

Recent Development in the Derivative Right to Passport and Freedom of Movement under The 1999 Nigerian Constitution

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Joseph Onele and Joseph Jagunmolu Ogunmodede

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Joseph Onele* and Joseph Jagunmolu Ogunmodede**

ABSTRACT

This article considers the propriety of the statement credited to the Executive Chairman of the Federal Inland Revenue Services (FIRS), Mr. Babatunde Fowler (at the meeting of the Joint Tax Board held on 28 November 2016 in Abuja) which gave most Nigerians the impression that there was a policy and/or regulatory move to make tax compliance a requirement for obtaining the Nigerian passport and/or the renewal of the Nigerian passport. Adopting the black-letter approach, this article argues that the ability of a Nigerian to obtain the 'international passport' and/or renew it, is a right ancillary to the fundamental right of freedom of movement among other rights under the 1999 Nigerian Constitution but not a privilege as some scholars have argued. Hence, the article submits that any subtle attempt by the government or any other relevant authority to encroach on this 'fundamental right' is susceptible to being declared unconstitutional by a court of competent jurisdiction

1.0 INTRODUCTION

Given the economic depression suffered by Nigeria in recent times, and taking into account, the options open to the Nigerian government, a sizeable number of concerned Nigerians and members of the international community have decried the 'approach' of the Nigerian government in addressing the gloomy state of the Nigerian economy.¹ More importantly,

* Joseph Onele LLB (First Class Honours, University of Ibadan), BL (Hons), Barrister and Solicitor of the Supreme Court of Nigeria; Legal Practitioner at Olaniwun Ajayi LP, Lagos, Nigeria; +2348137442133; joxy004@yahoo.com; <https://ng.linkedin.com/in/josephonele>

** Joseph Jagunmolu Ogunmodede LLB (First Class Honours, University of Ibadan); Faculty of Law, University of Ibadan, Nigeria; jagunogunmodede@gmail.com

¹ BBC News, 'Nigerian Economy slips into recession' *BBC Business News* (London, August 31, 2016) <http://www.bbc.com/news/business-327228741/> (accessed 10 February 2017); Nathalie Thomas, *Financial Times* (London, 23 November, 2016), 'Nigerian economy remains firmly in recession'

there appears to be some form of consensus that the relatively recent 'regulatory moves' of certain regulatory authorities in Nigeria would leave one in no doubt as to the misguided priorities of the President Buhari-led-administration, particularly exemplified by the Financial Reporting Council of Nigeria (FRCN),² the Nigerian Communications Commission (NCC)³ and more recently, the Federal Inland Revenue Service (FIRS)⁴- and some other regulatory authorities, who some Nigerians marvel at for their seemingly 'loss of touch' with the 'reality' in the country,⁵ the illusion of regulating for public good when most Nigerians actually get the impression that such regulations are 'anti-public good,'⁶ and ill-timed policies and regulations,⁷ anchored on weak legal foundation.

<http://www.ft.com/content/b860c57e-1b2f-3da1-b14b-240000001748/>
(accessed 11 February 2017).

² Chris Ugwu, *New Telegraph* (Nigeria, 9 November, 2016), 'Uproar over National Code of Corporate Governance' <http://newtelegraphonline.com/business/uproar-national-code-corporate-governance/> (accessed 10 February 2017).

³ Ifreke Inyang, 'GSM subscribers in Nigeria to pay more for data from December 1,' *Daily Post* (Nigeria, 29 November, 2016) <http://dailypost.ng/2016/11/29/gsm-subscribers-nigeria-pay-data-december-1/> (accessed 10 February, 2017)

⁴ Tony Ogonna, 'Nigerians to pay VAT on international passports- FIRS,' *Vanguard* (Nigeria, 28 November, 2016) <http://www.vanguardngr.com/2016/11/nigerians-pay-vatinternational-passport-firs/> (accessed 9 February 2017)

⁵ Jide Akintunde, Martins Hile, Chibuike, Oguh, 'Buhari's Change Puts Nigeria in troubled waters,' *Financial Nigeria* (Nigeria, 9 December, 2016) <http://www.financialnigeria.com/buhari-s-change-puts-nigeria-in-troubled-waters-feature-103.html?sthash.6oodRcXP.mjjo/> (accessed 11 February 2017)

⁶ Evarest Amaefule and Ozioma Ubabukoh, 'NCC bows to pressure suspends data tariff increase,' *The Punch Nigeria*, (1 December, 2016) <http://punchng.com/ncc-bows-pressure-suspends-data-tariff-increase/> (accessed 10 February 2017); Mark Igiehon, 'Law, economics, public interest and the theory of regulatory capture' 8(2) (2004) *Mountbatten Journal of Legal Studies* 2, 10-17; Jorgen Gronnegaard Christensen, 'Public interest regulation reconsidered: From capture to credible commitment' (Paper presented at 'Regulation at the Age of Crisis,' ECPR Regulatory Governance Standing Group, 3rd Biennial Conference, University College, Dublin, June 17-19, 2010)

