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## Freedom of Movement and Residence

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**Freedom of movement and residence**

21. (1) Everyone has the right to freedom of movement.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
- (4) Every citizen has the right to a passport.<sup>1</sup>

66.1 INTRODUCTION

**(a) Application and Scope of FC s 21**

The application and the scope of FC s 21 are two significant issues analytically prior to the determination of the extent of the protection of the right. The content and the interpretation of the right to freedom of movement and residence are intricably linked to general issues of application and more specific questions about citizenship.<sup>2</sup>

(i) *Beneficiaries of the Right*<sup>3</sup>

Textually, FC s 21's protection is given in some cases to 'everyone' and in other cases only to 'every citizen'. FC ss 21(1) and (2) are granted to 'everyone'. FC ss 21(3) and (4) are granted to 'citizens'. This distinction between citizens and non-citizens serves only to restrict the protection of the rights to enter the Republic, to remain in the Republic, and to reside anywhere in the Republic. On a straightforward textual interpretation, it is only the criterion of citizenship and not those of territoriality, nationality, or legality that determine FC s 21's application. Nonetheless, because these three latter criteria often drive the meaning of citizenship, they warrant further discussion.

As noted below, 'everyone' as used in FC s 21(1) and (2) means *everyone* and will apply to non-citizens. By contrast, the application of FC s 21 (3) and (4) is limited to South African citizens.

Where do juristic persons fit within this scheme? That juristic persons are able to possess the attributes of territoriality, nationality, and legality suggests that they ought to be able to secure some of the benefits of FC s 21.

That said, a distinction ought to be drawn between the first two sub-clauses of FC s 21 and the last two. The first two, certainly insofar as they comprise the freedom of locomotion, are presumably restricted to natural persons.

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<sup>1</sup> Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('Final Constitution' or 'FC').

<sup>2</sup> While the application of other clauses in the Bill of Rights is limited to citizens, the limited coverage of the last two sub-clauses in FC s 21 flows from a very specific intervention by the Constitutional Assembly. For a discussion of this intervention, see Jonathan Klaaren 'Contested Citizenship' in Penelope Andrews & Stephen Ellmann *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 304, 308-9.

<sup>3</sup> For a general discussion of the different classes of beneficiaries of the substantive provisions of the Bill of Rights, see Stu Woolman 'Application' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.3.

With respect to dual nationals, such persons, whether juristic or natural, should likewise be able to benefit from their South African nationality. Indeed, at international law, a person may have more than one nationality. South Africa's domestic legislation is relatively tolerant of dual nationality and clearly envisages persons with a nationality in addition to their South African nationality.

(ii) *The Criterion of Territoriality*

Territoriality is intimately bound up with the right to freedom of movement within the Republic. The Constitutional Court has, over several cases, articulated a relatively restrictive, though somewhat incoherent, territory-based approach to the application of the Bill of Rights.<sup>1</sup>

In *Lawyers for Human Rights v Minister of Home Affairs*, the Minister of Home Affairs argued for the non-application of the Bill of Rights to foreign nationals on the borders and without formal entry.<sup>2</sup> The Court rejected this contention and applied the constitutional rights to persons at South Africa's borders. *Lawyers for Human Rights* thus granted protection of the right of freedom and security of the person and the right of arrested, detained and accused persons to foreign nationals not yet formally granted permission to enter the country. However, the Court charted a relatively cautious course with respect to the application of the Bill of Rights in similar situations:

It is neither necessary nor desirable to answer the general question as to whether the people to whom s 34 of the [Immigration] Act applies are beneficiaries of all the rights in the Constitution. It is apparent from this judgment that the rights contained in s 12 and s 35(2) of the Constitution are implicated. The only relevant question in this case therefore is whether these rights are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution. It could hardly be suggested that persons who are being unlawfully detained on a ship in South African waters cannot turn to South African courts for

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<sup>1</sup> For a slightly different interpretation of the Court's position on extraterritoriality, see Woolman 'Application' (supra) at § 31.6.

