of Nigeria (NIALS Publication 1993) pp 30-43 at 32.

²³ *ibid*

²⁴ Nwabueze, Constitutional Democracy in Africa, p. 56

²⁵ See generally, Gardon Honson, San Diego U. C., International Migration and Human Rights (2009) a paper presented at the Woodrow Wilson international Centre for Scholars, <http://www.fordharm.edu/halsell/source/magnacarta.html> accessed on 24/5/2013

²⁶ Article 5 of DHRINCL 1985

²⁷ Article 8 and 39 of ICPRMWMF 1990

²⁸ *ibid*

²⁹ Section 81(1) of the Kenya Constitution of 1963 as amended in 2008

³⁰ *ibid*

³¹ Section 21(1), (2) & (3) of the South African Constitution 1996

³² Section 29(1) of the Uganda Constitution, 2003

to enter and remain in and inside anywhere in the republic and the right to enter and remain. It further provides that every citizen of the Republic has the right to a passport.

Thus, from the various instrument examined above that the Ghana, Uganda and South African Constitutions stand unique especially within the context of this derivative right to passport. The constitution of these countries the judiciary the trouble of having to interpret or construe the provision of constitution on freedom of movement to derive the right to passport by explicitly making it a right guaranteed and protected in the constitution.

In the context of the Nigerian Constitution particularly chapter iv which incorporated Bill of Rights, Section 41 thereof provides that: Every citizen of Nigeria is entitled to move freely throughout Nigeria and reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom." In same paradigm, the Rwandan Constitution, 2003 has a similar provision which reads that; "Every Rwandan has the right to move and to circulate freely and to settle anywhere in Rwanda. Every Rwandan has the right to leave and to return to the country. These rights shall be restricted only by the law for reasons of public order or State security, in order to deal with a public menace or to protect persons in danger". Similar section providing from freedom of movement exist in Botswana constitution whereof provides: "No person shall be deprived of his or her freedom of movement and for the purposes of this section, the said freedom means the right to move freely throughout Botswana, the right to reside in any part of Botswana, the right to enter Botswana and immunity from expulsion from Botswana."³³

It seems, therefore, that in our modern global world, and in the context of the global village, the right to travel has assumed even greater importance.³⁴ Thus, the right to leave and enter a country is a right to which every subject is entitled and as a common law right, it can only be limited or cancelled on appropriate condition stipulated by legislation.³⁵ Instructively the binding treaties can be used to force governments to respect the treaty provisions that are relevant for the human right. The non-binding instruments, such as declarations and resolutions, can be used in relevant situations to embarrass governments by negative public exposure; governments that care about their international image may consequently adapt their policies.³⁶ Apparently, reflecting on the international, regional conventions and provisions of the Constitutions from other jurisdictions on the protection and promotion of freedom of movement one cannot but agree that fundamental human right to freedom of movement and its concomitant right to passport for the enjoyment of individual right of ingress and egress is global.

4. Judicial attitude and interpretation of Freedom of Movement Globally

A very good starting point is the identification of the fact that the problem militating against enforcement of human rights must be considered separately within the context of law, the international and regional commitments.³⁷ Thus, in order to advance and remedy human rights violation there seems to be a need for judicial intervention to clarify what context of rights is for individuals. This is particularly relevant when nations around the world internalize international and regional conventions on human rights through implementation or adoption of Bill of rights in their Constitutions. This gives a person

³³ Section 14(1) of the Botswana Constitution, 2008

³⁴ Kathryn E. Wiiliam, Freedom of Movement at Stand Still? Fundamental Right to Interstate Travel (2010) 90. *Botswana University Law Review*, pp. 2461-6

³⁵ *Boesak v. Minister of Home Affairs and Another* 1987 (3) SA 665 (C) at p 669

³⁶ Note that for an elaborate strategies and implementation of the rights set forth in the ICCPR, the Human Rights Committee the monitoring body of the Covenant drafted the general Comment 15, the position of alien under the Covenant in 1986 stating that aliens have the right to liberty of movement and free choice of residence; they shall be free to leave the country. While this document does recognize that states shall have the right to choose who enters their borders it calls on nations to allow in anyone whose fundamental human rights are at stake and anyone who may be facing persecution. It also recognizes that aliens may be kept out of a country if they pose a threat to the well being of others. See also General Comment 25, of 1996 in reference to article 40 of ICCPR, 27, General Comment Freedom of Movement 1999, General Comment 28, Equality of Rights between Men and Women 2000.