⁷ Robert Baldwin *et al*, *Understanding Regulation: Theory, Strategy and Practice* (2nd Edn. Oxford University Press (OUP) 26-31; see for instance, Joseph Onele 'The Financial Reporting Council of Nigeria and Her Misguided Regulatory Approach: A Classic

1.1 Thesis Statement and Research Methodology

Whilst mindful of the fact that both the FRCN's decision to issue its Code of Corporate Governance for private sector and not-for-profit entities as well as the NCC's decision to increase the 'broadband and data services in Nigeria'⁸ has been overtaken by events,⁹ this article seeks to examine primarily, a seemingly recent approach by the FIRS, which seeks to curtail the ability of Nigerians to obtain or renew their international passports and proceeds to test same against the existing legal framework in Nigeria. In essence, this article tests the propriety of the statement credited to Mr. Babatunde Fowler, Executive Chairman of the FIRS, at the meeting of the Joint Tax Board held on 28 November, 2016 in Abuja, which gave the impression that there was a move to make tax compliance a requirement for obtaining the Nigerian passport and/or the renewal of the Nigerian passport.¹⁰

Further to the foregoing and adopting the black-letter approach,¹¹ this article argues that the ability of a Nigerian to obtain the 'international passport' and/or renew it, is a right ancillary to the fundamental right of freedom of movement among other rights under the 1999 Nigerian Constitution but not a privilege as some scholars have argued notwithstanding the 'derogation provisions' which tend to handicap such rights. Hence, the article submits that any subtle attempt by the government or any other relevant authority to encroach on this

Example of How Not to be a Regulator' (2017) 1(1) *University of Lagos Law (UNILAG) Review* 1-21

⁸ Adekunle, 'NCC's directive on data tariff increase insensitive – Telecoms consumers,' *Vanguard* (Nigeria, 30 November, 2016) <http://www.vanguardngr.com/2016/11/nccs-directive-data-tariff-increase-insensitive-telecoms-consumers/> (accessed 10 February, 2017)

⁹ Toyin Lasinde, 'NECA hails suspension of FRCN's Corporate governance code' *The Guardian* (Nigeria, 8 November 2016) <http://m.guardian.ng/news/neca-hails-suspension-of-frcns-corporate-governance-code/> (accessed 9 February 2017)

¹⁰ *Supra* note 5; The suspension of the NCCG and the seemingly fresh legislative efforts at attempting to regulate NGOs in Nigeria notwithstanding, the present authors are of the opinion that the lessons highlighted in this article are still very relevant and could be applied from time to time.

¹¹ Shazia Qureshi, 'Research Methodology in Law and its Application to Women's Human Rights,' 22(2) (2015) *Journal of Political Studies* 629, 643

fundamental right or affect the exercise of this fundamental right is susceptible to being declared unconstitutional by a court of competent jurisdiction.

It should be noted, however, that the article does not consider the nature of the ancillary right of a Nigerian citizen to a passport (which is arguably implied under the constitutional provisions relating to the freedoms of movement, association and right to personal liberty) vis-à-vis the constitutional right to property,¹² as the present writers take the view that the analysis is not necessary for the resolution of issues identified in this article.

2.0 FREEDOM OF MOVEMENT AND THE POSITION UNDER THE NIGERIAN CONSTITUTION

Having laid the necessary foundation for a seamless discussion of the major legal issues thrown by this article, the authors will proceed to examine the nature of relevant fundamental rights provided in the Constitution of the Federal Republic of Nigeria, 1999 (as amended), hereinafter referred to as the Nigerian Constitution.

First, a cursory look at Section 41(1) of the Nigerian constitution will reveal 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 thereby or exit therefrom.**

From a careful study of Section 41 of the Nigerian Constitution, particularly the words in **bold**, it can be safely argued that all Nigerian citizens are guaranteed the freedom of movement which includes the right to ingress into Nigeria and egress from Nigeria. It seems also plausible to argue that the constitutional right to freedom of movement is ordinarily made possible by a Nigerian Passport. Consequently, one may also rightly argue that the fundamental right to move freely throughout Nigeria and the 'freedom of entry and exit' from Nigeria, is one that the Nigerian

¹² Obiora Chinedu Okafor, 'The Fundamental Right to a Passport under Nigerian Law: An Integrated Viewpoint,' 40(1) (1996) *Journal of African Law* 53-61

Constitution does not contemplate should be hindered or obstructed in any form or by whatever means, except for the clearly limited exceptional instances, already stipulated in the Nigerian Constitution. These few constitutionally permitted instances when the right to freedom of movement can be derogated from will be discussed later on in this article. The foregoing said, this article will now proceed to make a case for the purposive interpretation of Section 41(1) of the Nigerian Constitution as same is very crucial to unravelling the crux of this article.