<sup>2</sup> *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC) ('*Lawyers for Human Rights*').

protection, or that a person who commits murder on board a ship in South African waters is not liable to prosecution in a South African court.<sup>1</sup>

Once it is accepted that persons *within* our territorial boundaries are entitled to constitutional protection, there is no reason why ‘everyone’ in FC s 12(2) and FC s 35(2) should not be given its ordinary meaning. When the Final Constitution intends to confine rights to citizens it says so.

*Lawyers for Human Rights* turns on a reading of the Bill of Rights that limits its protection to persons *within* the territorial boundaries of the Republic. Indeed, the *Lawyers for Human Rights* Court did not clearly rule out the use of the criterion of South African nationality in considering the application of other rights. Of even greater concern, the Court may also be understood to be leaving open the door to the ‘entry doctrine’. That doctrine treats persons without regularised migration status within the country as if they remained outside its territory. Following *Lawyers from Human Rights*, when read with both *Mohamed* and *Kaunda*, the Court’s position can be articulated as follows: A substantive provision of the Bill of Rights will be strongly presumed to operate within the territory of the Republic; however, the extra-territorial application of a substantive provision of the Bill of Rights will have to be demonstrated clearly.

What bearing does this position have on the content of FC s 21? It would seem that FC s 21 (1) and FC s 21(2) apply to all persons within the territory. FC s 21 would also seem to possess at least some extra-territorial dimensions. For instance, the protection afforded to every citizen of a right to a passport must have some application to the activity of South African embassies or consulates. Furthermore, the protection afforded to enter and to leave the country would not be meaningful without at least some extra-territorial protection. Still, as *Lawyers for Human Rights* suggests, the extra-territorial application of FC s 21 is not to be presumed, and is likely to be limited to its specific purposes. Finally, FC s 21 (3) and FC s 21(4) would appear to possess little by way of extra-territorial application.

(iii) *The Criterion of South African Nationality*

The term ‘everyone’ in FC s 21 (1) and FC s (2) should be interpreted as affording coverage to all natural persons, whether or not they hold South African nationality.<sup>2</sup> Constitutional Court authority and the text of FC s 21 (3) and FC s (4) support this proposition.<sup>3</sup>

This state of play was not always so clear. The application of various substantive provisions of the Bill of Rights to the Aliens Control Act was hotly contested

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<sup>1</sup> *Lawyers for Human Rights* (supra) at paras 26-27. The Court further noted: ‘It is not necessary in this case to answer the question whether people who seek to enter South Africa by road at border posts are entitled to the rights under our Constitution if they are not allowed to enter the country.’ Ibid at para 27.

<sup>2</sup> See Woolman ‘Application’ (supra) at § 31.3.

<sup>3</sup> The drafting history also supports this conclusion.

in the lower courts under the Interim Constitution.<sup>1</sup> Despite the trend of court decisions against its position, the Minister and the Department of Home Affairs continued to insist that persons without South African nationality could not benefit from the Bill of Rights.<sup>2</sup>

As I have already noted, the Constitutional Court lent some succor to this position in *Lawyers for Human Rights* by refusing to state, categorically, that all persons would enjoy all provisions of the Bill of Rights.<sup>3</sup> The *Lawyers for Human Rights* Court was careful to leave open the question of whether the rights of freedom and security of the person and the rights of arrested, detained, and accused persons applied to persons arriving by road at the borders of the Republic.

