

2/4/4/4/12

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 4  
FUNDAMENTAL RIGHTS**

**7 August 1995**

**REPORT:**

***4. POLITICAL RIGHTS***



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**THEME COMMITTEE 4**  
***-FUNDAMENTAL RIGHTS***

**SCHEMATIC REPORT ON**  
**POLITICAL RIGHTS**



| N<br>O | CONSTITUTIONAL<br>PRINCIPLES | ISSUES  | NON - CONTENTIOUS<br>ASPECTS                            | CONTENTIOUS\ OUTSTANDING<br>ASPECTS | REMARKS |
|--------|------------------------------|---|---|-------------------------------------|---------|
| 1.     | I, II, VIII, XIII.           | <b>Nature of right<br/>(Application of<br/>Constitutional<br/>Principle II)</b> | To be included in terms of<br>Constitutional Principles |                                     |         |



| N<br>O | CONSTITUTIONAL<br>PRINCIPLES | ISSUES           | NON - CONTENTIOUS<br>ASPECTS   | CONTENTIOUS\ OUTSTANDING<br>ASPECTS  | REMARKS |
|--------|------------------------------|------------------|--|--|---------|
| 2.     |                              | Content of right | Minimum content as formulated in section 21 of the Interim Constitution. | <p><b>Outstanding issues<sup>1</sup>:</b></p> <p>Right to occupy any position or office in any organ of government or administration should be included - <b>ANC.</b></p> <p>Further attention should be given to reduce the legal voting age, but qualifications of voters must appear elsewhere in the Constitution - <b>ANC.</b></p> <p>The right to vote in <i>free, fair and periodical elections</i> should be added in section 21(2) - <b>FF.</b></p> <p>The right to stand for election to public office in section 21(2) should be appended with "<i>in accordance with the Constitution or any other law</i>" - <b>FF.</b></p> <p>All provisions on the franchise to be contained in the chapter on fundamental rights, referring specifically to section 6 of the Interim Constitution - <b>FF.</b></p> |         |

<sup>1</sup> 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.



| N<br>O | CONSTITUTIONAL<br>PRINCIPLES | ISSUES         | NON - CONTENTIOUS<br>ASPECTS | CONTENTIOUS\ OUTSTANDING<br>ASPECTS  | REMARKS |
|--------|------------------------------|----------------|------------------------------|--|---------|
|        |                              | Content (cont) |                              | <p>Opposed to section 43(b) of the Constitution because it conflicts with the right to make political choices - <b>PAC</b>.</p> <p>The rights to vote, petition, initiate legislation, political parties, media and mass communication, to be dealt with under the heading "Political Rights" - <b>IFP</b> (see Addendum 2 for full text).</p> <p>The vote shall be personal, secret, free and equal - <b>IFP</b>.</p> <p>Political parties shall ensure internal democracy in their organisation and operations - <b>IFP</b>.</p> |         |



| N<br>O | CONSTITUTIONAL<br>PRINCIPLES | ISSUES  | NON - CONTENTIOUS<br>ASPECTS                        | CONTENTIOUS\ OUTSTANDING<br>ASPECTS  | REMARKS |
|--------|------------------------------|---|---|--|---------|
| 3.     |                              | <b>Application of the right (Nature of Duty)</b>              | The state shall protected and enforce these rights. | <p>State shall give effect to Constitutional Principles I, VIII, XVII and in the case of Constitutional Principle XXXIV for concomitant franchise rights - <b>FF</b>.</p> <p>State shall provide the necessary framework for the exercise of the rights - <b>NP</b>.</p> <p>State shall facilitate the exercise of the right by citizens outside the state - <b>IFP</b>.</p> |         |
| 4.     |                              | <b>Application of the right (To common and customary law)</b> | Shall apply to common law and customary law.        | Traditional leadership is often determined on a hereditary basis, which may be in conflict with the democratic premise underlying these rights - <b>NP</b> .   |         |
| 5.     |                              | <b>Application of the right (Duty on Private Actors)</b>      |   | <p>Vertical and horizontal application - <b>ANC, ACDP</b>.</p> <p>Rights can operate only against the state - <b>FF, NP</b>.</p>   |         |