2.1 Making a Case for Purposive Interpretation for Section 41(1) Of the Nigerian Constitution

Further to the reading of Section 41(1) of the Nigerian Constitution, it is argued that a purposive interpretation¹³ of the freedom of movement provision in the Nigerian Constitution would reveal that the draftsmen did contemplate that Nigerian citizens should be provided with every facility (including a passport) necessary to enjoy their fundamental rights, which in this case is the freedom of movement protected by *Section 41(1) of the Nigerian Constitution*. The foregoing argument is bolstered by the decision of the Supreme Court, per Udo Udoma JSC in *Nafiu Rabi'u v The State*¹⁴ where his Lordship said:

...it is the duty of this court to bear constantly in mind the fact that...where the question is whether the Constitution has used an expression in the wider or in the narrow sense...this court should whenever possible, and in response to the demand of justice, lean to the broader interpretation .[Emphasis supplied]

¹³ P.E. Oshio, 'Towards a Purposive Approach to the 1999 Constitution,' <http://webcache.googleusercontent.com/search?q=cache:ATzBNGmhDYwj:www.nigerianlawguru.com/articles/constitutional%2520law/TOWARDS%2520A%2520PURPOSIVE%2520APPROACH%2520TO%2520THE%2520INTERPRETATION%2520OF%2520THE%25201999%2520CONSTITUTION.pdf+&cd=1&hl=en&ct=clnk&gl=uk> (accessed 4 March 2017); Ehi Oshio, 'The Changeless Change in Constitutional Interpretation: The Purposive Approach and the Case of The Five Governors'; Elijah Adewale Taiwo, 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' 9(2) (2009) *African Human Rights Law Journal* 546-575

¹⁴ (1981) 2 N.C.L.R. 293 at 326 (Nigeria)

As seen from the position of the Nigerian apex Court in *Rabiu's case*, it would appear that the Nigerian Supreme Court often tilts towards a broader, liberal and more embracing interpretation of a constitutional provision, with a view to doing substantial justice, preventing absurdity in all circumstances and avoiding a situation where the law is unable to remedy any flagrant violation of rights. This much is equally evident in the celebrated case of *Attorney-General of the Federation v. Abubakar*,¹⁵ where the Supreme Court again saliently observed:

...the case at hand is, by every standard, a novel one...But, no legal problem or issue must defy legal solution. Were this not to be so, the society, as usual, will continue to move ahead, law, God forbid, will then remain stagnant and consequently become useless to mankind...a Judge, whenever faced with a new situation which has not been considered before, by his ingenuity regulated by law, must say what the law is on that new situation; after all, law has a very wide tentacle and must find solution to all man-made problems.¹⁶[Emphasis supplied]

Furthermore, the Supreme Court, in *Amaechi v INEC*,¹⁷ per Oguntade JSC, quoted with judicial approval, the famous dictum of Lord Denning M.R. in

¹⁵ (2007) 10 N.W.L.R. (Pt. 1041) 1 at 171-172 (Aderemi, J.S.C.)

¹⁶ *Supra* note 16

¹⁷ (2008) 5 N.W.L.R. (pt. 1080) 227 at 451; see also the pronouncement of Aderemi, J.S.C. in *Amaechi's case* when the Learned Justice of the Supreme Court opined brilliantly thus: "... Judges who dispense justice in this court of law and equity must always be ready to address new problems and even create new doctrines where the justice of the matter so requires;" see further Azinge, E. "Living Oracles of the Law and the Fallacy of Human Divination" 6th Justice Idigbe Memorial Lecture, Faculty of Law, University of Benin, Page 8, where Oputa JSC is reputed to have opined thus: "The judge should appreciate that in the final analysis, the end of law is justice. He should, therefore, endeavour to see that the law and the justice of the individual case he is trying, goes hand in hand... To this end he should be advised that the spirit of justice does not reside in formalities, words, nor is the triumph of the administration of justice to be found in successfully picking a way between pitfalls of technicalities. He should know that all said and done, the law is, or ought to be, but a handmaid of justice, and inflexibility which is the most becoming robe of law often serves to render justice grotesque. In any 'fight' between law and justice the judge should ensure that justice prevails – that was the very reason for the emergence of equity in the administration of justice. The judge should always ask himself if his decision, though legally impeccable in the end

the celebrated English Case of *Packer v Packer*,¹⁸ where the Law Lord stated eruditely as follows:

What is the argument on the other side? Only that no case has been found in which it had been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both.¹⁹

A calm reading of the foregoing cases, with the opinions of the various leading jurists and very respected Law Lords will reveal how imperative it is for the law to be able to adjust itself to meet new challenges, be amenable to new situations, and be able to provide practicable solutions to all complex situations, no matter how novel, given that the ultimate end of the law should be doing substantial justice, to all manner of men, even if the heavens fall.²⁰

Additionally, making recourse to Professor Hohfeld's concept of 'right' and 'duty',²¹ it can be argued that where a Nigerian citizen has a right to

achieved a fair result. 'That may be law but definitely not justice' is a sad commentary on any decision."

