



# Person's Freedom of Movement Restrictions

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### Introduction

Freedom of movement has various aspects. It is the basis for various important activities, relationships, and rights. Free movement includes the movement of capital, goods, and services.

However, given the political, economic, and social changes the world has experienced in recent decades, we will focus on the freedom of movement of persons, and see to what extent this freedom is applied.

Article 13 from the Universal Declaration of Human Rights, which was proclaimed by the United Nations General Assembly in Paris on 10 December 1948<sup>1</sup> mentioned that

*"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 to return to his country."*

Article 13(1) of the declaration states that everyone has the right to move, sell and live wherever he/she wants within the territory of his/her country. And, paragraph 2 of the article gives every individual the right to leave any country including his/her own, and the right to return. This paragraph is more about the right to travel and move from country to another one.

Article 13 neither mentioned nor limited this right and the General Assembly proclaimed in the preamble that this declaration should be considered the "achievement of all people and all the nations". Thus, in a utopian world, people should be able to travel and move around without passports or other travel documents, their nationality would not matter; and other forms of discrimination would not affect this right, whether based on ethnicity, gender, country of origin, social or economic situation, etc...

However, the system of States, the application of international law, and national law vary from State to State which makes it difficult to find a common procedure to implement this right.

One of the examples of success in adopting and implementing the right of the person's freedom of movement is the European Union model. This success did not come by itself, but there are several elements and features that made this model a success:

- The countries are on the same continent and in the same geographical area
- Common political and economic interests

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<sup>1</sup> United Nations; Universal Declaration of Human Rights; Peace, dignity and equality on a healthy planet, UN official website, [www.un.org](http://www.un.org), visited on January 6th, 2023

- A single predominant religion<sup>2</sup>, which also influences culture and traditions
- The European Union was founded on November 1, 1993, and has strong institutions and bodies that make taking common decisions easier and more effective:
  - European Parliament (Brussels/Strasbourg/Luxembourg)
  - European Council (Brussels)
  - Council of the European Union (Brussels/Luxembourg)
  - European Commission (Brussels/Luxembourg/Representations across the EU)
  - Court of Justice of the European Union (Luxembourg)
  - European Central Bank (Frankfurt)
  - European Court of Auditors (Luxembourg)<sup>3</sup>

All these points facilitated the application and implementation of the Treaty of Rome of March 25, 1957. The treaty has given the "Free Movement of Persons, Services and Capital"<sup>4</sup> and paragraph 1 of Article 48 mentions that " *Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.*" So, the article focuses on the workers and not on all the individuals. From this, we can infer that although the EU introduced freedom of movement, the main objective is economic interest and not the general right to free movement. And, also, in Article 49, the legislator uses again the term "workers", which confirms that the right of the freedom of movement is linked to the person statute which is supposed to be "Worker". The absence of such a statute may lead to the loss of this right. Later, however, in 1990, the EU took another step towards the fundamental right to the free movement of persons and implemented the Schengen Agreement, which created the Schengen area and abolished all internal border controls for its members. This agreement extended the freedom of movement from only "workers" to all citizens, residents of the Schengen area, and citizens from outside the EU or the EEA who have obtained a visa from a Schengen country. Article 2 of the Schengen Agreement states that "internal borders may be crossed at any point without any checks on persons carried out". In other words, the person is allowed to travel without any formalities or checks.<sup>5</sup>

However, as with any general rule and any other fundamental rights, exceptions are "a must" that the legal system "likes".

Although the EU had adopted this freedom of movement, the Schengen Border Code adopted in 2006 allowed member states to establish several exceptions based on the security and public order needs of the state.

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<sup>2</sup> Britannica; Religions of Europe; Europe; People; website [www.britannica.com](http://www.britannica.com); visited on January 9th, 2023

<sup>3</sup> European Union; Types of institutions and bodies; Set-up and locations; Institutions, law, budget; an official website of the European Union; [www.european-union.europa.eu](http://www.european-union.europa.eu), consulted on January 3rd, 2023

<sup>4</sup> Treaty of Rome, March 25th, 1957, Title III

<sup>5</sup> Emily Delcher; Freedom of Movement and the Schengen; 2012; Iceland Human Rights Center; website [www.humanrights.is](http://www.humanrights.is); visited on December 27th, 2022

On the other hand, many other countries have not made as many decisions to implement the freedom of movement right. Up to this point, nationality and type of passport have been the determining factors in determining the extent to which a person enjoys the right to freedom of movement.

