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JOHN

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

PARTY SUBMISSIONS

- Political Rights
- Citizens' Rights
- Freedom of Movement
- Freedom of Residence

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- ANC

ANC PRELIMINARY SUBMISSION
THEME COMMITTEE 4 - POLITICAL RIGHTS

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 vote¹ shall be entitled to stand for and occupy any position or office in any organ of government or administration.

¹ 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.

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**

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.

2. CITIZENS' RIGHTS

2.1 Content of the Right

Section 20 of the Interim Constitution reads:-

"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 Democratic Party supports the provision of these rights, as formulated in the Constitution.

The use of the word 'citizen' as opposed to 'person', carries special significance in the light of our past history. The National Party Government used citizenship as a weapon in its war to maintain absolute power. Citizens were denied passports, deported and banned to particular areas of the national territory without any recourse to the law.

The inclusion of the right to 'enter' the Republic especially applies to citizens born in exile.

The right to unrestricted travel within the national borders and to foreign countries is an essential 'classic' component of liberal democracy. Wherever government attempts to curtail this right, such government has something to fear from the free exchange of ideas.

2.2 Nature of the duty to be imposed on the State

The words 'without justification' are incorporated to provide for s.5(2), which provides for the possible loss of citizenship, subject to the rights contained in s.20. The normal limitation test in s.33(1) will govern any such decision.

2.3 Bearers of the Right

The right applies to all South African citizens.

2.4 International Precedent

The rights contained in this section are sanctioned by the Strasbourg Declaration on the Right to Leave and Return, adopted by the International Institute of Human Rights in November 1986.

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).

4. FREEDOM OF MOVEMENT

4.1 Content of the Right

Section 18 of the Interim Constitution reads:-

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

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

The right to unhindered movement within one's country is absolutely essential to freedom, and a hallmark of liberal democracy. The American Supreme Court Justice, William O. Douglas wrote:

"Like the right of assembly and the right of association, it often makes all other rights meaningful - knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer ...".

Aptheker v Secretary of State, 378 U.S.500(1964)

The right to free movement becomes all the more salient when we examine our history. The National Party regime disregarded the right in the furtherance of its twin causes of separate development and national security. In a particularly egregious disregard for civil rights, Parliament passed the Riotous Assembly Act, the Internal Security Act (formerly the Anti-Communism Act), and the Bantu Administration Act. This legislation gave government the teeth to restrict the free movement of individuals - refusing individuals the right to choose freely where to live, work and travel; banning individuals from leaving a particular magisterial district, or town, or house; throwing political dissidents into prison without trial. Our new Constitution must decisively set its face against such occurrences, which the formulation contained in s.18 does in decisive terms.

4.2 Nature of the duty imposed on the State

The right obliges the State not to hinder the right to freedom of movement, subject to such limitations as s.33 will permit.

4.3 International Precedent

This right is guaranteed in the Universal Declaration of Human Rights, article 13; and in the International Covenant on Civil and Political Rights, article 12.

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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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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.

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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 be 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.

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 16(ii): CITIZENS' RIGHTS

1 Content of the right

As in the case of the right to vote, the transitional constitution contains two provisions dealing with citizenship. Section 5 creates a South African citizenship and provides that the acquisition, loss and restoration of South African citizenship shall be regulated by law. Section 20 provides that citizenship shall not be deprived without justification, and that a citizen shall have the right to enter, remain in and leave the Republic.

Actually, citizens' rights refer directly to three aspects. *Firstly*, it refers to the right to citizenship. *Cf* in this regard section 30(1)(a) which provides expressly for the right of every child to a nationality. Naturally, this right applies to adults as well. *Secondly*, one has the right to change one's citizenship or nationality, provided, of course, that the other country is willing to grant it. (This right is expressly recognised in the *Universal Declaration of Human Rights*.) *Thirdly*, no person shall be deprived of his or her citizenship without justification. *In addition*, citizens' rights refer more indirectly to a citizen's right to enter and to leave the country, which implies a right to a passport. In this regard, at least, our rules and practice governing the issue and withdrawal of passports may need revision.

2 Application of the rights

2.1 *Nature of duty on the state*

The state must refrain from interfering with the exercise of citizens' rights. It may not withhold citizenship from a person entitled to it, it may not deprive a person's citizenship without justification, and it may not prevent a person from acquiring the citizenship of another country. Whereas it may not prevent a person from leaving the country, it must also take positive steps to enable a person to exercise that right, for instance by providing passports to those entitled to them.

2.2 *Application to common law and customary law*

Citizens' rights should apply to common law and customary law.

2.3 *Other actors*

These rights only bind the state.