¹⁸ [1953] All E.R. 127, 129

¹⁹ *Packer v Packer* [1953] All E.R. 127, 129

²⁰ The Latin maxim that all judges are enjoined to hold on to is *fiat Justitia ruat coelum* which literarily means "let justice be done though the heavens fall." Merriam-Webster Online Dictionary available at <https://www.merriam-webster.com/dictionary/fiat%20justitia.%20ruat%20caelum> (accessed 5 February 2018)

²¹ David Lyons, 'The Correlativity of Rights and Duties' 4(1) (1970) *Nous* 45-55; Arthur Corbin, 'Rights and Duties' 1(1) (1924) 33 *Yale Law Journal* 502; W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' 23 (1913) *Yale Law Journal* 16, 28-59; Joseph William Singer, 'The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld,' (1982) *Wisconsin Law Review* 975; Nikolai Lazarev, "Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights." (2005) *Murdoch University Electronic Journal of Law* 9 <http://www.austlii.edu.au/au/journals/MurUEJL/2005/9.html> (accessed 4 March

freedom of movement, which as earlier mentioned, would arguably necessarily include the Nigerian passport, as the passport is a necessary facility to enjoying the fundamental right in the case of ingress and egress, then the Nigerian government or any other authority or person, has a corresponding duty, by law, not to act in any way that would affect the enjoyment of the right.²² The authors find the submission of Professor Obiora Okafor, who opined that the right to a passport is a derivable right from the right of every person to freedom of movement, freedom of association and right to personal liberty is very instructive and relevant in this regard.²³

The foregoing submission that where a Nigerian citizen has a right to freedom of movement, the Nigerian government or any other authority or person, has a corresponding duty, by law, not to act in any way that could affect the enjoyment of the right, becomes even more compelling when one considers the submission that a Nigerian passport is not only a fundamental proof of one being a Nigerian and identity document for travel purposes,²⁴ but also takes into consideration Lord Diplock's

2017); Isaac Husik, "Hohfeld's Jurisprudence" *University of Pennsylvania Law Review* 263-277

²² Nikolai Lazarev, 'Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights.' [2005] *Murdoch University Electronic Journal of Law* 9 <<http://www.austlii.edu.au/au/journals/MurUEJL/2005/9.html>> (accessed 4 March 2017); Isaac Husik, 'Hohfeld's Jurisprudence' *University of Pennsylvania Law Review* 263-277; Arthur Corbin, 'Rights and Duties' 1(1) (1924) 33 *Yale Law Journal* 502; W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' 23 (1913) *Yale Law Journal* 16, 28-59; Joseph William Singer, 'The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld,' (1982) *Wisconsin Law Review* 975

²³ Obiora Chinedu Okafor, 'The Fundamental Right to a Passport under Nigerian Law: An Integrated Viewpoint,' 40(1) (1996) *Journal of African Law* 53-61

²⁴ D.P. O' Connell, *International Law* (London 1970) 691; G.S. Goodwin-Gill, *International Law and the Movement of Persons Between States* (Oxford, 1978); *Joyce v DPP* [1946] A.C. 347; *R v Brailsford and Anor* [1905] 2 K.B. 730; A. Nylander, *The Nationality and Citizenship Laws of Nigeria* (Lagos, 1973) 81 cited in Obiora Chinedu Okafor, 'The Fundamental Right to a Passport under Nigerian Law: An Integrated Viewpoint,' 40(1) (1996) *Journal of African Law* 53, 56

declaration in *A.G. of Gambia v Jobe*²⁵ where the Law Lord stated eruditely thus:

A constitution and, in particular, that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled is to be given a purposive construction.²⁶

Similarly, in *Pepper (Inspector of Taxes) v. Hart*,²⁷ the House of Lords, per Lord Griffiths declared as follows:

The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts must adopt a purposive approach which seeks to give effect to the true purpose of the legislation.²⁸

It is equally important to allude to the dictum of one of the most indefatigable champions of the purposive approach to the interpretation of constitutional provisions, Lord Denning, MR, who, in *Magor and St. Mellons Rural District Council v. Newport Corporation*²⁹ opined thus:

The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the “purposive approach”...In all cases now in the interpretation of statutes we adopt such a construction as will “promote the general legislative purpose” underlying the provision.³⁰

In what could be termed as a very bold attempt at reaffirming the move towards a purposive approach in the construction of laws, Lord Denning further opined in *Seaford Court Estates Ltd v. Asher*³¹ thus:

²⁵ (1984) A.C. 680, 700 (Gambia)

²⁶ Supra note 22

²⁷ (1993) 1 ALL E.R.42

²⁸ Supra note 24

²⁹ (1951) 2 All ER 839, [1952] AC 189

³⁰ Supra note 26

³¹ (1949) 2 K.B. 481, 498

It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, **when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it,** and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give ‘force and life’ to the intention of the legislature.”³² [Emphasis supplied]

In admitting the limitations of law, how imprecise and inadequate laws could sometimes be and why it is important for judges to put on their thinking cap at all times, whilst adopting a purposive approach, Lord Denning again opined thus:

Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold set of facts which may arise and even, if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were...³³

Relying on the foregoing, one may rightly submit, adopting the purposive approach to interpretation of constitutional provisions, that given that Section 41(1) of the Nigerian Constitution guarantees a Nigerian citizen his right to freedom of movement which arguably includes not being denied access to the Nigerian passport for any reason unknown to the Nigerian Constitution, the Nigerian government or any other authority or person, has a corresponding duty, by law, not to act in any way that would affect the enjoyment of the right, including but not limited to making regulations or enacting laws that interfere with the exercise and free enjoyment of this right, outside the contemplated limited instances when the right can be derogated from. It is on this note that this article now proceeds to consider the constitutionally recognised instances when

³² *ibid.*

³³ *ibid.*

the constitutional right to freedom of movement can be derogated from.

