

2/10/4/15

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

8 August 1995

Room M 46

REPORT :

7. FREEDOM OF RESIDENCE

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THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

SCHEMATIC REPORT ON
FREEDOM OF RESIDENCE

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II	Nature of right (Application of Constitutional Principle II)	Right should be included in Bill of Rights.		
2.		Content of right	The right to freedom of residence (freely to choose his or her place of residence) anywhere within South Africa / the national territory / the territory of the state.	<p>Outstanding issues ¹:</p> <p>(i) Freedom of movement, residence and citizenship in once section - ACDP, ANC.</p> <p>(ii) Section 19 of the Interim Constitution as a separate right - DP, NP.</p> <p>(iii) Freedom of movement and residence and to enter, remain in, leave and return in one section - FF, IFP, PAC.</p>	

1. It should be noted that items marked "*Outstanding*" do not signify contention amongst political parties. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
3.		Application of the right (Nature of Duty)		<p>Outstanding issues:</p> <p>(i) State has duty to protect the right - ACDP, ANC.</p> <p>(ii) State may not infringe the right and may not force a person to reside in a particular location - NP.</p> <p>(iii) State to allow freedom of residence in accordance with the general rules of international law, incorporated in our law (FF).</p> <p>(iv) No government policy forcing the relocation of people shall be allowed - IFP</p>	
4.		Application of the right (To common and customary law)	Shall apply to common law and customary law.	Constitutional provisions to supercede common law - FF Outstanding	
5.		Application of the right (Duty on Private Actors)		<p>Apply horizontally and vertically - ACDP, ANC, NP Outstanding</p> <p>Apply vertically - FF Outstanding</p>	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
6.		Bearers of the right		<p>All natural and juristic persons - ACDP.</p> <p>Every person (Human beings) - ANC.</p> <p>Every person living in South Africa - DP.</p> <p>All citizens and aliens lawfully present in the country - FF, NP.</p> <p>Every citizen and permanent resident - PAC.</p> <p>Everyone - IFP.</p>	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
7.	Section 33	Limitation of right	Right in principle subject to limitation.	<p>Limitable only when reasonable evidence exist that the interest of the public is threatened - ACDP.</p> <p>Any limitation shall have to be justifiable and reasonable in an open and democratic society - ANC.</p> <p>Present sections 33 and 34 - DP, NP. It should be considered to limit these rights by legislation in the case of persons who are unlawful immigrants or fugitives from justice. There could also be other factors, such as measures to combat epidemics, to deal with natural disasters, insurrection, etc.</p> <p>To what extent these matters should be dealt with in the Constitution and to what extent they should be left for adjudication by the courts is debatable - FF.</p>	

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON FREEDOM OF RESIDENCE

This report is drawn up on the basis of submissions received from political parties, organisations of civil society and individuals; the public participation programme and other activities of the Constitutional Assembly.

PART I

MATERIAL CONSIDERED BY THE THEME COMMITTEE

1. **Submissions received from political parties (in alphabetical order):**
 - ACDP
 - ANC
 - DP
 - FF
 - NP
 - PAC

2. **Submissions received from the public and civil society²:**
 - 2.1 Individuals (in alphabetical order)
 - 2.2 Organisations (in alphabetical order)
 - 2.3 Government structures\ institutions (in alphabetical order)

3. **Technical Committee reports:**

None to date

4. **Relevant Constitutional Principles**

II

2. This section will be completed once all the submissions received have been processed.

PART II

1. NATURE OF THE RIGHT (Application of Constitutional Principle II)

1.1 Non-contentious Issues

1.1.1 The right must be included in the Bill of Rights.

2. CONTENT AND SCOPE OF THE RIGHT

2.1 Non-Contentious Issues

2.1.1 The right to freedom of residence (freely to choose his or her place of residence) anywhere within South Africa / the national territory / the territory of the state.

2.2 Outstanding issues³

2.2.1 Freedom of movement, residence and citizenship in one section - ACDP, ANC.

2.2.2 Section 19 of the Interim Constitution as a separate right - DP, NP.

2.2.3 Freedom of movement and residence and to enter, remain in, leave and return in one section - FF, IFP, PAC.

3. APPLICATION OF THE RIGHT (Nature of the duty on the state)

3.1 Outstanding Issues

3.1.1 State has duty to protect the right - ACDP, ANC.

3.1.2 State may not infringe the right and may not force a person to reside in a particular location - NP.

3.1.3 State to allow freedom of residence in accordance with the general rules of international law, incorporated in our law (FF).