| N<br>O | CONSTITUTIONAL<br>PRINCIPLES | ISSUES                  | NON - CONTENTIOUS<br>ASPECTS  | CONTENTIOUS\ OUTSTANDING<br>ASPECTS  | REMARKS |
|--------|------------------------------|-------------------------|---|--|---------|
| 6.     |                              | Bearers of the<br>right | Citizens are the bearers of<br>the right.   | Natural persons - <b>ACDP, ANC, FF.</b><br><br>Not opposed to extension of<br>franchise to permanent residents -<br><b>DP.</b><br><br>Possibly also persons lawfully<br>resident in the country - <b>FF.</b> |         |
| 7.     | Section 33                   | Limitation of<br>right  | Rights may be limited in<br>principle.<br><br>Section 33 and other<br>limitations contained in the<br>Constitution - <b>ANC, DP,</b><br><b>NP, PAC.</b> | Right to vote may be suspended<br>by judicial adjudication of<br>incompetence, or by an<br>irrevocable sentence for major<br>crimes specified by the law - <b>IFP.</b>                                       |         |



# THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

## REPORT ON POLITICAL RIGHTS

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
  - IFP<sup>2</sup>
  - NP
  - PAC
  
2. **Submissions received from the public and civil society<sup>3</sup>:**
  - 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**

I, II, VIII, XIII

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2. The comments on the IFP submission are based on the submission made by them at the outset of the work of the Theme Committee. See Addendum.

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 Political rights should be included in terms of Constitutional Principle I, II, VIII, XIII.

### 2. CONTENT AND SCOPE OF THE RIGHT

#### 2.1 Non-Contentious Issues

2.1.1 Minimum content as formulated in section 21 of the Interim Constitution.

#### 2.1.2 Outstanding<sup>4</sup> Issues

2.1.3 Right to occupy any position or office in any organ of government or administration should be included - **ANC**.

2.1.4 Further attention should be given to reduce the legal voting age, but qualifications of voters must appear elsewhere in the Constitution - **ANC**.

2.1.5 The right to vote in *free, fair and periodical elections* should be added in section 21(2) - **FF**.

2.1.6 The right to stand for election to public office in section 21(2) should be appended with "*in accordance with the Constitution or any other law*" - **FF**.

2.1.7 All provisions on the franchise to be contained in the chapter on fundamental rights, referring specifically to section 6 of the Interim Constitution - **FF**.

2.1.8 Opposed to section 43(b) of the Constitution because it conflicts with the right to make political choices - **PAC**.

2.1.9 The rights to vote, petition, initiate legislation, political parties, media and mass communication, to be dealt with under the heading "Political Rights" - **IFP** (see Addendum for full text).

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4. 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.



2.1.10 The vote shall be personal, secret, free and equal - **IFP**.

2.1.11 Political parties shall ensure internal democracy in their organisation and operations - **IFP**.

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

**3.1 Non-contentious Issues**

3.1.1 The state shall protect and enforce these rights.

**3.2 Outstanding issues**

3.2.1 State shall give effect to Constitutional Principles I, VIII, XVII and in the case of Constitutional Principle XXXIV for concomitant franchise rights - **FF**.

3.2.2 State shall provide the necessary framework for the exercise of the rights - **NP**.

3.2.3 State shall facilitate the exercise of the right by citizens outside the state - **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 Traditional leadership is often determined on a hereditary basis, which may be in conflict with the democratic premise underlying these rights - **NP**.



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

**5.1 Contentious\ Outstanding Issues**

5.1.1 Vertical and horizontal application - **ANC, ACDP.**

5.1.2 Rights can operate only against the state - **FF, NP.**

**6. BEARERS OF THE RIGHT**

**6.1 Non-contentious Issues**

6.1.1 Citizens are the bearers of the right.

**6.2 Contentious\ Outstanding Issues**

6.2.1 Natural persons - **ACDP, ANC, FF.**

6.2.2 Not opposed to extension of franchise to permanent residents - **DP.**

6.2.3 Possibly also persons lawfully resident in the country - **FF.**

**7. LIMITATION OF THE RIGHT**

**7.1 Non-contentious Issues**

7.1.1 Rights may be limited in principle.

7.1.2 Section 33 and other limitations contained in the Constitution - **ANC, DP, NP, PAC.**

**7.2 Contentious\ Outstanding Issues**

7.2.1 Right to vote may be suspended by judicial adjudication of incompetence, or by an irrevocable sentence for major crimes specified by the law - **IFP.**