³⁷ Perret, the logic of Fundamental Rights in Fundamental Rights, p 21

alleging that his rights has being, is being or likely to be violated a fertile ground to litigate for redress. The attitude of court in this perspective can be distilled from the Nigerian Supreme Court case of *DSSS v Agbakoba*³⁸ where Oguntade JSC observes that:

One does not expect to find a Constitution minutes details, for it is necessarily brief and comprehensive. It prescribes outlines leaving the filling up to be deduced from the outlines. In setting up an enduring framework of government, the framers of our Constitution undertook to carry out for the indefinite future and in the vicissitudes of the changing affairs of men and women, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative provisions which are subject to reversion with the changing course of events, but as a revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. Thus, the courts will give especially, broad, liberal construction to those constitutional provisions designed to safeguard fundamental rights.³⁹

On the basis of the above let us began by exploring the judicial interpretation of the right of movement in the determination of whether it is concomitant to right to hold passport for the purpose of ingress and egress from the perspective of the few selected countries constitutions, regional and international convention of right of movement. As in the case of most post-colonial independence constitutions, and also the more recent Nigeria Constitution, UNHR or AFCHPR, the right to hold passport is not mentioned, but not the right to enter, leave or residence it.⁴⁰ This may have been out of sensitivity to the prerogative right of the sovereignty authority to issuance of passport to his citizen and withdrawal of same, since in terms of international law, every country retains the right to refuse entry to aliens or to impose conditions upon their entry. It does not, however, imply the absence of a right to passport (subject to compliance with the immigration laws of the issuing countries) represents a direct corollary of non-recognition of individual right to movement, which is an inalienable right of all citizens.⁴¹

Instructively, a great deal of the interpretation of provisions of fundamental rights a reliance on several canons of interpretation are relevant such as the Literal Rule, the Golden Rule, the 'Mischief Rule,' *Ejusdem Generis*, Blue Pencil, Severability principle, which are mere semantic aids rather than linguistic devices for reading the text of the Constitution or Statutes. Thus, the absence of recognised, single and all encompassing binding cannon of interpretation, and the resulting potential for lack of precision is particularly problematic.⁴² This is because some of these canons of interpretation take the form of broad principle only; consequently, a common feature of most of them is that they are of little practical assistance in settling doubts about interpretation in particular cases. This is partly due to vagueness, but also because in many cases, where one canon appears to support a particular interpretation, there is another canon, often on equal status, which can be invoke in favour of an interpretation, which could lead to a different result.⁴³

Therefore, in construing sections conferring fundamental rights, a broad and generous interpretation is to be preferred, while sections derogating from those rights are to be narrowly

³⁸ (1999) 3 SC 59 at 77

³⁹ *Ibid* p. 77

⁴⁰ Orji U. U., *The African Charter on Human and Peoples' Rights* (Hague: Martinus Nijhoff Publisher, 1997) pp, 3-4 & 5

⁴¹ Bas De Gay Forman, *Adventurous Judgments: A comparative Exploration of Human Right as a Moral-Political Force of Development of Law*, (2006) *Utrecht Law Review*, pp. 22-26

⁴² *Awolowo v. Shehu Usman Aliu Shagari* *ibid*, p.53, (1979) 6-9 SC 51 at 64, see generally, Agbede A. O., *Preservation of Individual Rights*, Ajomo and Owosanyo (eds.), *Individual Rights under the 1989 Constitution*, (NIALS Publication, 1993) pp. 30-43

⁴³ *ibid*

construed⁴⁴ as rightly observed by Lord Wright in the Australian case of *James v. Commonwealth of Australia* that: It is trite that a Constitution must not be construed in any narrow and pedantic sense. This grounded on premises that words used may be necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge.⁴⁵ It is not that the meaning of the words changes, but the changing circumstances illustrates and illuminates the full import of that meaning.⁴⁶