³ It should be noted that items marked "*Outstanding*" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

3.1.4 No government policy forcing the relocation of people shall be allowed - IFP

4. APPLICATION OF THE RIGHT (To common and customary law)

4.1 Non-contentious issues

4.1.1 The right must apply to the common and customary law.

4.2 Outstanding issues

4.2.1 Constitutional provisions to supercede common law - FF

5. APPLICATION OF THE RIGHT (Duty on private actors)

5.1 Outstanding Issues

5.1.1 Apply horizontally and vertically - ACDP, ANC, NP.

5.1.2 To apply only vertically - FF.

6. BEARERS OF THE RIGHT

6.1 Outstanding Issues

6.1.1 All natural and juristic persons - ACDP.

6.1.2 Every person (Human beings) - ANC.

6.1.3 Every person living in South Africa - DP.

6.1.4 All citizens and aliens lawfully present in the country - FF, NP.

6.1.5 Every citizen and permanent resident - PAC.

6.1.6 Everyone - IFP.

7. LIMITATION OF THE RIGHT

7.1 Non-contentious Issues

7.1.1 Right in principle subject to limitation.

7.2 Contentious\ Outstanding Issues

- 7.2.1 Limitable only when reasonable evidence exist that the interest of the public is threatened - ACDP.
- 7.2.2 Any limitation shall have to be justifiable and reasonable in an open and democratic society - ANC.
- 7.2.3 Present sections 33 and 34 - DP, NP. It should be considered to limit these rights by legislation in the case of persons who are unlawful immigrants or fugitives from justice. There could also be other factors, such as measures to combat epidemics, to deal with natural disasters, insurrection, etc. To what extent these matters should be dealt with in the Constitution and to what extent they should be left for adjudication by the courts is debatable - FF.

ADDENDUM

PARTY SUBMISSIONS

- ACDP

**AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE FOUR**

**FREEDOM OF MOVEMENT,
RESIDENCE AND CITIZENSHIP**

Sections 18, 19 and 20 of the Constitution read as follows:

Every person shall have the right to freedom to movement anywhere within the national territory.

Every person shall have the right freely to choose his or her place of residence anywhere in the national territory.

Every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall without justification be deprived of his or her citizenship.

The Content Of The Right

The ACDP suggests that the above three sections of the constitution be read as one interrelated right.

Freedom of Movement

The ACDP believes that the rights of movement including to assemble to petition against grievances is a fundamental human right.

The right to movement is a reflection of self government and the ability to organise human effort. Movement is by definition the basic freedom that exists which assert human beings to develop to their full potential.

It is when government interferes with this right that fundamental human liberty is threatened.

The ACDP believes that government should not interfere in family and church government, or other social institutions, as long as they do not aim to destroy the social fabric of a society.

In the past we have experienced the hardships of the Group Areas policy, and other socio-economic restrictions that affected the upward mobilisation of the people, and for which we are still reaping the consequences today.

The freedom of movement involves the right to pursue one's goals, and to be given all the available assistance to achieve them.

The ACDP believes that the right to a healthy education and economic system are all aspects which constitute towards the growth of our nation, and assist in the development of a well-balanced discerning nation, able to govern themselves responsibly and lawfully.

As with all rights there are limitations and responsibilities. Insofar as the right to movement reflect a socio-economic dynamic and improved development standard within society, it also is possible that exploitation and oppressive measures may increase.

It is therefore the ACDP's opinion that under no circumstances may any form of destabilisation occur or any instability in neighbouring regions be encouraged.

We support the development of the Southern Africa regions in that it aims to uplift the communities productive levels.

The ACDP supports the freedom of movement without any government interference, unless reasonable evidence exist that the interest of the public is threatened.

We are also of the opinion, that more should be done to develop a culture of self-worth and entrepreneurialism in order that we develop the skills of our people, and resist the brain-drain we are currently experiencing.

Freedom of Residence

The ACDP believe that God has granted unto the family the right to ownership, in order that family government can be exercised in a stable environment, and as well as to educate the people in responsible stewardship of their gifts.

The freedom to choose a residence is closely linked to the principle of dominion, which further is interrelated to other forms of authorities.

It is the awareness of these other spheres of influences, that allow people and organisations to value the role and significance of each other.

It is within these different dimensions that we realise the dignity of human creativity and resourcefulness, as well as to see the God-ordained authority imparted to humanity to cultivate and inhabit the earth.