However, in *Kbosa*, the Court stated emphatically that the criterion of South African nationality would not be applied in determining the application of the Bill of Rights within the territory of the Republic. Writing for the majority, Mokgoro J contrasted the right to social security granted to ‘everyone’ in FC s 27 with the right of access to land in FC s 25(5) granted to ‘citizens’. Mokgoro J confirmed that ‘everyone’ would be given its ordinary meaning and would apply to non-citizens — and in particular permanent residents — claiming the benefits of access to social security.<sup>4</sup>

(iv) *The Criterion of Legality*

Intertwined in the debate over the application of the Bill of Rights (and perhaps especially so in the policy areas of movement and residence) is the question of legality.<sup>5</sup> While lower courts have not always been explicit on this point, whether a

<sup>1</sup> Constitution of the Republic of South Africa Act 200 of 1993 (‘Interim Constitution’ or ‘IC’). See Jonathan Klaaren ‘So Far Not So Good: An Analysis of Immigration Decisions Under the Interim Constitution’ (1996) 12 *SAJHR* 605; Anton Katz ‘Immigration and the Court: From *Xu* to *Ruyobezu*’ in Max du Plessis & Steve Pete (eds) *Constitutional Democracy in South Africa: 1991-2004* (2004). Our constitutional doctrine has thus departed from pre-Bill of Rights cases. See *Cabinet for the Territory of South West Africa v Chikane & Another* 1989 (1) SA 349 (A) (Fundamental rights are often restricted to nationals of states with charters of human rights; restrictions on aliens’ rights to enter and to move could not contravene the rights to equality or due process); *Lewis v Minister of Internal Affairs & Another* 1991 (3) SA 628 (B) (Since it was never the intention of the legislature in promulgating the Bophuthatswana Bill of Rights to allow individual rights to prevail over the interests of the state or public safety, an alien may not contest a Minister’s decision on the grounds that he was denied a hearing, reasons for his deportation, or treated unequally.)

<sup>2</sup> For more on the relationship between nationality and children, see Adrian Friedman & Angelo Pantazis ‘Children’s Rights’ in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 54.

<sup>3</sup> This case-by-case approach may have been a result of the unusual procedural circumstances of the case. The case which required, effectively, abstract review of parts of the Immigration Act.

<sup>4</sup> *Kbosa v Minister of Social Development; Mablaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at paras 46-47.

<sup>5</sup> For the constitutional doctrine of legality, as opposed to the meaning of the term under immigration legislation, see Frank Michelman ‘The Rule of Law, Legality, and the Supremacy of the Constitution’ in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11. Indeed, the constitutional doctrine of ‘legality’ suggests that the immigration doctrines of ‘legality’ may well be unconstitutional.

person is 'legal' or 'illegal' has often counted heavily in the determination of fundamental rights protection. This is true both at the level of doctrine, and perhaps more significantly, at how the law is applied on the streets.

What the criterion of 'legality' entails in these debates over application is usually understood as a regularized status in terms of migration legislation. Before 2002, the applicable legislation was the Aliens Control Act. As of 2002 the Aliens Control Act was supplanted by the Immigration Act.<sup>1</sup>

In present day South Africa, migration status is, however, more a matter of bureaucratic practice than it is of judicial interpretation. Furthermore, more than ten years after the coming into effect of South Africa's constitutional framework, migration status still bears the readily apparent effects of apartheid. The Aliens Control Act afforded state bureaucrats under apartheid the discretion to determine rights of movement and residence. Despite the replacement of the Aliens Control Act by the Immigration Act in 2002, the bureaucracy has remained wedded to the discriminatory ways of the Aliens Control Act. As we shall see, however, the doctrine of constitutional supremacy may warrant a finding that the immigration legality doctrine offends any number of substantive provisions of the Bill of Rights.

According to the drafting history of FC s 21, the issue of immigration legality was specifically touched upon by the Constitutional Assembly. The Panel of Constitutional Experts addressed the issue of immigration legality and argued that migration status was appropriate for limitations enquiry and not for rights protection or application concerns.<sup>2</sup> After consideration of this opinion, the final text adopted by the Assembly granted the right of residence only to citizens. Thus, the Assembly used the criterion of South African nationality and not that of legality in delineating the scope of application of FC s 21. This drafting history strongly suggests that FC s 21 — where it applies to everyone — applies to all persons present in the territory of the Republic regardless of the criterion of legality. In addition, the drafting history supports the contention that persons challenging their citizenship status or the right to a passport can rely upon FC s 21.