Contemporarily and in universal term, constitutional provisions or regional and international conventions on human rights are to be construed, where possible, so as to comply with international obligations under treaties rather than to breach,⁴⁷ especially where the wording of the admit of expansion or inferences where the letter of the law did not encapsulate a new development in the area of fundamental right. This is in agreement with statement of Onu JSC that: The Constitution cannot condescend in its description of every right guaranteed therein. The Constitution is an organic document which must be treated as speaking from time to time, it can only described rights it guarantees in broad terms, it is for the court to fill the fundamental right provisions with content such that would fulfill its purpose and infused them with life. A narrow and literal construction of human right or any provision in our Constitution can only make the Constitution arid in the sphere of rights. Such approach will retard the realization, enjoyment and protection of those citizen's rights and freedom and it is unacceptable.⁴⁸ It is posited that the court's construction of the provision of fundamental right should always be one of liberalism so as to achieve the very purpose for which is design and not to defeat the rationale behind the constitutional guarantee of human rights.⁴⁹

The foregoing exposition would be used as a guide in the review of the cases exemplifying judicial attitude to construction of the derivative right of ingress and egress with the fundamental rights to freedom of movement for some selected countries around the world as evidence of universality of the right.

Having set down what had been and should be the proper approach of the courts in construing Bill of Rights, it is necessary to demonstrate the attitude of courts around the world in construing right to hold passport and of ingress and egress as derivable from the freedom of movement. For instance, in the Nigerian case of *Director of State Security Service v Agbakoba*,⁵⁰ the derivate right of ingress and egress was subject of judicial interpretation particularly the imperative of a person right to hold passport as contingent to the enjoyment of the right. The relevant facts are that; The Respondent, Olisa Agbakoba, was invited by the Netherlands Organisation for International Development and Cooperation (NOVIB) to attend a conference which was scheduled to take place between 22nd and 25th April, 1992. On 21st April, 1992, he went to Murtala Muhammed International Airport, at Ikeja Lagos with a view to traveling to The Hague in the Netherlands. However, he could not board the plane because he was stopped by officers of the Nigerian State Security Service (SSS) who impounded his passport without giving any reason for the seizure.

After fruitless efforts to regain the passport, the Respondent instituted an action suit under the Fundamental Rights (Enforcement Procedure) Rules seeking among others: A declaration that the forceful seizure of the applicant's passport by agents of the State Security Services (1st Respondent herein) is a gross violation of the his right to personal liberty, freedom of thought, freedom of expression and freedom of movement respectively guaranteed under Section 32, 35, 36 and 38 of the Constitution of the Federal Republic of Nigeria 1979 (as amended) and is accordingly unconstitutional and illegal.⁵¹

⁴⁴ *DSSS v Agbakoba*, *ibid*.

⁴⁵ (1936) AC 578 at 614

⁴⁶ *ibid*, see also, *Attorney-General v. Moagi*, [1982] 2 (2) BLR 124 at p.184, where Amissah J.P quoted with approval Kentridge JA who, in the case had pointed out that a Constitution such as the Constitution of Botswana, embodying fundamental rights, should, as far as its language permits, be given a broad construction.

⁴⁷ See also the case of *Petrus v The State* [1984] B.L.R. 14, CA at p 37

⁴⁸ *DSS v Agbakoba* (1999) 3 SC 95, Salmond, *Jurisprudence*, pp 131-140

⁴⁹ See *Nafiu Rabi'u v the State* (1983) 2 NCLR 293 at 326

⁵⁰ *ibid*

⁵¹ *DSS v Agbakoba* (1999) 3 SC 95, Salmond, *Jurisprudence*, pp 131-140

The Supreme Court of Nigeria held that: it is a matter of common knowledge that for a Nigerian to travel out of Nigeria to another country he must possess a valid passport issued by government of Nigeria...without this document, he cannot leave Nigeria or be admitted to another country. It follows therefore that without a passport a citizen of Nigeria cannot exercise the right guaranteed him by the Constitution of egress from Nigeria. The court further held that possession of passport makes exit out of Nigeria possible, the right of egress from a given him by section 38 of the Constitution. Therefore, to hold that passport is ancillary to the right of egress from Nigeria given in section 38(1) of the 1979 Constitution.⁵²

The facts and decision of the Supreme Court in *Sugaba Darma v Minister of Internal Affairs*⁵³ is a typical evidence that demonstrably established the fact that court will resist any attempt by the government or its agencies to restrict the movement of citizen within the boarder of Nigeria which is contrary to any entrenched right in the Constitution in favour of citizen, and where such has been imposed it will indemnify the government by an award of damages.⁵⁴

In the earlier case of *William v. Majekodunmi*⁵⁵ a restriction order placed on the appellant following the declaration of state of emergency in Western Nigeria was declared a violation of the constitutional right of the appellant. These cases demonstrate the courts' strong position in protection and promotion of human rights in a democratic society like Nigeria. They also indicate the abhorrence which the Supreme Court has against unlawful restriction and violation of individual freedom of movement.