2.2 The Freedom of Movement: A Right without Any Exception?

The present authors are not oblivious of the provisions of the Nigerian Constitution which provides for limited circumstances where there can be derogation from the freedom of movement. However, there are seemingly two different schools of thought on the exceptions to this right as it concerns the issue of tax compliance as a requirement for the issuance or renewal of international passport. The first school of thought considers strictly, the derogations directly provided under Section 41(2) of the Nigerian Constitution, wherein the limited circumstances are basically where any law that is 'reasonably justifiable' in a democratic society:

- (a) imposes restriction 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) provides for the removal of any person from Nigeria to any other country to be tried outside Nigeria for any criminal offence; or
- (c) provides for the removal of any person from Nigeria to undergo imprisonment outside Nigeria in the execution of the sentence of a court of law in respect of a criminal offence of which he has been found guilty provided there is a reciprocal agreement between Nigeria and such country in relation to such matter.

A careful reading of the foregoing provisions will reveal a basic but very critical test that must be passed before any law made to curtail the right to freedom of movement pass the constitutional threshold and this is: whether such a law is 'reasonably justifiable' in a democratic society. Putting this in context, can it be said that the move by the Nigerian government, to subtly deprive Nigerian citizens of their constitutional right to freedom of movement, all in attempt to make them tax compliant, reasonably necessary in a democratic society like ours? The answer to this lingering question will be considered subsequently.

Notwithstanding the fact that the present authors are not advocates of citizens abdicating their civil responsibilities (which includes paying relevant taxes for keeping the machinery of the state in operation and doing their part in making Nigeria a 'going concern' as well as a pride of all), it is argued that 'administrative fees' made payable for the issuance of a passport or renewal, and making payment of 'laid out tax obligations' by citizens condition-precendent to obtaining the Nigerian Passport, which ultimately affects the right to enjoy the freedom of movement (including entry and exit from a country, are two different things.

In essence, it can be safely asserted that payment of "administrative fees" for the issuance of a passport or renewal is not the same thing as making tax compliance a requirement for obtaining the Nigerian passport or renewal. Whilst the former gives no cause for great concern, the latter should be of great concern to all human rights' advocates. For instance, whilst it is plausible and quite reasonable to make payment of 'filing fees' before any process can be instituted in a court of law in Nigeria, there is a looming and impending threat to citizens' fundamental rights where tax compliance is made a precondition to having access to court and by implication, justice.

The fear is that if the FIRS or any other Nigerian government agency is allowed to have its way with this kind of policy/regulation/legislation, it simply means that the average citizen may not be able to enjoy basic fundamental rights like right to fair hearing, right to dignity of human person, right to personal liberty and even the freedom of movement as we earlier argued. The earlier such excesses of our policy/law makers are curbed, the better! Whilst the authors do not have a problem with going after those who neglect, refuse or fail to pay their taxes and even applying necessary legal sanctions as stipulated in the relevant laws, we struggle with the reasoning that a legal end can be achieved by an illegal means. We all need to ensure that any attempt to rob people of their fundamental rights under the disguise of 'policies,' 'regulations,' or even 'laws' that are not only 'anti-public good' but also encroach on the fundamental rights of all should be resisted by all reasonable means, for freedom is never freely given.

Having alluded to the instances recognised under the Nigerian Constitution when the freedom of movement and the right to personal liberty may be derogated from, it is humbly submitted that where a Nigerian citizen is subjected to any restriction that does not fall within any of the exceptions in Section 41(2) of the Nigerian Constitution, a court of competent jurisdiction would be more disposed to declaring such law, regulation or policy unconstitutional and as such, null and void in accordance with Section 1(1) & (3) of the Nigerian Constitution.³⁴

In the same vein, it is quite apposite to mention that Section 13(1) of the Immigration Act, 2015³⁵ grants Nigeria's Interior Minister, the discretionary power to 'cancel or withdraw any person issued to any person if-

- (a) the passport is obtained by fraud; or
- (b) a person unlawfully holds more than one passport at the same time.

Additionally, whilst Section 9(1) of the Immigration Act 2015 vests the Comptroller-General with the power to issue Nigerian Passports, Section 9(2) of the Immigration Act 2015 expressly provides that Nigerian Passports shall be issued only to bona fide, within and outside Nigeria. Section 2 of the Immigration Act 2015 imposes certain duties on Nigeria Immigration Service which essentially are:

- (a) the control of persons entering or leaving Nigeria;
- (b) issuance of travel documents including Nigerian passports, to Nigerian citizens within and outside Nigeria;
- (c) issuance of residence permit to foreigners in Nigeria;
- (d) border surveillance and patrol; and
- (e) enforcement of laws and regulations with which they are directly charged.