## **(b) The Content of FC s 21**

### *(i) Purpose of the Right to Freedom of Movement and Residence*

Any constitutional interpretation of the right to freedom of movement and residence must acknowledge the apartheid history of restrictions on those rights.<sup>3</sup> Pass laws were a defining feature of apartheid. They were among the earliest and

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<sup>1</sup> Act 13 of 2002.

<sup>2</sup> Jonathan Klaaren 'Contested Citizenship' in Penelope Andrews and Steven Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 304, 308-9.

<sup>3</sup> John Dugard *Human Rights and the South African Legal Order* (1978) 137-141 (Discusses the power to restrict movement in terms of the Riotous Assemblies Act, the Internal Security Act, and the Bantu Administration Act.)

one of the most hated of apartheid restrictions on the rights of black South Africans. A common phrase of the anti-apartheid struggle was that black persons had no place to rest.<sup>1</sup>

This deep national concern with rights of movement and residence — along with their inclusion in international instruments<sup>2</sup> — resulted in FC s 21. The prominence of rights — and the denial of rights — to movement and residence in South Africa resonates profoundly with contemporary concerns about migration and national policy towards foreign nationals (non-South African nationals)<sup>3</sup> and ought to inform our interpretation of FC s 21. The courts have already demonstrated that they are alive to the purpose of FC s 21 and are committed to not permitting history to repeat itself.<sup>4</sup>

A historical inquiry would also show how the freedom of movement relates to the freedom of residence. Because of an overriding concern with granting rights to ‘illegals’, South Africa’s Final Constitution does separate the two rights. This bifurcation of the rights suggests that the state possesses greater latitude with respect to the right to residence than with respect to the right to movement.

A further purpose of the right is the promotion of liberty. Where foreign constitutional courts recognize an implicit right to freedom of movement, it is often grounded in an express right to personal liberty.<sup>5</sup>

Where the freedom of movement has been expressly enumerated in constitutional texts, it has often been linked to the right of economic activity. This relationship suggests a final purpose of the right: the construction of a Republic as a free trading area. The drafters of the Final Constitution did not expressly follow this trend.<sup>6</sup> However, while the core of the right of freedom of movement may be

<sup>1</sup> Christina Murray & Catherine O’Regan *No Place to Rest: Forced Removals and the Law in South Africa* (1990).

<sup>2</sup> Beyond its specifically South African roots, the right of the freedom of movement has a venerable international pedigree. Indeed, the right to freedom of movement is contained explicitly in many of the international human rights instruments. See, eg, art 13 of the Universal Declaration of Human Rights, art 12 of the International Covenant on Civil and Political Rights, and art 12 of the African Charter on Human and Peoples’ Rights.

<sup>3</sup> The Constitutional Court prefers the term ‘foreign national’ over that of ‘alien’. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) n 11.

<sup>4</sup> *Victoria & Alfred Waterfront (Pty) Ltd & Another v Police Commissioner of the Western Cape & Others* 2004 (4) SA 444 (C), [2004] 1 All SA 579, 584 (C) (*‘Victoria’ & Alfred Waterfront*) (‘I may add that in the light of the unfortunate recent history of this country where millions of people were denied access to towns, cities and other public places, the practice of excluding people from parts of a city, albeit for limited periods, may appear repugnant and not pass constitutional muster.’)

<sup>5</sup> Indian case law suggests that the right may be interpreted in this fashion. See Penuell Maduna ‘Movement and Residence’ in Halton Cheadle, Dennis Davis, and Nicholas Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 321 citing Paul Sieghart *The International Law of Human Rights* (1983). The right of freedom of movement has also been used in the construction and interpretation of other rights. See *The Attorney-General v Dow* 1994 (6) BCLR 1 (Botswana Court uses freedom of movement to flesh out understanding of gender equality).