The courts' positions from other jurisdictions around the world will now be examined. The first point of reference is the Botswana's judicial attitude to interpretation of freedom of movement and its derivative right of ingress and egress demonstrated in a similar pedestal to the Nigerian Supreme Court position in the case of *Patson v. the Attorney-General*.⁵⁶ The brief fact of the case was that; nearly three years after Patson first made application to the Department of Immigration and Citizenship for the renewal of his passport, the applicant approached the High Court for an order compelling the department (represented A by the respondent) to grant his application. He instituted proceedings in the form of an application for the review and setting aside of the decision of the department (by inaction) to refuse his application for the renewal of his passport on the ground that the decision unlawfully infringed his fundamental right to freedom of movement under s 14(1) of the Botswana Constitution.

The court held that every citizen of Botswana had the right to be issued with and to possess a national passport (or a valid travel document should a passport not be available) for the proper exercise of his right to freedom of movement and, in particular, his right to travel abroad, as entrenched in the common law and in the Constitution of Botswana, save in exceptional circumstances where a refusal or withdrawal of a passport was properly justified by law. The court further stressed the fact that the right carried with it a corresponding duty on the state not to restrict its exercise by administrative or other action inconsistent with the exceptions allowed by the Constitution of Botswana.⁵⁷

Similarly, in the India judiciary, the courts have exhibited a great transformation and a new beginning of right to life and liberty in its attitude towards the safeguard of personal liberty. This has been noticed after the horrible experience of infamous 1979 national emergency in the case of *Menaka Ghandi v Union of India*.⁵⁸ The brief summary of the case was that Ghandi was issued a Passport on 1/6/1976 under the passport Act 1967. The Regional Passport Officer, New Delhi issued a letter on 27/7/1979 addressed to Ghandi in which she was asked to surrender her passport under section 10(3)(c) of the Act on public interest within 7 days from the date of receipt of the letter. Ghandi immediately wrote a letter to the Regional Passport Officer seeking in return a copy of the statement of reason for such order.

⁵² *Ibid* p.95

⁵³ (1982) 3 NCLR 915

⁵⁴ *Ibid*, the restriction to be sustained by be based on law, i.e. execution of lawful sentence by a court of competent jurisdiction, lawful arrest, sections 38, 40, 41 of the Nigerian Constitution, and by section 45 of the same constitution for the purposes of public order or safety, or where the interest of others will be affected,

⁵⁵ (1962) 2 SCNLR 262 or 1 ALL NLR 413

⁵⁶ (2008) 2 BLR 66 (HC)

⁵⁷ *Ibid* see also the India case of *Satwant Singh D Sawhney v Assistant Passport Officer, New Delhi* AIR (1967) SC 1836 and *Kent v Dulles* 357 US 116 (1958)

⁵⁸ AIR (1978) SC 507

However, the government of India, Ministry of External Affairs refused to produce any such reason in the interest of public. Menaka Ghandi then filed a writ of petition under Article 32 of the Indian Constitution in the Supreme Court challenging the Government of India as a violation of her fundamental right guaranteed under section 21 of the Constitution. Justice Krishna Iyer observed that: "the spirit of men is at the root of Article 21, personal liberty makes the worth of the human person and travel makes liberty worthwhile". He finally held that: "the right to travel and go outside the country is included in the right to personal liberty guaranteed under Article 21 of the Indian constitution".

The Indian Supreme Court had earlier in the case of *Satwant Singh Sawhney v. Assistant Passport Officer, New Delhi*⁵⁹ held that: to refuse a person a passport was in effect to preclude him from travelling abroad, and so to deny him his right to free movement.