³⁴ See for instance *Abubakar v. Dankwambo & Ors* (2015) LPELR-25698(CA); *Obasanjo v. Yusuf* (2004) 9 NWLR (Pt. 877) 144 at 183

³⁵ Section 114 of the Immigration Act 2015 repeals both the Passport (Miscellaneous Provisions) Act, Cap. P1, Laws of the Federation of Nigeria (LFN) 2004 and the Immigration Act, Cap 11, LFN, 2004

Relatedly, Article 12 of the African Charter on Human and Peoples' Rights domesticated in Nigeria by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act³⁶ (hereinafter referred to as the African Charter) allows for some exceptions. Whilst noting that "every individual is entitled to the right to leave any country including his own, and return to his country," the African Charter provides that 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." Flowing from a read of Article 12 of the African Charter, it could be argued that, for any restriction(s) on the right of a Nigerian citizen to leave Nigeria and return at will to be effective, such restraint must fall under any of the following heads:

- (a) National security;
- (b) Law and order;
- (c) Public health or morality.

Nonetheless, given the 'wide' and 'wild' nature of the instances where derogation is allowed; in the event of any likely conflict between the African Charter and the Nigerian Constitution, the Nigerian Constitution will prevail and any provision(s) of the African Charter that is inconsistent with the Nigerian Constitution will be null and void to the extent of its inconsistency.³⁷

Similarly, Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR)³⁸ provides that "everyone shall be free to leave any country, including his own," whilst Article 12(3) stipulates that rights shall not be subject to any restrictions except those which are provided by law and are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present ICCPR. It is again the contention of the loyalists of the first school of thought that in the case of

³⁶ Cap A9, LFN 2004

³⁷ See *A-G. Lagos State v A.G. Federation* (2003) 12 NWLR (Pt.833) 1 at 119; *Eze&Ors. v. Governor of Abia State &Ors.* (2010) LPELR-4133(CA)

³⁸ Adopted as a multilateral treaty by the United Nations General Assembly with resolution 2200A (XXI) on 19 December 1966

any likely conflict between the Nigerian Constitution and the ICCPR, assuming *arguendo* that the ICCPR has been domesticated under Nigerian law,³⁹ the Nigerian Constitution will prevail. It must, therefore, be clearly pointed out at this juncture that the crux of the view of the first school of thought is that the introduction of tax compliance as a *sine qua non* for issuance or renewal of international passport is not for national security, public order, public health or public morality but for the purpose of revenue generation which, by implication, amounts to an infringement of the fundamental right to freedom of movement.

The second school of thought holds the view that the regulation which prescribes tax compliance as a requirement for the issuance or renewal of international passport is not an infringement on the fundamental right

³⁹ By Section 12(1) of the Nigerian Constitution: “No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly;” *Treaties (Making Procedure Etc) Act*, Cap. T 20 LFN 2004; *Abacha v Fawehinmi* (2000) 77 LRCN 1261 – 1262; [2000] 6 NWLR (Part 660) 228; *Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v Medical and Health Workers Union of Nigeria* (2008) 2 NWLR (Pt. 1072) 575; A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press: Cambridge, 2007) 182; ; B.I. Olutoyin, “Treaty-Making and its Application under Nigerian Law: The Journey so far” 31 (2014) *International Journal of Business and Management Invention* 7 – 18; B.O. Nwabueze, *Federalism in Nigeria Under the Presidential Constitution* (Lagos, Lagos State Ministry of Justice, 1983) 225 – 226; I. Brownlie, *Principles of Public International Law* (7th edn. Oxford: Oxford University Press, 2008) 31 – 33; Babatunde Isaac Olutoyin, ‘Treaty Making and Its Application under Nigerian Law: The Journey So Far’ 3(3) (2014) *International Journal of Business and Management Invention* 7-18; Edwin Egede, ‘Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria’ 51(2) (2007) *Journal of African Law* 249, 250; Imo J. Udofa, ‘Treaty-Making Power of the President and the Requirement of Domestication under the Nigerian Constitution’ 46 (2016) *International Affairs and Global Strategy* 55; see further *Oshevire v British Caledonian Airways Ltd.* (1990) 7 NWLR, (Pt. 163) 489, where the Nigerian Court applied and gave effect to the Warsaw Convention of 1929. Similarly, in *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR, (Pt. 498) 124 at 150, the Supreme Court upheld the applicability of the Warsaw Convention in Nigeria even though it was omitted from the Laws of the Federation of Nigeria 1990 and affirmed that Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law; see also *United African Company (UAC) Nig. Ltd. v Global Transport* (1996) 5 NWLR, (Pt. 448) 291, where the Court of Appeal gave effect to the Hague Visby Rules. Worth noting is that in the aforementioned cases, the treaties were given precedence over municipal laws.

to freedom of movement under the Nigerian law. The argument proffered by the loyalists of this school of thought is that the derogations provided under Section 45 of the Nigerian Constitution are generally applicable to all fundamental human rights provisions in the Nigerian Constitution, except the right to fair hearing⁴⁰ and the tax compliance requirement is a cogent ground for such derogation. Section 45 of the Nigeria Constitution (which is in *pari materia* with Article 12 of the African Charter) provides as follows:

- (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.