## **ADDENDUM**

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## EXCERPT FROM IFP SUBMISSION MADE TO T\C 4 AT OUTSET OF WORK PROGRAMME

The IFP proposed the following under the heading **Political Rights**:

### **54. Right to Vote**

*a) All citizens of eighteen years or older shall have the right to vote. The vote shall be personal, secret, free and equal. The right to vote may be suspended by a judicial adjudication of incompetence, or by an irrevocable sentence for major crimes specified by the law.*

*b) The law recognises, and the Federal Republic of South Africa shall facilitate, the exercise of the right to vote by citizens who are outside the State.*

### **55. Right to Petition and to Initiate Legislation**

*Any citizen has the right to petition Parliament and any branch of level of Government. A Citizen's legislative proposal signed by five hundred citizens may be submitted to Parliament.*

### **56. Freedom of Information**

*Any citizen has the right to access and receive any information or document which is in the possession of the Government of the Federal Republic of South Africa or its direct instrumentalities or of any of the commissions or agencies established under this constitution, provided that such document or information is not privileged as established by law to protect privacy, commercial secrets or national or State security. During the process of judicial review of the government's decision to withhold information, the court shall have the power to examine in camera the information withheld.*

### **57. Political Parties**

*The citizens have the right to form political parties to participate in all levels of democratic life. No one shall be directly or indirectly compelled in any way to join a political party or shall be penalised for not belonging to one. Political parties shall ensure internal democracy in their organisation and operations.*

### **58. Media of Mass Communication**

*Anyone shall have the right to establish media of mass communication, including newspapers, cable, radio and television stations. The law shall regulate the rights of citizens and political parties to access media of mass communication under the control of the government or in situations of virtual hegemony of monopoly.*



## **ADDENDUM**

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**PARTY SUBMISSIONS**



**- ACDP**



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

**POLITICAL RIGHTS**

Content of the right

Section 21 of the Constitution reads as follows:

- 1) Every citizen shall have the right:
  - a. to form, to participate in the activities of and to recruit members for a political party;
  - b. to campaign for a political party or cause; and
  - c. freely to make political choices.
  
- 2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

The ACDP supports the essential principles of the right listed above.

We regard the provision of this right as being essential to the democratic ideals of human activity.

We believe that political rights constitute the value preferences of people, based upon a variety of distinctive interests.

To build a political rights culture in a diverse society like South Africa, it requires democratic ideals reflecting a character of communality.

The aspirations around political activity should be exercised within certain symbolic interpretations. If we succeed in raising the stature of the negotiation process, the culture of tolerance, the value of human dignity and programmes like Masakhane to symbolic status, we will instil in our diverse population a desire towards *integrative* nation-building.



The ACDP believes that political rights should be developed within a culture of accountability, integrity and participatory democracy. We are further of the opinion that all laws should be equitable and righteous, above party or class interests and designed for the upliftment of the people's morale.

The political integrity and accountability of the people will be determined in terms of the broader political culture that is reflected by the ruling authorities.

As long as the rule of law is just and righteous, a stable environment is established which sets the arena for political activity that is supported by the following principles:

- a sufficient identification of citizenship
- legitimacy of accountable authorities
- participatory democracy
- efficient political machinery

The ACDP believes that authority is vested in the people. They are the one's who have the responsibility to elect their officials to govern over them (Deuteronomy 16: 18-20).

It is also acknowledged that rulers are appointed or elected by the people as being part of them, and not to raise themselves above the authoritative levels of the people. (Deuteronomy 17:18-20).

In no circumstances should political rights be brought in line with the thinking based upon authoritarianism, segregation, forced labour, and all forms of oppression.

It is once a culture of accountability and political integrity is advanced within the political thought of the population, that democratic ideals are authoritatively exercised.

We therefore, support the right which is stated above.



Application of the Right

**2.1 Nature of the duty to be imposed upon the State**

A positive duty is placed upon the State to respect and enforce the right of political freedom.

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

The right should apply to common law and customary law.

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

The ACDP believes that the Bill of Rights should have horizontal and vertical applications.

**2.4 Who should be the bearer of the right?**

The right should apply to all natural persons.