<sup>6</sup> Lourens du Plessis & Jacque de Ville ‘Personal Rights: Life, Freedom and Security of the Person, Privacy and Freedom of Movement’ in David Van Wyk, John Dugard, Bertus de Villiers, and Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 212, 254-263 (Notice that the Kempton Park negotiators opted for ‘the German rather than the Canadian approach.’).



located in the right of individual locomotion,<sup>1</sup> the right of freedom of movement inevitably establishes the territory of the Republic as one where free movement, and thus free economic activity and trade, may occur.<sup>2</sup>

(ii) *Everyone has the right to freedom of movement*

The pass laws of apartheid offer perhaps the most obvious and egregious example of a violation of the right to freedom of movement. The use of border posts to regulate inter-provincial travel within South Africa would, likewise, be deemed constitutionally infirm under our basic law.

The content of the right of freedom of movement in post-apartheid South Africa clearly extends beyond preventing the reintroduction of pass law legislation.<sup>3</sup> Random checks of identity documents would likely not pass constitutional muster.<sup>4</sup> Indeed, the right may now be deemed to operate not only between the state and its citizens, but in the ‘so-called’ private domain.<sup>5</sup>

For example, in *Victoria & Alfred Waterfront (Pty) Ltd & Another v Police Commissioner of the Western Cape* the High Court was obliged to assess the relative value of the applicants’ property rights — including an obvious right to protect their custom and business interests — and the respondents’ right to freedom of movement — where they engaged in the practice of begging — at a popular Cape

<sup>1</sup> It is sometimes suggested that the freedom of movement right also includes a right to be free from surveillance. See Maduna (supra) at 321—322 (Citing *Kharak Singh v State of Uttar Pradesh* [1964] 1 SCR 332 (Subha Rao J for the minority).) The placing of a person under surveillance may constitute a restriction with a lower degree of control than a detention that would trigger the right of freedom and security. Nevertheless, surveillance constitutes a degree of control of personal liberty that ought to attract the attention of our courts. However, it would seem that the right to privacy and the right of access to information would be better suited to provide a location for defending the individual or a juristic person against unjustifiable surveillance. See David McQuoid-Mason ‘Privacy’ in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 38; & Jonathan Klaaren & Glen Penfold ‘Access to Information’ in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2002) Chapter 62.

<sup>2</sup> For related views on the relationship between conflicts of law and free economic activity, see Victoria Bronstein ‘Conflicts’ in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

<sup>3</sup> *Victoria & Alfred Waterfront* (supra) at 585 (‘With regard to freedom of movement (section 21 of the Bill of Rights) Mr de Waal submitted that the core of the right is to prevent the reintroduction of the pass laws which prevented people from moving freely from one place to another during the apartheid era. It may be that the effect of the section is to prohibit such legislation. However, the section is not limited to those circumstances. It is broadly stated. There is no reason to limit it so as to bring it in line with the common law; rather, the converse applies.’)

<sup>4</sup> See *Elliot v Commissioner of Police, Zimbabwe* 1998 (1) SA 21 (ZS).

<sup>5</sup> *Victoria & Alfred Waterfront* (supra) at 585 (‘The right to exclude is further limited by the fact that exclusions will be a limitation of the constitutional right of freedom of movement of the second and third respondents.’) See also *South African National Defence Union v Minister of Defence & Others* 2003 (3) SA 239, 255 (T), 2003 (9) BCLR 1054 (T) (‘SANDU’) (Discusses the right of free movement.) But see *SANDU & Another v Minister of Defence & Others; In re SANDU v Minister of Defence & Others* 2004 (4) SA 10 (T), [2003] 3 All SA 436 (T) (Criticizes the Constitutional Court’s earlier judgment in *SANDU* in this regard.)