In same paradigm, the United States case of *Kent v Dulles*⁶⁰ is a landmark United States of American's case on right to travel and passport restriction as they relate to the First Amendment Free Speech Right is significant. It is the first case in which US Supreme Court makes a distinction between the constitutionally guaranteed substantive due process and right to travel abroad characterised as "right to international travel." This is a case where an arbitrary refusal of a passport was held by the court to contravene the right to movement and liberty. The case concern application for passports denied by secretary of State. One Rockwell Kent who desired to visit England and attend a meeting of organization known as the "World Council of Peace" in Helsinki, Finland was denied a passport. The Director of the Passport Office informed Kent that issuance of passport was precluded by the S 51.135 of the Regulation promulgated by Secretary of State on two grounds: that he was a communist and that he had a consistent and prolonged adherence to communist Party line. The letter of denial specified some detailed facts on which those conclusions were based. Kent was also advised of his right to an informal hearing under S 51.137 of the regulations. But he was also told that whether or not a hearing was requested, it would be necessary, before a passport would be issued, to submit an affidavit as to whether he was then or ever been a Communist. Kent did not ask for hearing but filed a new passport application listing several European countries he desired to visit. When advised that a hearing was still available to him.⁶¹

His attorney replied that Kent took the position that the requirement of an affidavit concerning Communist party membership "is unlawful and that, for that reason and as a matter of conscience," he would not supply one. He did however have a hearing at which the principal evidence against him was from his book "It's Me O Lord" which Kent agreed was accurate. He again refused to submit the affidavit, maintaining that any matter unrelated to the question of his citizenship were irrelevant to the Department consideration of his application.⁶²

Thereupon Kent sued. The court held among others that "the right to travel is a part of the liberty of which the citizen cannot be deprived without due process of the law under the Fifth Amendment...three Human Rights in the Constitution of 1787 shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad like within the country may be necessary for a livelihood. It may be close to the heart of the individual for the choice of what to eat, what to wear or read. Freedom of movement is basic in our scheme of value...Freedom of movement is, indeed an important aspect of citizen's liberty. Where activities or enjoyment natural and often necessary to the well being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. We hesitate to find in these broad generalized powers an authority to trench so heavily on the right of the citizen."⁶³

Interestingly, what can be distilled from the above cases it is argued, that nexus exist in both ability of a person to leave his own state and the ability to enter another which is in practice closely connected with the possession of a passport, so that the ease or difficulty with which he can obtain a

⁵⁹ AIR 1967 SC 1836

⁶⁰ *Kent v Dulles* 357 US 116 (1958)

⁶¹ *ibid*

⁶² *ibid*

⁶³ *Ibid*, pp 301-302

passport materially affects his freedom of international movement.⁶⁴ Thus, unlawful seizure, withdrawal, or denial of passport not based on grounds stipulated under any restrictive premises will definitely constitute interference and violation of a person's right of movement except it is based not on political ground by law(s). Instructively, evidence abound that interference with right of movement through prevention of citizens from traveling abroad by denial of travel document or passport may sometimes be political.⁶⁵ It is posited that the rationale flowing from the judicial attitude exhibited in the cases examined attested to the fact that the desire and courage of the courts to construe the provision of freedom of movement liberally and purposefully by expounding the spirit and letter of the law to infer individual right of movement and the concomitant right to hold passport is to achieve the purpose of enjoying freedom of movement guaranteed by law.

In summary, it is posited that the universality of the freedom of movement as established from domestic constitutions of the selected countries, regional and international conventions in this paper demonstrate the fundamental of the right as a touchstone of all the freedoms to liberty and privacy, which the instrument of promotion and protection throughout the world are consecrated. This view has been further reiterated by all judicial bodies demonstrated in their attitude to construing the issues dealing with human right to freedom of movement. The generality of Articles and constitutional provisions reflect the fact that freedom of movement is one of the basic human right, vital to an individual's personal development, his political consciousness, and development.

5. Restriction on freedom of movement

In many part of the world as can be fathom from the foregoing explanations, there are reported cases of violation of human right of citizen to ingress and egress. Incidentally, freedom of movement as sacrosanct as it seems is not, however, absolute. Every system of international and domestic rights recognised carefully established and limited restrictions on freedom of movement like every other rights, taking into cognizance the values of individual dignity and democracy.⁶⁶ Therefore, under international and regional human rights laws or the national laws some level of restrictions are establish, but such restriction on freedom of movement must comply with the provisions of the laws for the purpose. For instance, the ICCPR stipulates that, the exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may, therefore, be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others and for the protection of national security or of public order or of public health or morals.⁶⁷

The question that first needs be answered is whether citizen has a right of ingress and egress and right to passport? Whether government has unfettered discretion to issue, withdraw, seize or deny individual right to be issued a passport or travel document? Considering the provision regulating the issuance of passport and other related matters from Passport (Miscellaneous Provisions) Act, it appears that the government through the Minister of Internal Affairs⁶⁸ is empowered to issue passport or withdraw, seize or deny same on the grounds that, the passport is obtained by fraud, the passport has expired, a person unlawfully holds more than on passports at the same time.⁶⁹ From this provision, a

⁶⁴ See generally, Jennings and Watts (eds.) *Oppenheim's International Law* Vol 1: Peace (9th ed. Longman, London 1997) p 866 See www.law.cornell.edu/supct/html/history.