It can, therefore, be garnered from the foregoing, that the exceptions in Section 41(2) of the Nigerian Constitution are not the only exceptions recognized in relation to the fundamental right to freedom of movement, as the Nigerian Constitution also recognises the derogation under Section 45 of the Constitution. If this school of thought is adopted, it is the view of the present writers that the initial legal analysis on the supremacy of

⁴⁰ See for instance, *Ariori v. Elemo* (1983) 1 SCNLR 1, where the Supreme Court, Per Abaje, JSC held inter alia as follows:

“(1) Fundamental rights that are for the sole benefit of the private individual can be waived. These include the right to speedy trial which a litigant can waive by asking for an adjournment of the case in so far as the adjournment does not give rise to a miscarriage of justice.

(2) Fundamental rights that are for the benefit of the litigant and the public cannot be waived. These include the right to speedy trial which a litigant cannot waive by seeking an adjournment if the adjournment is of such a nature that the Court will lose the advantage it has of accurate assessment of the witnesses it had observed in the course of trial. This is because to permit such a waiver will lead to injustice as it is against public policy to compromise illegality, manifest or latent.”

See also *Fawehinmi v N.B.A.* (No 2) (1989) 2 NWLR (Pt.105)558; (1989) All N.L.R 274; (1989) 4 S.C. (Pt 1) 63; (1989) LPELR-1259(SC)

the Nigerian Constitution over the African Charter will no longer be necessary.

Sequel to the foregoing, it is now established that the provision of Section 41 of the Nigerian Constitution can be derogated from on the grounds provided under Section 45 of the Nigerian Constitution and the reason for this is not farfetched.⁴¹ It is submitted that the introduction of tax compliance as a necessary requirement for international passport issuance or renewal can be said to be reasonably justifiable in this context. One cannot but ask: Why the unscrupulous tax evasion by some Nigerians and subsequent attempt to move out of the country after enjoying the facilities built from the taxes paid by some other Nigerians? Critically examined, it is contended strongly that this move is unfavourable to defence, considering the fact that the funds used in the procurement of arms and ammunition are gotten from taxes. The regulation can also be said to be in the interest of public order because it may get to the point of public protest, riot and rebellion by the compliant citizens against both the government and the tax evaders in the demand for an egalitarian treatment. Furthermore, it can be argued that it is reasonably justifiable for the purpose of protecting the rights and freedom of other persons

⁴¹ See *A-G. & Commissioner of Justice, Kebbi State v. Jokolo & Ors* (2013) LPELR-22349(CA) (Pp. 75-77, paras. D-A), where the Court of Appeal, Per Akomolafe-Wilson, JCA, held authoritatively that though every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria is to be expelled from Nigeria or refused entry thereto or exit therefrom, Sections 41(2)(a)(b) and 45(1)(a)(b) of the Constitution stipulates the circumstances of restriction on and derogation from fundamental human rights of an individual. According to the Court of Appeal, the Constitution is quite clear that nothing will 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 Right to freedom from discrimination (i) Be tried outside Nigeria for any criminal offence, or (ii) Undergo 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. The Court of Appeal further held that derogation is allowed to the extent that such law, by virtue of Section 45(1)(a)(b), is reasonably justifiable in a democratic society and is either in the interest of defence, public safety, public order public morality or public health; or for the purpose of protecting the rights and freedom of other persons.

who faithfully pay their taxes and will remain in Nigeria upon the exit of the migrants.

However, as erudite as the arguments on the justification of such regulations on the basis of the second school of thought may appear, it is pertinent to state that it has been regarded by many scholars as a formidable impediment to optimal enjoyment, protection and promotion of the fundamental rights in Nigeria.⁴² Whilst it is conceded that there is hardly a right without any qualification, it is respectfully submitted that the “wordings” of the derogatory provision of the constitutional provisions limiting the rights guaranteed in the Nigerian Constitution are somewhat imprecise, nebulous, and hazy as well capable of being abused, thereby, constituting a drawback in the effort to promote human rights globally.⁴³ For instance, what law is “reasonably justifiable in a democratic society” neither enjoys any definition nor is it capable of any precise articulation and many courts have grappled with this problem overtime.⁴⁴ In fact, this vague legal phrase can serve as a creek for the creation of an unjust double standard in the interpretation of such laws, policies and regulations by the judiciary the result of which is the ultimate defeat of the purpose of the draftsmen. All these factors are clear pointers to the fact that the Nigerian government needs to exercise extra degree of care in making as well as rolling out policies and regulations like the instant one into the society.

3.0 THE NIGERIAN COURTS AND THE ‘DERIVATIVE’ FUNDAMENTAL RIGHT TO A PASSPORT: LESSONS FROM OTHER JURISDICTIONS

⁴² Jacob Abiodun Dada, ‘Impediment to Human Rights Protection in Nigeria’ (2012) 18(1) *Annual Survey of International & Comparative Law* 76

⁴³ *Ibid*

⁴⁴ *ibid.* See *Olowoyin v A.G. Northern Region* [1961] 1 N.L.R. 269 (Nigeria); *Williams v Majekodunmi* [1962] 1. N.L.R. 413].