Town mall.<sup>1</sup> The decision turned in part on the character of this mall. The Court wrote:

The Waterfront is somewhat different from other shopping malls and appears to be private property of a particular kind. It is 123 hectares in extent and consists of a vast array of shops, restaurants, offices and places of public entertainment. It also includes public roads, hotels and access to the sea. People wishing to visit Robben Island are obliged to board the boat or ferry transferring them to the island at the Waterfront. Moreover, a post office and a police charge office are located on the property. It has the distinctive character of private property to which members of the public have routine access and which the public are invited to visit whether or not they intend to conduct any business on the property. It is for all practical purposes a suburb of Cape Town.<sup>2</sup>

It may make some difference where in the territory of the Republic the restrictions on movement are levied. For instance, the police and the military may legitimately exercise greater powers of search and seizure within a certain proximity of the nation's borders. Likewise, reasonable restrictions on movement after natural disasters or in the immediate environs of a police investigation are likely to be found justifiable.

An infringement of the freedom of movement is conceptually distinct from an infringement of the right of freedom and security of the person.<sup>3</sup> One way to state the distinction between these two rights is that a restriction of the freedom of movement is a restriction that does not amount to a detention. It may be a condition on access or egress. A restriction on movement would embrace a mandatory exclusion from a certain area (such as exclusion from a military base), rather than a mandatory inclusion (detention). As a general rule, a restriction on the freedom of movement does not entail the same degree of control as does a detention.

The general right to freedom of movement may apply to the right to international travel. Such a right would, in part, be contingent upon the Court's recognition of FC s 21's extraterritorial application. However, one can imagine a FC s 21 challenge where an international speaker is refused a visa to South Africa or persons within the country are denied the ability to travel to hear a speaker on a controversial topic.

The right of freedom of movement may also be influential in respect of decisions regarding deportation. For instance, the right of freedom of movement was employed in a pre-Immigration Act matter declaring invalid the deportation from

<sup>1</sup> For a general discussion of rights of assembly and movement in quasi-public spaces such as shopping malls, see Stu Woolman 'Freedom of Assembly' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43.

<sup>2</sup> *Victoria & Alfred Waterfront* (supra) at 582. Cf *Landvreugd v Netherlands* 36 EHRR 56 (A 14-day banning of beggars from an area of Amsterdam was upheld.)

<sup>3</sup> For a detailed analysis of the right to freedom and security of the person, see Michael Bishop & Stu Woolman 'Freedom & Security of the Person' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40.

South Africa of a foreign national married to a South African citizen.<sup>1</sup> Section 34 of the Immigration Act now regulates the deportation and detention of ‘illegal foreigners’ and, at least in respect of deportation, must comply with the right of freedom of movement and residence.

The right of freedom of movement in FC s 21(1) likely protects the rights of lawful resident foreign nationals in a similar manner to FC s 21(3). In short, lawful resident foreign nationals should possess the same rights to enter, remain in and to reside anywhere in the Republic.<sup>2</sup> That said, it may be easier for the government to justify regulation of, for instance, the right to enter the Republic with respect to foreign nationals than with respect to citizens.

Residency requirements may impact upon the freedom of movement as well as upon the freedom of residence. Disproportionate requirements of residency may interfere with the freedom of movement. For instance, if the hospitals of Gauteng were to limit the availability of their services to residents of Gauteng, this limitation might require justification in terms of FC s 36.<sup>3</sup>

(iii) *Everyone has the right to leave the Republic.*

The laws of apartheid-era South Africa regulated the right of persons to leave the Republic.<sup>4</sup> Currently, most Southern African countries have only procedural requirements for departure from their territory. However, some countries substantively regulate the right of persons to leave their territory.<sup>5</sup>

Procedural regulations regarding departure would clearly fall within the ambit of FC s 21(2). They would, however, in most cases be deemed constitutional.<sup>6</sup> Such procedural regulations are usually not intrusive and certainly yields benefits of information to the state in its efforts to promote development and, at least in the case of its nationals, to protect their rights beyond the borders of the territory.