In other words, it is when we discover our skills and gifts to develop this planet and to enjoy the fruits of our labour, that we reject any ideological system which teaches centralised economic beliefs, or government with *top-down* authoritative decision-making powers.

We are further of the opinion that anyone has the right to choose a residence, and to have access to a healthy environment and leisure and entertaining centres, and be subjected to taxation and the payment for services.

No one should be denied permits to reside in South Africa, as long as they do not have a criminal record in their country of origin, and is willing to contribute to the development of our country.

We are of the opinion that ownership or right to residence should be open to foreigners who do not wish to take out South African citizenship, and that this right should be available to South African citizens who wish to reside abroad as well.

We suggest that where-ever the situation merits the need for dual residence this should be allowed.

Freedom of Citizenship

The ACDP believe that citizenship is a covenant relationship that exist between the State and its people for the pursuit of excellence and well-being of all in society.

In the past South African citizenship has been defined by race, class and nationalism.

We do not support the notion that nationalism is the criterion which define citizenship, as it relegates us to the past where the supremacy of "Volk" and language were the pre-determined factors on which nationhood was built.

As South Africa is a multi cultural society, our citizenship should interpretatively reflect a diversity, yet evoke a shared communality, with a dignified allegiance to a territorial sovereignty.

A united South African territorial awareness should evolve among our citizens.

South Africa is in the fortunate position, that it is creating a new constitution which is to be the supreme law of the land. It is by establishing a constitutional democracy, to which all people adhere to, that citizenship can be defined.

In other words, citizenship will not be described according to a cultural identity, but more broadly understood within a context of a Constitutional State.

The advantage of this position is that it transcends cultural barriers and move towards a general sense of patriotism and civil responsibility.

The status of equality is enshrined within this description and reduces group conflict and enhances group tolerances.

We should endeavour to encourage a broad democratic citizenship in building the Constitutional State with the objective to benefit the citizenship as a whole.

With regard to foreigners and immigrants, the Bible reminds us that: *"You shall neither mistreat an alien or oppress him, for you were aliens in Egypt."* (Exodus 22:21)

"When an alien lives with you in your land, do not mistreat him. The alien living with you must be treated as one of your native-born. Love him as yourself, for you were aliens in Egypt. (Leviticus 19: 33,34)

The political struggle has shown us that were it not for those friendly countries who welcomed our political exiles the fight for justice would have been a completely different one.

We should at all times be reminded of the discrimination and the persecution many of us experienced during the Apartheid era, and therefore should beware of placing others under similar sufferings.

Our history is a lesson unto us, and our laws will ensure that aliens require justice and protection within our borders.

The scriptures also strongly speaks out against oppression as a serious offence, because it indicates that to all practical intent no law exists.

True law gives a common protection to all those who are law-abiding, and where the weak are unable to get such protection, the law is non-existent.

True law discriminates against those who are wrong-doers. If the lives and properties of foreigners, children and the general population are not protected by the civil order, then that order has become lawless.

The ACDP believe that a system is just only insofar as the citizens of a country experience a sense of justice and that their support for authority rest in the legitimacy of the state based upon the will of the people.

The ACDP therefore proposes that the rights as enumerated above be combined into the following sections as suggested by the South African Law Commission Report on Group and Human Rights that:

Every person shall have the right to freedom of movement and residence anywhere within South Africa.

Every citizen shall have the right to enter, remain in or return to the Republic and no citizen shall be deprived of his or her citizenship.

Application of the Right

2.1 Nature of the duty to be imposed upon the State

It is the duty of the State to ensure that all rights and freedom be protected and that everyone shall enjoy access to full benefit of the State.

2.2 Application of the right to common law and customary law.

The ACDP restates its position that the biblical principles of justice, righteousness and equality are morally dependant upon the responsibilities of all citizens, and that these should be reflected in both common and customary laws.

2.3 Should the right under discussion impose a constitutional duty on actors other than the state?

The ACDP believes that every right has a corresponding set of responsibilities.

God created us with the ability to communicate and have social relationships. Human nature is intuitively inclined to explore and settle anywhere in their region and the world.

We uphold this right and hold the view that those who choose to operate outside of the protection of the law or to illegally usurp certain privileges, should be brought to correction.

2.4 Who should be the bearer of the right?

All natural and juristic persons should be the bearers of these rights.

2.5 Should the right under discussion be capable of limitation by the legislature?

All limitations applied to these rights is dependant upon the nature of the right applied, and whether such right exceed legal and moral grounds. The rights above clearly supports other rights of human dignity, freedom of forced labour, freedom of oppression and discrimination etc.