According to Prof. Obiora Okafor⁴⁵, Nigerians, in the exercise of their rights to personal liberty and freedom of movement as well as right to (private) property, are entitled in law to enter and leave the country freely.⁴⁶ The learned Professor of International Law asserts that the trio of the right to personal liberty⁴⁷, freedom of movement⁴⁸ and the right to property⁴⁹ “constitute the parent rights from where their respective individual rights to own and retain a passport derives.” Making reference to the case of *Alhaji Shugaba Darman v. Minister of Internal Affairs*,⁵⁰ he notes that a person who cannot identify himself by showing his Nigerian passport will in practice not be able to enter Nigeria without seeking a permit like every foreigner and opines that such a person may be denied entry into Nigeria on this note. He further asserts that this would have been the fate of Alhaji Shugaba Darman in the defunct second republic, but for the timely intervention of the court which held that the seizure of Alhaji Shugaba Darman's passport infringed his right of exit from Nigeria.

On a related note, the Supreme Court, per Onu JSC, in *Director, State Security Services v Agbakoba*,⁵¹ citing with judicial approval, the decision of Taylor L.J. in the English case of *R v Secretary of State, ex parte Everreett*,⁵² opined that the grant or refusal of a passport affects the right of individuals and their freedom of movement which includes the right to travel. Also worth noting, is the decision of the Supreme Court of India, per Subba Rao, C.J. where it was held in *Satwant Singh Sawhney v Assistant*

⁴⁵ An international legal expert on Human Rights and currently the Chairperson of the United Nations Human Rights Council Advisory Committee

⁴⁶ Obiora Chinedu Okafor, ‘The Fundamental Right to a Passport under Nigerian Law: An Integrated Viewpoint,’ 40(1) (1996) *Journal of African Law* 53-61

⁴⁷ Section 35(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

⁴⁸ *ibid.* Section 41(1)

⁴⁹ *ibid.* Section 44(1)

⁵⁰ (1981) N.C.L.R. 25

⁵¹ (1993) 3 NWLR (Pt 595) 314

⁵² (1989) 1 All E.R. 655 at 660

*Passport Officer and Ors*⁵³ that possession of a passport is a necessary condition to travel in the international community.

Furthermore, in *Kent v Dulles*,⁵⁴ the United States Secretary of States refused to issue an American passport to an American citizen based on the suspicion that the plaintiff was going abroad to promote communism. The court, per Justice William Douglas, held that the federal government may not restrict the right to travel without due process and further asserted thus:

The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law...If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress...Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country...may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of value.

In addition, the US Supreme Court in *Crandall v Nevada*⁵⁵ declared that the freedom of movement is a fundamental right and that a State cannot inhibit people from leaving the State by taxing them. It is also useful to note the decision of the American Court in *Paul v Virginia*⁵⁶ in 1869 where the American Court defined the freedom of movement as 'right of free ingress into other States, and egress from them.'

One common theme in the aforementioned cases is that best practice; respect for the rule of law and sanctity of human rights expect that governments and/or any governmental agency or institution will do nothing to hinder citizens from leaving or coming into the country they are citizens of, whether directly or indirectly by taxing them, including making regulations and/or passing policies that are capable of affecting their derivative right to a passport, the right to travel in and out of the country and by effect, their fundamental right to freedom of movement.

⁵³ (1967) 3 S.C.R 525

⁵⁴ 357 U.S. 116 (1958)

⁵⁵ 73 U.S. 35 (1868)

⁵⁶ 75 U.S. 168 (1869)

4.0 CONCLUSION

Conclusively, this article has argued that where the Nigerian government cannot come within any of the exceptions in section 41(2) of the Nigerian Constitution, it cannot, whether directly or indirectly, deprive a Nigerian citizen of his or her right to the freedom of movement which includes the right to hold a Nigerian passport. Hence, it is argued that should the statement credited to the FIRS about making tax compliance a requirement for obtaining the Nigerian passport and/or the renewal of the Nigerian passport be given effect to and made to see the light of day, an application can be made to a court of competent jurisdiction for the enforcement of fundamental right to freedom of movement in accordance with both Sections 41(1), 46(1) of the Nigerian Constitution and the Fundamental Enforcement Procedure Rules 2009.

Conclusively, the present writer cannot but agree more with the law doyen, Chief F.R.A. Williams QC, SAN, who seeing into the future, opined in 1967 at a speech he delivered at the University of Pennsylvania thus:

Today, many objective observers would agree that there is a real need, almost everywhere in Africa, for a system of government which will guarantee economic prosperity, full employment, social justice and fundamental liberties for all.⁵⁷

Indeed, there is a real need for positive change in Nigeria and it is up to the Nigerian government to rise to the occasion and redefine its priorities by not only ensuring that they champion policies and regulations that will guarantee more economic prosperity, social justice and fundamental liberties, but also embrace respect for the rule of law for “the King himself ought not to be subject to man, but subject to God and the law, because the law makes him King.”⁵⁸

⁵⁷ Chief F.R.A. Williams, ‘Fundamental Rights and the Prospect for Democracy in Nigeria’ 115 (1967) *University of Pennsylvania Law Review* 1073

⁵⁸ See Per Lord Chief Justice Coke quoting Bracton in the case of Proclamations (1610) 77 ER 1352 <http://bracton.law.harvard.edu/Unframed/English/v2/33.htm> (accessed 11 February 2017)