<sup>1</sup> *Patel & Another v Minister of Home Affairs & Another* [2000] 4 All SA 256 (D).

<sup>2</sup> In this respect, the thrust of the interpretation offered by a former Minister of Home Affairs, Penuell Maduna, is instructive:

Though the words used in section 21(3) of the Constitution are clear, it is unimaginable that the intention of the makers of our Constitution (all of whom were inspired by the noble ideal of democracy founded on basic core values encapsulated in the Constitution) was consciously to take away the rights of foreigners lawfully abiding with the national territory of our country. In terms of section 6(2) of the Canadian Charter of Rights and Freedoms, these rights are enjoyed by all persons lawfully within any democratic country. It is, thus, safer to assume that a foreigner lawfully within the Republic has a right to enter, reside and remain in any province, city, town or community with generally the same mobility rights as a South African citizen.

Penuell Maduna ‘Movement & Residence’ Halton Cheadle, Dennis Davis & Nicholas Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 299.

<sup>3</sup> In this respect, it is probably worth noting that the constitutional position of the provinces is derivative of the national territory rather than the reverse. In this respect, the South African position on residency would presumably be even stronger than the protection afforded by the US Constitution.

<sup>4</sup> John Dugard *Human Rights and the South African Legal Order* (1978) 141-143.

<sup>5</sup> For instance, the African Emigration and Immigrant Workers Act 1 of 1954 (Malawi) apparently remains in effect.

<sup>6</sup> Section 9 of the Immigration Act 13 of 2002 regulates the departure of persons from the territory requiring a passport, that such departure be done at a port of entry, that the departure is recorded by an immigration officer, and that such departing person may be examined by an immigration officer.

For example, in the current global market for services and skilled professionals, medical professionals trained in South Africa will want to exercise the right to leave the Republic to work in other countries.

FC s 21(2) differs from the rights contained in FC s 21(3) most obviously (apart from its content) by its extension to ‘everyone’ as opposed to every ‘citizen’. As noted above, FC s 21(2) is most likely applicable only to natural persons.

(iv) *Every citizen has the right to enter the Republic*<sup>1</sup>

The procedures that the state uses to verify claims of entrance based on citizenship at the border would be implicated by this right.<sup>2</sup> One substantive obligation imposed by the right is that a state must accept a citizen deported to it.

(v) *Every citizen has the right to remain in the Republic*

Most of the litigation regarding the right to remain in the Republic is concerned with the legislative provisions allowing for extradition.<sup>3</sup> Comparative constitutional case law suggests that extradition laws do not violate the right of freedom of movement.<sup>4</sup> Despite the wording of FC s 21(3), the current policy of the Republic is that the citizenship of the person to be extradited is not relevant. The Constitutional Court has found no reason to query this policy determination.<sup>5</sup> Nonetheless, in the view of the *Geuking* Court, FC s 21(3) could well be relevant to ‘the exercise of the discretion conferred on the Minister by the Act.’<sup>6</sup> To be safe, the Minister ought to at the least consider the citizenship of the person in the exercise of the Extradition Act’s provisions regarding orders or refusals of surrender to a foreign state.

The language of FC s 21(3) suggests that certain forms of punishment are no longer permissible. For example, FC s 21(3) should bar the state from exiling a citizen.

<sup>1</sup> One relevant international instrument is the International Covenant on Civil and Political Rights. Article 12(4) provides: ‘No one shall be arbitrarily deprived of the right to enter his own country.’

<sup>2</sup> Section 9 of the Immigration Act 13 of 2002 regulates admission requiring a passport, that such admission be done at a port of entry, that the entry is recorded by an immigration officer, and that such entering person may be examined by an immigration officer.