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

All efforts must be made to ensure that the right to political freedom is preserved and protected. The limitation clause in Section 33 of the constitution should apply where the security of the State is threatened, or where the interest and safety of the public is undermined by the philosophies and aims of a subversive group.



**- ANC**



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**ANC PRELIMINARY SUBMISSION**  
**THEME COMMITTEE 4 - POLITICAL RIGHTS**

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**1. CONTENT OF THE RIGHT**

Political rights are dealt with in various international human rights documents, including Article 21 of the Universal Declaration of Human Rights which reads as follows:

- "1. Everyone has the right to take part in the government of his pr her country, directly or through freely chosen representatives.
2. The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure. "

The ANC supports the formulation of political or participatory rights which must encapsulate the following:

1. South Africa as a multi-party democracy in which all persons shall enjoy basic political rights on an equal basis.
2. Elections shall be regular, free and fair based on universal franchise.
3. All men and women entitled to vote<sup>1</sup> shall be entitled to stand for and occupy any position or office in any organ of government or administration.

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<sup>1</sup> The ANC is of the view that the debate as to the minimum age for voting is not over and that further consideration should be given to arguments in favour of reducing the legal voting age, perhaps to 16.



4. All citizens shall have the right to form and join political parties and to campaign for social, political and economic changes wither directly or through freely chosen representatives.

The formulation in the Interim Constitution cogently expresses the right to free political activity which should occur in a multi-party system of representative democracy. It is believed that detailed principles of election and qualification of voters must appear elsewhere in the constitution.

## 2. APPLICATION OF THE RIGHT

- 2.1 The state shall protect the political rights of its citizens.
- 2.2 The right shall apply to both common law and customary law.
- 2.3 The right shall bind the state, private persons, social structures and political organisations.
- 2.4 The bearers of the right are human beings.
- 2.5 The limitations will occur only under strict, justifiable, necessary and reasonable conditions which apply 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**



## **1. POLITICAL RIGHTS**

### **1.1 Content of the Right**

Section 21 of the Interim Constitution reads:-

"Every citizen shall have the right -

- (a) to form, to participate in the activities of and to recruit members for a political party;
- (b) to campaign for a political party or cause; and
- (c) freely to make political choices.

Every citizen shall have the right to vote, to do so in secret and to stand for election to public office."

The Democratic Party agrees with the formulation of this provision of this right, in the Interim Constitution. Political rights form a cornerstone of liberal democracies the world over. The right to freely join, engage in and stand for public office represents one of the great victories of the political fight against apartheid and the creation of a new democratic order in South Africa. Indeed, political rights are a fundamental cornerstone of our young democracy.

The emphasis on political free choice and the right to vote is absolutely crucial to the success of South African democracy. The dangerously high levels of political violence and intimidation leading up to our first national elections should dispel any doubts about the necessity of this provision.

### **1.2 Nature of the duty to be imposed on the State**

The rights included in this section should not be easily limited, as any restriction will have to pass the stricter test of necessity laid down in s.33(1)(aa). The lessons of government attempting to control political thought in our own history and in countries from as far afield as the former Soviet Union, should deter any such political curtailment in future.

### **1.3 Bearers of the Right**

Clearly, the right as formulated applies to all South African citizens. Whether it should also apply to permanent residents is worth considering. The Democratic Party would not oppose the extension of franchise rights to such persons.



- FF





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## FREEDOM FRONT

### THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

#### SUBMISSIONS ON POLITICAL RIGHTS

#### 1. Content of political rights

Section 21 of the transitional Constitution reads as follows:

- '(1) Every citizen shall have the right -
- (a) to form, to participate in the activities of and to recruit members for a political party;
  - (b) to campaign for a political party or cause; and
  - (c) freely to make political choices.
- (2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office'.

The Freedom Front is substantially in agreement with the provisions of section 21, quoted above. In our view the provisions of this section reflect, generally, principles of democracy universally accepted. We would, however, propose a few amendments to the present section 21.

We suggest that section 21(2) should (inter alia) be rephrased to read as follows: 'Every citizen shall have the right to vote in free, fair and periodical elections, to do so in secret and to stand for election to public office in accordance with the Constitution or any other law' (insertions stressed). We consider that details relating to the franchise and elections need not appear in the Constitution, but can be set out in other legislation.