Even though international law and the Declaration of Human Rights have been playing a major role in protecting the rights of individuals. The country's sovereignty, internal public order, and security remain the main cornerstones of the national legal system and laws. We cannot deny that this is important for the security, safety, and protection of citizens. For this reason, we have found several legitimate limits defined by law, national security and public order (A), public health and morals (B), and others' freedom and rights (C); which, misused or abused can have negative effects.

Why and how are these restrictions justified? And, to what extent might they be democratic?

### **The legitimate limits of the movement's freedom of persons**

The freedom of movement for persons can have limits, and only countries can do so for legitimate and justified reasons. International law and communities cannot interfere with countries' internal decisions or domestic law, especially when it comes to justified exceptions. Dr. Ulrich Menzel explains in his theory, that states should have four principles: the principle of territoriality, the principle of sovereignty, the principle of legal equality, and the principle of balance of power.

First, sovereignty is the most important principle that concerns our topic. According to Ulrich sovereignty means that the state has sovereignty directed outward and has no superior authority that can interfere in its affairs. Its representation of interests is based on self-help and has an inward sovereignty that allows it to choose its political system completely freely. Moreover, it is not accountable for its internal affairs. However, this principle should coexist with three other principles. They are the points that define a state, and at the same time, establish the rights of that state.

Secondly, the principle of territoriality means that the state has defined borders, an absolute monopoly of power, legal orders and systems, tax authorities, people, nations, religion... etc<sup>6</sup>

As a result, the state should protect its people and nation and has the right to manage its borders as it suits its interests.

We can say that the goal of all countries is to protect their sovereignty and interests. One of these interests is to protect the security and order of the country and its citizens.

However, it is very important to emphasize that any restriction of freedoms or rights is a delicate matter. Therefore, "any measure restricting the right to liberty of movement must be

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<sup>6</sup> Ulrich Menzel; Westphalian State System or Hegemonic World Order?, A Theoretical Introduction; published on [www.ulrich-menzel.de](http://www.ulrich-menzel.de); consulted on January 11th, 2023

in accordance with law”<sup>7</sup> and ”strike a fair balance between the public interest and the individual’s rights”<sup>8</sup> and to define whether or not the restriction is legitimate, the question that should be asked is ”the impugned measure was “necessary in a democratic society”<sup>9</sup>.

In other words, if these restrictions are a necessity then they are legitimate.

### **A. National security and public order**

Recent decades have been marked by changes in terrorist movements and attacks. In the last decade, numerous terrorist attacks have occurred in parallel with the arab spring revolutions. We are not only talking about terrorist groups confined to a specific geographical area or group but some of these attacks have also been perpetrated by individuals.

#### Case Study: Tunisia

After the Arab Spring began in Tunisia in 2010, Syria was the first destination of many ”militants” who joined the terrorist movement in Syria called ISIS. This group controlled large parts of northeastern Syria, as well as some border areas with Turkey and Iraq. According to IEMed<sup>10</sup>, ”In 2014, it was estimated that ISIS, Jabhat al-Nusra, and Ahrar al-Sham had 26,000 members, including 12,000 foreign fighters, of whom 1,000 were Europeans and 100 were US citizens.”<sup>11</sup> And according to the UN report, it is mostly Tunisians who have joined the terror groups. A United Nations team of experts concluded that around 5,500 young Tunisians, joined terrorist organizations in Iraq, Syria, and Libya. Therefore, at that time, Tunisian authorities tried to impose a series of legitime restrictions to prevent these individuals from leaving the country and joining these terrorist groups, although Tunisian citizens can travel to Libya and Turkey without any legal restrictions imposed by the two aforementioned countries. These countries are visa-free for Tunisian nationals. In order to ensure the maintenance of national security and public order, the 2015’s Prime Minister, Habib Essid, announced to the Tunisian Parliament that the authorities prevented some 15,000 young Tunisians from leaving the country to join ”jihadists” abroad.<sup>12</sup> Based on the ”necessity of the time”, Tunisian authorities concluded that ”freedom of movement” should be restricted, although, at the international level, Tunisia had ratified the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights<sup>13</sup> on March 18th, 1969; and, the African Charter on