⁶⁵ *Shugaba Darma v Minister of Internal Affair* (1982) 3 NCLR 915; Shugaba was elected as a member of Borno State House of Assembly in 1999. He was deported to Niger from Nigeria on the allegation that he was not a Nigeria. see also the South African case of *Boesak v Minister of Home Affairs and Another* (supra) and *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T)

⁶⁶ See generally, Maina Peter, *Fundamental Rights and Freedom of Movement in Kenya*, (1991) 3(1), *African Journal of International Comparative Law*, pp 61-98

⁶⁷ See also Article XII(2) of the ACHPR and Article XXIX of UDHR which letters and wordings are *imperimaterial* with ICCPR. See also Article 19(3) of ICCPR

⁶⁸ Cap E4 Laws of the Federal Republic of Nigeria 2004

⁶⁹ *Ibid* section 5(1) & (2)

citizen's right of ingress and egress upon holding a passport is subject to government decision though the exercise of this right is subject to conditions stipulated by law.

However, the restrictions must meet certain test which include the fact that the restriction should be based and have the force of law, the law which must be accessible and formulated with sufficient precision to enable the citizen to regulate his conduct. Similarly, the restriction must pursue one of the legitimate aims listed in Articles and the Constitution.⁷⁰ This list is exhaustive and lastly, the restriction must be necessary to secure that aim, in the sense that it does not go beyond what is necessary to secure the aim, that the reasons given to justify it are relevant and sufficient, and that it is proportionate to the aim.

A very good and most recent example that can be given is the declaration of state of emergency in the mostly affected areas (Borno, Yobe and Adamawa states) of Boko Haram insurgency in Nigeria coupled with curfew placing restriction on movement with some hours of the day.⁷¹ The restriction of movement in the states typified the grounds of law, public security and public safety upon which it should be placed as provided by national, regional and international conventions. This is because national constitutions on fundamental right commonly require that any restriction on freedom of expression must be provided by law and reasonably justifiable in a democratic society. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, the objective, which the measures are responsible for or designed to achieve, should be sufficiently significant to justify overriding a constitutionally protected right or freedom.

The universality of grounds for restriction of movement and the test under domestic constitutions, regional and international law recognize the prerogative right of government in this perspective for the purpose of placing restriction on individual movement. However, such power may require that restrictions are set out clearly in law, that they pursue objectives or aims of sufficient importance to warrant limiting a fundamental right and they meet a test of necessity and proportionality.

6. Conclusion

Freedom of movement constitutes one of the essential foundations of a democratic society, the basic conditions for its progress and for the development of every man. The overriding importance of freedom of movement including the right to hold passport for the purpose of ingress and egress has been widely and universally recognised, both for its own sake and as an essential underpinning of democracy and means of safeguarding other human rights. Therefore, if right of movement has to be restrained, the grounds of restriction should be explicitly defined and properly be within the context of law.

It is an undisputable fact that the constitutional designed as it is, is to enhance and protect fundamental rights, thus it must certainly not to be construed so as to cancel or limit the common law right to travel unless the language of the section clearly requires this. These fundamental rights are inalienable because they are attached to one as human being, without them there is automatic diminution of his humanity.⁷²

⁷⁰ For instance, Article 29(2) of the Uganda Constitution 1995, section 41(2) of the Nigerian Constitution 1999 as amended in 2010, Article 21 of the Indian Constitution, Article 21(2) of the Ghana Constitution 1992 etc, all provides restriction based on law, for public safety, public order and security and morality

⁷¹ The declaration was made on Tuesday, May 14, 2013 pursuant to the president power to declare state of emergency in section 305 of the Nigerian constitution 1999. The Emergency Power (General) Regulation, 2013 has been laid to the National Assembly for enactment. See the Nation, 14th and 23rd May, 2013, pp 1 and 2 thereof.

⁷² Oputa JSC, *Human Rights in the Political and Legal Culture of Nigeria*, (Law Publication Ltd, 1989) p. 45