2.4 *Bearers of the rights*

It is clear that every South African shall have the right to acquire South African citizenship. The right does not apply only to children (section 30(1)(a)), but to all South Africans. The same holds true for the other aspects mentioned in paragraph 1, namely the right to acquire the citizenship of another country and the right not to be deprived of one's citizenship without justification. It must be emphasised that these rights do not apply to aliens: section 20 expressly refers to "every citizen". However, it would seem appropriate for an alien to insist on the right to *leave* any country in which he or she is lawfully present. *Cf* in this regard Article 2.2 of

Protocol No 4 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*: "Everyone shall be free to leave any country, including his own." The right to leave the country should therefore be extended to aliens as well. (Note that an alien has no right to *enter* another country.)

2.5 Limitation of the rights

The possibility that citizens' rights may be limited is foreseen in section 5 of the transitional constitution, which provides for a law that regulates the acquisition, loss and restoration of South African citizenship. Any rule in that law on the acquisition, loss and restoration of citizenship will have to comply with the limitations clause (section 33), whereas any rule on the loss of citizenship will, in addition, have to comply with the specific requirement that citizenship may not be deprived without justification.

3 Wording

It is possible that the right needs redrafting in order to distinguish properly between the rights of citizens on the one hand to enter and leave the country and the right of aliens on the other to leave the country.

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 16(iii): FREEDOM OF MOVEMENT

1 Content of the right

Freedom of movement is often protected as a separate category of the right to personal freedom (see section 11 of the transitional constitution).

According to international law, freedom of movement covers six aspects, namely (i) freedom to move about anywhere within the borders of a state; (ii) freedom to reside in any place within the territory of a state; (iii) freedom to enter a state; (iv) freedom to leave a state; (v) freedom from expulsion from a state; and (vi) freedom from exile. Except for (i), these aspects are all dealt with under other rights. Freedom of residence is protected in a separate provision of the transitional constitution (section 19), whereas the rights to enter, remain in and leave the country are dealt with under citizens' rights (section 20). The freedom from expulsion and from exile also fall under citizens' rights. These matters have been addressed in other submissions.

Freedom of movement then means that any person has the right to move about in South African territory unhindered and without interference by the state. The term "national territory" in the present section 18 means any part of South Africa, although, as a general rule, the right will not prevail over the rights of others to privacy or to own property. In other words, the law on trespassing on private property is not abolished by the right. However, in a case where a worker is exercising some or other labour right, it could require freedom of movement on the private property of the firm in question.

2 Application of the right

2.1 *Nature of duty on the state*

The state shall not prevent the individual from moving freely in the national territory. The right is particularly aimed at unjustified and discriminatory restrictions on free movement imposed by the state.

2.2 *Application to common law and customary law*

The right should apply to common law and customary law.

2.3 *Other actors*

The right binds the state and is not, in principle, applicable to the relationship between private persons. The rights to privacy and to own property would be seriously infringed if otherwise. However, as mentioned above, it is possible that cases may occur where a person may be allowed to enter a private premises in order, for example, to exercise his or her labour rights.

2.4 *Bearers of the right*

All persons, citizens as well as aliens, are bearers of the right.

2.5 *Limitation of the right*

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.

- 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

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29 MAY 1995

PRELIMINARY SUBMISSIONS OF THE PAC ON CITIZENS' RIGHTS

An aspect of this right as it appears in Article 20 of the Interim Constitution has been moved in our submission to freedom of movement. This aspect is "the right to enter, remain in and leave the Republic."

Content of the right.

No citizen shall be deprived of his or her citizenship.

Other aspects of the right.

1. This right when read with freedom of movement is very important to a citizen as it guarantees him or her a right to a passport.
2. This right can be limited and suspended.

R K Sizani - MP



29 May 1995

PRELIMINARY SUBMISSION OF THE PAC ON THE FREEDOM OF MOVEMENT

We feel that the freedom of movement should include the freedom of residence. In addition, this freedom encompasses some citizen rights and those of every person. Where we indicate that a particular right is for citizens, non-citizens can be catered for under legislation. For example, immigration rights of non-citizens can be covered by legislation.

Contents of this freedom.

1. The right of every citizen to enter, remain in or return to South Africa.
2. The right of every person lawfully in South Africa to freedom of movement anywhere within South Africa.
3. The right of every citizen and permanent resident to freely choose his or her place of residence and pursue a livelihood anywhere in South Africa.
4. The right of every person to leave South Africa.

Other related aspects

1. These rights can be limited and suspended.
2. Due to our new Constitutional order, influx control laws, such as, Group Areas Act, Population Registration Acts cannot be Constitutional.

R K Sizani - MP