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<sup>7</sup> European Court of Human Rights; Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights, Freedom of movement; Updated on August 31st, 2022; Council of Europe; Page 33

<sup>8</sup> Ibid Page 35

<sup>9</sup> Ibid Page 35

<sup>10</sup> European Institut of the Mediterranean (Institut Européan de la Méditerranée

<sup>11</sup> Vincent Durac; The Role of Non-State Actors in Arab Countries after the Arab Uprisings; 2015; IEMed Mediterranean Yearbook; published on [www.iemed.org](http://www.iemed.org); consulted on January 3rd, 2023

<sup>12</sup> DW.ع.ع/ع.ج.م (أ ف ب، رويترز، د ب أ)، تقرير أممي: التونسيين الأكثر إنضماما للجماعات الإرهابية، 2015، G/ AJM (AFP, Reuters, DPA), UN report: Tunisians join terrorist groups the most, 2015, DW; published on [www.dw.com](http://www.dw.com); consulted on December 29th, 2022

<sup>13</sup> Article 12

Human and Peoples' Rights<sup>14</sup> in 1983, but, these conventions gave it the right to make exceptions to protect national security and public order. And, at the level of Tunisian national law, the Tunisian Constitution of 2014, which was in effect at the time of our case, Article 24(2) mentioned that "Every citizen has the right to choose their place of residence, to free movement within the country, and the right to leave the country." And, the exception was established by Article 49 of the same Constitution: "The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defense, public health, or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations. No amendment may undermine the human rights and freedoms guaranteed in this Constitution."

The same procedure is applicable in almost all countries, and whenever there is public order or national security, freedoms and rights can be restricted, and this is a democratic instrument, provided that the restriction is necessary and regulated by law.

And, these situations are considered legitimate restrictions on freedom of movement:

- The person can be asked not to leave his/her place of residence or other specific areas without permission. This may be ordered: as part of the bail conditions or as a separate measure in the context of criminal proceedings, during bankruptcy proceedings; in the

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1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

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

4. No one shall be arbitrarily deprived of the right to enter his own country.

<sup>14</sup> ARTICLE 12

Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

Every individual shall have the right to leave any country including his own, and to return to his country.

This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups

context of compulsory military service; as crime prevention measures; a prohibition to approaching a certain place, etc...<sup>15</sup>

These exceptions are also applied when public health or morals may be endangered.

## **B. Public Health or Morals**

### **a. Restrictions on a person's freedom of movement due to public health**

There is no better situation than the case of the Covid 19 pandemic that can give us a clear idea and understanding of public health as a restriction on the right to freedom of movement. At that time, all countries took the necessary measures to control the situation and protect their citizens.

A general lockdown was imposed, including a ban on leaving homes, except in approved cases. During the Covid pandemic, restrictions of movement became the general rule and freedom of movement the exception. This measure is considered "a measure of a general character" and "to be able to claim victim status"<sup>16</sup>, the European Court of Human Rights, in the case of Guillaume Zambrano v. France<sup>17</sup>, decided that the "victim" must show exactly how the measures affected him/her or whether they were directed against him/her because of "possible individual characteristic in the context of Covid 19". The same rule was applied in other cases such as Piperea v. Romania<sup>18</sup>, and Magdić v. Croatia<sup>19</sup>. And, in all cases, the Court applied the same rule because the measure has a general character.

The restrictions enacted during the Covid 19 pandemic not only limited the freedom of movement but also limited the exceptions for this movement and many requirements were imposed in the event that the person belongs to the excepted group, such as vaccination, the reason to travel, the residence of the person, the nationality and citizenship, and where and when the person travels. As a result, "the crisis caused by the COVID-19 virus is an emergency which demands certain extraordinary measures to protect public health, including restrictions on fundamental civil and political rights."<sup>20</sup> However, during this public emergency period "demand some punctual measures like to suspend certain rights but under the principles of legality, and with full respect for the non-discrimination clauses of international human rights law"<sup>21</sup>. United Nations confirmed this opinion in 2000 by stating that "Even without formally declaring states of emergency, states can adopt exceptional measures to protect public health

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<sup>15</sup> European Court of Human Rights; Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights, Freedom of movement; Updated on August 31st, 2022; Council of Europe; Page 22 - 23