A fundamental aspect of the present section 21 is that it confers



the franchise on citizens only. However, section 6 of the transitional Constitution confers the franchise on non-citizens as well, if it is so provided for in terms of an Act of Parliament. The 'right' of non-citizens to vote can, accordingly, be revoked by ordinary Act of Parliament, while the franchise of citizens is entrenched by section 21, falling under the chapter of fundamental rights. The Freedom Front proposes that all provisions relating to the vote should occur in the chapter on fundamental rights.

## 2. Application of these rights

### 2.1 Nature of the duty imposed on the state

The nature of the duty imposed on the state is to give effect to the provisions of Constitutional Principle VIII, viz. that there shall be 'representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation'. This Principle (see the next paragraph for its implementation) should be read together with other Constitutional Principles mentioned here. (Constitutional Principle I requires 'a democratic system of government', while Constitutional Principle XIV stipulates that provision must be made for participation of minority political parties in the legislative process in a manner consistent with democracy. Constitutional Principle XVII, again, stipulates that there shall be democratic representation at each level of government.)

The transitional Constitution does not refer expressly to 'adult suffrage' or (in general) to 'proportional representation'. The new Constitution should do so, in compliance with Constitutional Principle VIII. If the new Constitution is to give effect to self-determination of communities in terms of Constitutional Principle XXXIV, provision should also be made for concomitant franchise rights.

### 2.2 Application of these rights to common law and statutory law

We do not believe that these rights should be governed by the ordinary law of the land (common law and statutory law), but that they should be firmly entrenched in the Constitution, as they form the very basis of democracy.

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

In our view political rights of this nature should not impose a constitutional duty on actors other than the state. Our main reason for this statement is that, by their very nature, these rights operate in the public law sphere, or vertically, with the state being the sole other actor.



Naturally, if any person other than the state were to interfere with the exercise of these rights, criminal or private law proceedings could be brought, but this does not mean that these rights in a constitutional sense have horizontal application.

2.4 Who should bear these rights?

These rights are primarily, if not totally, confined to natural persons. We propose that they should be confined to South African citizens and, at most, to persons lawfully resident in the country.

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

We consider that these rights should be limited 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 said Constitution), as they are so fundamental in a democratic state that they should be firmly entrenched in the Constitution. It is difficult, however, to conceive to what extent political rights under section 21 could be limited on the basis of such limitation being 'necessary' (see section 33(1)).

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- NP



# NATIONAL PARTY PRELIMINARY SUBMISSION

## THEME COMMITTEE 4

### ITEM 16(i): POLITICAL RIGHTS

#### 1 Content of the right

Political rights usually refer to the right to vote, the right freely to engage in political activity and the right to stand for and to hold public office. Of course, these rights presupposes the recognition of rights such as the right to freedom of expression, the right to freedom of association, the right to assemble and demonstrate with others peacefully and unarmed and the right to present petitions. These rights are discussed in other submissions and in this submission we focus on the first-mentioned political rights proper.

#### (a) *The right to vote.*

The right to vote means that it must be general, equal, direct and secret. The principle of *general franchise* prohibits the exclusion from voting rights of persons or groups on arbitrary grounds (the grounds mentioned in section 8(2) of the transitional constitution constitute an appropriate starting-point), but does not prohibit voting qualifications such as mental illness, minimum age, electoral fraud or other serious crimes. Section 6 of the transitional constitution and the Electoral Act 1993 contain particulars in this regard that more or less correspond to internationally accepted norms and which can therefore be retained in principle. *Equal franchise* prohibits the allocation of different weights to the votes of different voters or categories of voters. A multiple vote for some voters is also prohibited. Of course, this aspect of the right to vote has implications not only for



voter qualifications, but also for the electoral system itself. An electoral system that blatantly results in different weights being allocated to the votes of different voters would definitely be suspect. The principle of *direct franchise* means that no go-between is allowed who may influence the result after the electorate has voted. By *secret ballot* is meant that no government interference or coercion in the exercise of the right to vote is allowed. These last two aspects affect the particulars with regard to the conduct of elections contained in the Electoral Act.