The right is a positive right and should be encouraged.

- ANC

CITIZENS RIGHTS, FREEDOM OF MOVEMENT AND FREEDOM OF RESIDENCE

1. Content of the Right

The cluster of rights named above can be dealt with under one section as they are very closely related and overlap considerably. Further, in the Universal Declaration of Human Rights they are dealt with under Article 13, and are similarly dealt with in other major international instruments.

The significance of these rights, even in a South African context, must not be underestimated. The former South African government's abuse of citizens rights in terms of the issue or denial of passports and deportations, give these rights a significant dimension.

Restrictions in terms of freedom of movement and residence as experienced through the notorious pass laws, laws prohibiting movement of civilians to other provinces, influx control and the abhorred Group Areas Act, all restricted free movement within the borders of our national territory.

The ANC believes that all South Africans shall have the right, without discrimination, to move freely and reside in any part of the country, to receive a passport, travel abroad, to return to his or her country and to emigrate if he or she so wishes.

We support the formulation of the Law Commission which reads as follows:

Every person shall have the right to freedom of movement and residence anywhere within South Africa.

Every citizen shall have the right to enter, remain or return to South Africa, and no citizen shall be deprived of his or her citizenship.

2. Application of the Right

- 2.1. The state has a duty to protect the right.
- 2.2. The right applies to both common law and customary law.
- 2.3. The right shall bind the state, private individuals, institutions and social structures.
- 2.4. The bearers of the rights shall be human beings.
- 2.5. Any limitation shall have to be justifiable and reasonable in an open and democratic society.

- DP

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CONSTITUTIONAL ASSEMBLY : THEME COMMITTEE 4

DEMOCRATIC PARTY SUBMISSION ON:

- 1. POLITICAL RIGHTS**
- 2. CITIZENS' RIGHTS**
- 3. FREEDOM OF RESIDENCE**
- 4. FREEDOM OF MOVEMENT**

3. RIGHT OF RESIDENCE

3.1 Content of the Right

Section 19 of the Interim Constitution reads:-

"Every person shall have the right freely to choose his or her place of residence anywhere in the national territory."

The Democratic Party supports the provision of this right, as formulated in the Constitution.

This 'classic' civil right is absolutely fundamental to a free society. The right to choose where to live is the prerogative of a free person in a free society. Dictating where and how one should live is not the role of the government. One of the most despicable laws of the apartheid era was the Group Areas Act, which racially demarcated on a separate and unequal basis, the territory of South Africa.

3.2 Nature of the duty to be imposed on the State

The right to choose residence does not in itself sanction squatting. Limitations on the right to regulate, for example, illegal squatting will be possible, provided they pass the test in s.33(1).

3.3 Bearers of the Right

The right applies to all persons living in the Republic.

3.4 International Precedent

The right is internationally recognized and protected in both the Universal Declaration of Human Rights, article 13(1), and the International Covenant on Civil and Political Rights, article 12(1).

- FF



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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON FREEDOM OF MOVEMENT,

FREEDOM OF RESIDENCE AND CITIZENS' RIGHTS

1. Content of the rights of freedom of movement, freedom of residence and citizen's rights

General

The South African Law Commission in its Final Report on Group and Human Rights, October 1994 (at p 52) preferred to treat sections 18, 19 and 20 of the transitional Constitution together, as the freedom to choose one's residence and move about within a particular state territory are treated together in all the major international instruments. Moreover, the right to leave any country, including one's own, appears almost identically in all international instruments. On the other hand, however, the right to enter or to return to a particular state differs fundamentally from the other rights mentioned above. This right is, in international law, confined to nationals of that state, with the object of preventing statelessness, which international law attempts to eliminate.

The Freedom Front is of the opinion that the new Constitution should contain a provision substantially corresponding with article 12 of the International Covenant on Civil and Political Rights, 1966, which reads as follows:

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, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country'. (Stress supplied.)

Freedom of movement and freedom of choice of residence

We agree with the provisions of sections 18 and 19 of the transitional Constitution relating to freedom of movement and the free choice of a place of residence anywhere in South Africa, respectively. We suggest that these two provisions should be combined in one article, referring to the right to freedom of movement and residence of every person lawfully (see paragraph 2.4 below) anywhere within South Africa, and not being a fugitive from justice.

The Freedom Front submits that provisions relating to freedom of residence should not be construed as conferring any rights on illegal squatters. It is for this reason that we recommend that the wording of article 12 of the International Covenant on Civil and Political Rights should be introduced into the new Constitution. (See article 12.3, cited above.)