<sup>16</sup> Ibid, Page 32

<sup>17</sup> Case 41994/21, Guillaume ZAMBRANO v. France; European Court of Human Rights; published on [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int), on September 9th, 2021, consulted on January 11th, 2023

<sup>18</sup> Case 24183/21, Gheorghe PIPEREA v. Roumanie, ECHR; published on July 5th, 2022

<sup>19</sup> Case 17578/20, Dalibor MAGDIĆ v. Croatia

<sup>20</sup> Anna Maria Bolborici; The Covid 19 Pandemic and the Fundemantal Rights in the EU; Bulletin of the Transilvania University of Brasov. Series VII, Social Sciences and Law., suppl. Special Issue; Brasov Vol. 14, (2021): 17-22; Page 1

<sup>21</sup> Ibid, Page 3

that may restrict certain human rights, respecting of the requirements of legality, necessity, and proportionality, and be non-discriminatory”<sup>22</sup>.

Thus, if it is a general measure aimed at protecting public health, that is, the interest of the whole group, the other rights may be restricted or suspended during this period. In other words, this restriction or derogation is temporary, it is only to let things get back to "normal" and cannot be permanent otherwise it would be considered an unlawful decision and violation of human rights. For this reason, governments and authorities should be very careful when it comes to measures or decisions that restrict the rights and freedom of individuals. Is this a necessity? Is it an emergency? How long is the time period? Are there any other solutions or ways? What human rights and freedoms would be affected? All these questions should guide the authorities and the governments when they make such decisions.

### **b. Moral restrictions on a person's Freedom of Movement**

Moral and public health have been linked in the articles of law because both have the same measures to be considered legitimate as a restriction. Moral can serve as a restriction on human rights, especially the right to freedom of movement in our case, if the restriction is necessary and required in a democratic society. And since public health can be a reason for these restrictions, moral can do the same.

The first covenant that clearly established this restriction after the Universal Declaration of Human Rights is the International Covenant on Civil and Political Rights which was adopted on December 16, 1966. Article 12 of the Covenant states in the first three paragraphs: " 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

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

This article will be adopted in the coming international or regional conventions and applied to many national laws.

"None of the foundational supranational instruments define "morals." However, in practice, clauses that allow states to limit rights in the name of morality-what I call moral provisions-have been invoked by governments primarily on issues of sex and sexuality. States have invoked morality to assert sovereign authority over subjects as diverse as same-sex activity, abortion and reproductive rights, sex work, group sex, BDSM, and the "promotion" of

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<sup>22</sup> Ibid, Page 3

homosexuality.”<sup>23</sup>. Since the early 1990s; however, many of the aforementioned forms of “sexual autonomy and expression” have been recognized as human rights.<sup>24</sup>

Yet, sex workers may be the best example for our case. As a result, they are not allowed to leave the country if sex work is illegal, or to enter some countries for whatever reason.<sup>25</sup> And why is this considered a moral restriction that can be legitimate in this situation? States consider this as a fight against human trafficking crimes, and to protect the person if he/she is a victim.

At the same time, many states define sex work as “immorality” that can threaten or endanger public morality. As a result, in many cases, sex workers are unable to present the real employment contract to obtain a VISA for entry into a country. In many cases, the contract they do present includes another job title such as “waitress”.<sup>26</sup>

In addition, many countries may prohibit the right to leave if they suspect the person will travel to engage in sex work.

### **C. Rights and freedom of others**

This provision has not been explained by law, it is left open to the states to define it internally in a way that better suits the interests of their countries and communities.

And, like the previous two parts, this restriction should be necessary and democratic.

Many examples can be given in this part because many rights and freedoms can be “used” as a pretext to make them a legitimate restriction on the right to freedom of movement.

In Tunisia, for example, in order to protect the children and their parents, it was made a legal requirement that a child can only travel with one parent if the other parent also agrees and either present their consent in a written format or be present in the airport at the time of the travel. This restriction was put in place because many couples, especially those where one parent has different citizenship or nationality. In many of these cases, when the couple has a disagreement or files for divorce, the other person would try to kidnap the child and travel with him back to his/her home country.