(b) *The right freely to engage in political activity.*

The content of this right is spelled out in section 21(2) of the transitional constitution and refers to the right to form and join a political party or organisation, participate in and campaign for a political party or cause, recruit members for a political party or organisation, and freely to make political choices. (The latter relates to the right to vote in secret.) It should be pointed out that the transitional constitution refers only to political parties and not to political organisations in general. The right should not be interpreted this narrowly.

(c) *The right to stand for and hold public office.*

The right to stand for election to public office as formulated in section 21(2) of the transitional constitution naturally implies a right to hold public office. The right is, of course, heavily qualified in various provisions of the constitution dealing with the qualifications of membership of Parliament, provincial legislatures, all executive offices, the judiciary, etc. The right will never apply in the absolute terms of the bill of rights, and will always apply as defined in all relevant provisions of the constitution. Therefore, the right actually means "the right to stand for and hold public office *as defined in this constitution*". (See the remarks under paragraph 2.5.)



(d) *The right to take part in government, directly or through freely elected representatives.*

This right is mentioned in the *Universal Declaration of Human Rights*, the *American Declaration of the Rights and Duties of Man*, and the *African Charter of Human and Peoples' Rights*. In the *International Covenant on Civil and Political Rights* the right is referred to as the right to take part in "the conduct of public affairs". The right is not expressly mentioned in the transitional constitution, but could be inferred from the wording of section 21. After all, the right to vote means the right to vote for representatives in government bodies.

(e) *The right to democratic government.*

This right is nowhere expressly mentioned and can (or should) be inferred from the wording of the provisions dealing with voting and other political rights, as well as the rest of the constitution.

## **2 Application of the rights**

### **2.1 Nature of duty on the state**

It is obvious that the state must refrain from interfering with the free exercise of political rights. At the same time, however, the state has the duty to provide the necessary machinery and opportunities for citizens to freely exercise their political rights. The state must, for example, provide in great detail the electoral mechanisms necessary to ensure the exercise of general, equal, direct and secret voting rights.



## *2.2 Application to common law and customary law*

Political rights should, in principle, apply to common law and customary law. However, it must be kept in mind that traditional leadership is often determined on a hereditary basis, which may be in conflict with the democratic premise underlying these rights.

## *2.3 Other actors*

Political rights are enforced against the state and no other actors are bound by them.

## *2.4 Bearers of the rights*

As mentioned before, voter qualifications and qualifications for holding public offices exclude persons under a certain age, persons who are mentally ill, and persons convicted for certain serious offences. Not all persons are therefore bearers of these rights. Another category of persons excluded are aliens, because, by definition, political rights pertain to citizens only.

## *2.5 Limitation of the rights*

It must be emphasised that the voter qualifications and qualifications for holding public office contained in the constitution itself (see for example section 6 with regard to voter qualifications, and sections 42, 43, 50, 51, 99(2), 110(4), 132, 133, 179, 191(3), and 200(3) with regard to qualifications for holding certain public offices) are not limitations that can be tested against the grounds for the limitation of rights set out in section 33. That would imply that some provisions of the constitution enjoy higher status than others, which would be contrary to section 4.



Such an interpretation is, in any case, excluded by the clear wording of section 33(2), which provides: "Save as provided in subsection (1) *or any other provision of this Constitution*, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter." (Italics added.) Qualifications provided for in other provisions of the constitution must, therefore, be read with the basic political rights contained in the bill of rights in order to determine the true content of the political rights provided for in the constitution.

Limitations imposed in other laws, such as the Electoral Act are, however, subject to the constitution and can be invalidated if found inconsistent with section 33. Note that the stricter test of necessity applies here.

### **3 Wording**

We believe that the wording of section 21 of the transitional constitution can be retained unamended.



**- PAC**





29 May 1995

## PRELIMINARY SUBMISSIONS OF THE PAC ON POLITICAL RIGHTS

In a country like South Africa, where the majority of the people have just gained the right to participate in a democratic political order, participatory political rights are very important.

### Content of the Rights

1. The right of every citizen to;
  - (a) form, participate and recruit members for a political party;
  - (b) Campaign for a political party or cause;
  - (c) Freely to make political choices. The PAC is opposed to S43 (b) of the Interim Constitution.
2. The right of every citizen to vote, to do so in secret and to stand for election to public office.

### Other related aspects:

1. These may be limited under very strict conditions and circumstances.
2. They may be suspended during a State of Emergency

R K Sizani