Citizen's rights

The implication of a right to leave the country and travel or sojourn abroad is that the prerogative relating to the granting of a passport has been repealed by implication by the transitional Constitution.

In the light of the exposition above the Freedom Front prefers the formulation of the South African Law Commission to that of section 20 of the transitional Constitution. The former reads as follows: 'Every citizen shall have the right to enter, remain in or return to the Republic and no citizen shall be deprived of his or her citizenship' (stress supplied). Section 20 provides that every citizen shall have the right to enter, remain in and return to the Republic, and that no citizen shall without justification be deprived of his or her citizenship. The effect of our submission, if accepted, would be that the South African government would not be able to deprive a South African citizen of his or her citizenship, thereby probably rendering such person stateless.

2. Application of the rights

2.1 Nature of the duty imposed on the state

If our recommendations are accepted, the nature of the duty imposed on the state is to allow freedom of movement, residence, entry into, remaining in or return to the Republic in accordance with the general rules of international law, incorporated into our law.

2.2 Application of these rights to common law and statutory law

In our view common law and statutory provisions relating to these three matters will be superseded by the provisions of the Constitution we have recommended. In any event, the common law prerogative rules relating to passports will have been replaced, as stated above.

2.3 Should these rights impose a constitutional duty on actors other than the state?

In our view the answer to this question should be in the negative. There is no reason to give horizontal effect to these provisions: the existing private law will afford adequate protection to persons whose freedom of movement and residence have been impaired by persons other than the state.

2.4 Who should bear these rights?

In our view all nationals and all other persons who are not unlawfully inside the country should be bearers of these rights. It is to this end that we have proposed that this portion of the chapter on Fundamental Rights should incorporate the wording of article 12 of the International Covenant on Civil and Political Rights, 1966, which provides (in article 21.1) that 'everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement. . . ' etc.

2.5 Should these rights be capable of limitation by the legislature?

In our view these rights should be capable of limitation by the legislature only in accordance with the general limitation clause (at present section 33 of the transitional Constitution) and in the case of a state of emergency (see section 34 of the transitional Constitution).

It should, however, be considered to limit these rights by legislation in the case of persons who are unlawful immigrants or fugitives from justice, as set out above.

There could also be other factors requiring qualification of freedom of movement, such as measures to combat epidemics, to deal with natural disasters, insurrection, etc. To what extent these matters should be dealt with in the Constitution and to what extent they should be left for adjudication by the courts is debatable.

- NP

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 16(iv): FREEDOM OF RESIDENCE

1 Content of the right

As mentioned elsewhere, freedom of residence closely relates to freedom of movement and some even regard it as part of the latter right (see *eg Cachalia et al Fundamental Rights in the New Constitution* (1994) 63). In the *Universal Declaration of Human Rights*, the *American Declaration of the Rights and Duties of Man*, the *International Covenant on Civil and Political Rights* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* the two rights are also mentioned together. This makes sense, because one cannot physically choose any place of residence if one is unable to move freely.

In terms of section 19 of the transitional constitution, every person has the right to choose a place of residence anywhere in the national territory. This means that a person may not be forced to live in a particular place or area or be prohibited from living anywhere he or she chooses. The national territory includes the provincial and local territories, as well as traditional or tribal land.

2 Application of the right

2.1 *Nature of duty on the state*

The state may not infringe the right of a person freely to choose his or her place of residence and may not force a person to reside in a particular location.

2.2 *Application to common law and customary law*

In principle, the right should apply to common law and customary law.

2.3 *Other actors*

The right freely to choose one's place of residence is a right against the state and other actors are not bound by it.

2.4 *Bearers of the right*

The right applies to persons, *ie* to all citizens and to aliens lawfully present in the country. According to Cachalia *et al Fundamental Rights in the New Constitution* (1994) 65, juristic persons are not bearers of the right. If, as it should be, the emphasis is on a place of *residence*, this is correct. This aspect should, however, not be confused with the right of a juristic person to buy fixed property for the purpose, for example, of putting up its headquarters. This would fall under the right to own property.

2.5 *Limitation of the right*

This right should also be subject to limitation by the state. It should be possible to limit the free exercise of the right for health and safety reasons. In addition, considerations of town planning, in terms of which certain areas are set aside for residential purposes and others not, are also relevant. Restrictions on squatting, on public as well as private land, is another example of the limitation of the freedom of

residence. All such limitations will have to comply with the limitations clause (the present section 33).

3 Wording

The wording of section 19 of the transitional constitution can be retained.