The other example concerns the right to employment for citizens of the Schengen area. People who come from a third national country can travel there to work. However, the visa can be

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<sup>23</sup> Ryan Thoreson; The Limits of Moral Limitations: Reconceptualizing "Morals" in Human Rights Law; Harvard International Law Journal; Vol. 59; no.1; pp. 197-244; Page 199

<sup>24</sup> Ibid; Page 199-200

<sup>25</sup> Global Network of Sex Work Projects; Sex Workers and Travel Restrictions; Policy Brief

<sup>26</sup> European Parliament; The differing EU Member States' regulations on prostitution and their cross-border implications on women's rights; 2021; Policy Department for Citizens' Rights and Constitutional Affairs; study requested by the FEMM Committee

rejected if other Schengen citizens have the same qualifications to fill the job. Employers must prove that they have searched for potential profiles in the Schengen area, and if there are any, they can hire someone from a third (national) country.

The reason for this policy is to protect the right to employment of the citizens involved, so that it is ensured that they have priority to work in the marketplace in their countries.

In Hungary, for example, in order to obtain a work permit, one must first advertise the job: "Advertise the job in the Hungarian Labour Office (Munkaügyi Központ) for a fixed period of 15 days to allow sufficient time for unemployed Hungarian national to compete for the job vacancy."<sup>27</sup>

This rule is the same in almost all EU countries.

## Conclusion

For all of the above reasons for restricting the freedom of movement, public order, national security, moral, public health, and the rights and freedoms of others, there is no specific definition in international, regional, or local laws. States can interpret these terms in the way that is best for their interest and sovereignty. And whenever, the country's interests are at stake, the political situation will be the main factor in these interpretations and the actions taken to restrict them.

Exceptions can be useful in some situations and the only way to protect the general interest, but, they can also be used as leverage against the opposition and minority groups.

In many cases, exceptions have been abused and used as a basis for discrimination: A person's faith, race, nationality, social class, and sexual orientation can be grounds for denying him or her the right to freedom of movement or for imposing harsher and more restrictive on the enjoyment of that right.

Islamophobic countries have been changing their visa procedures over the past decade to reduce the number of "Muslims" allowed into their countries.

Third-country nationals have always been the main target group to be searched and questioned at the borders, and even with a valid visa they can be denied entry.

The war between Russia and Ukraine is the best example of how the right of refugees to move to other countries depends on their nationality. Although the war in Congo, West Africa, Syria, Yemen, and developing and Muslim countries has been going on for a long time, the measures to receive these people who apply for asylum and ask to be allowed to leave their countries and travel to other countries are not the same as those taken for Ukrainian citizens.

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<sup>27</sup> ShieldGeo; Immigration and Work Permits; published on [www.shieldgeo.com](http://www.shieldgeo.com); consulted on January 13th, 2022

A simple check on the embassies' websites and visa processing confirm that the right of Ukrainians to leave for other countries takes priority, while the right to freedom of movement for other affected groups from different countries is completely ignored.

Recently, the European Union urged Serbia to introduce tourist and business visas for Burundian and Tunisian nationals in order to better control borders and prevent "illegal migrants" from entering other European countries from Serbia. And, "Serbia will likely reinstate the visa requirement for more nationalities in the next few months to better align itself with EU policy".

Sex workers can be denied entry into a country, even if, they are only there for tourism purposes, to prevent them from engaging in sexual activities. The person's personal life and morals are judged by border authorities.

Conservative and homophobic countries have denied the LGBTQA+ community the right to move freely outside or within their borders. Transgender people are the most affected by this.

The visa process itself is not fair and equitable. Some countries have different conditions depending on nationality, social class, gender, sexual orientation, etc. "Since visa systems are instruments to control entry into the States, one of their most evident policy functions is to guarantee national security by keeping out 'undesirables'."<sup>28</sup>

All these illegitimate situations and human rights violations lead us to believe that international, regional, and local human rights treaties and laws need even more effective and stronger institutions, independent of political conflicts, social prejudices, and, above all, any kind of discrimination, in order to achieve a balance between rights, freedom, and protection.

But in a realistic world, people will always try to abuse power for their personal interests. Therefore, the role of the judiciary, strong independent institutions, the media, and civil society is very important and should be supported to better respect human rights and freedoms.

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<sup>28</sup> Annalisa Meloni; Visa Policy within the European Union Structure; 2006; Springer Berlin Heidelberg New York

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