<sup>3</sup> Extradition Act 67 of 1962. Other constitutional challenges to extradition proceedings have implicated other provisions of the Final Constitution. See *Harkesen v President of the Republic of South Africa* 2000 (2) SA 825 (CC), 2000 (4) BCLR 578 (CC)(FC s 231); *Director of Public Prosecutions: Cape of Good Hope v Robinson* 2005 (2) BCLR 103 (CC), 2005 (2) BCLR 103 (CC)(FC s 39(2)).

<sup>4</sup> *Re Federal Republic of Germany and Ruaca* (1983) 145 DLR (3d) 638.

<sup>5</sup> *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC) (*‘Geuking’*) at para 28 (‘The President is therefore entitled to adopt a policy that it is in the interests of the Republic to consent to a request for extradition proceedings against a person, regardless of his or her citizenship.’)

<sup>6</sup> *Ibid.*

<sup>7</sup> Although it did not explicitly use the right to movement and residence, *Mobamed v President of the Republic of South Africa* concerned the conditions of leaving the Republic where the person in question has been detained by the state. 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) The *Mobamed* Court interpreted the right to life and the right to be free from cruel and unusual punishment to require assurances from a *receiving* state that a death penalty would not be used upon a person being *removed* from South Africa.

(vi) *Every citizen has the right to reside anywhere in the Republic*

Residence means an acknowledged or a sanctioned place of residence. It does not refer to the substantive aspects of residence. The right to shelter is catered for by FC s 26, the right to adequate housing.

It has been argued that the term ‘anywhere in the Republic’ restricts the powers of the provincial legislatures to prevent persons from other provinces from taking up residency.<sup>1</sup> For example, any provincial law or policy requiring occupancy in a province for more than a year before providing particular medical benefits or even treatment would be constitutionally suspect.<sup>2</sup> FC s 21(3) may well protect a person’s right to determine where they receive their post.

That the benefits of FC s 21(3) extend only to citizens has certain repercussions for non-citizens. Any challenge to a residency requirement by a non-citizen (for instance asylum seekers) would need to proceed in terms of FC s 21(1).

(vii) *Every citizen has the right to a passport*

Since the issues that this subsection raises are closely connected with the status, rights, and duties of citizenship, this aspect of the right to freedom of movement and residence is discussed, along with such closely related provisions as FC s 3 and FC s 20, in the chapter on citizenship.<sup>3</sup>

**(c) Policy issues relevant to the Right to Freedom of Movement and Residence**

The courts have deployed the right of freedom of movement and residence in a number of decisions where the right itself was not actually at issue. In criminal law, the right has been used as a partial justification for the length of a sentence.<sup>4</sup> In matrimonial property law, the right has been cited as part of the justification for a spoliation order to return marital property taken from a residence.<sup>5</sup> In prisons law, the right was considered ‘widely’ relevant in a decision denying internet access for study purposes.<sup>6</sup> In some evictions cases before the Land Claims Court, the right has been said to be of little or no avail.<sup>7</sup> In respect of civil procedure, the right was invoked in support of an order requiring release of

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<sup>1</sup> Maduna (supra) at 315.

<sup>2</sup> Ibid at 320.

<sup>3</sup> See Jonathan Klaaren ‘Citizenship’ in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, April 2007) Chapter 67 (Discusses the provisions of the South African Citizenship Act 88 of 1995 and the South African Passports and Travel Documents Act 4 of 1994).

<sup>4</sup> *Mfingwa & Others v S* [2001] JOL 8933 (Tk)(Two year sentence for kidnapping of a woman and a child and forcible ejection from their homestead.)

<sup>5</sup> *Mans v Mans (born Maddock)* [1999] 3 All SA 506 (C).

<sup>6</sup> *Thukwane v Minister of Correctional Services & Others* [2005] JOL 13467 (T).

<sup>7</sup> *Portion 608 New Belgium CC v Monyiki & Another* [2003] JOL 10995 (LCC)(Little avail); *Swanevelder & another v Mpedi & others* [2002] JOL 9913 (LCC)(No avail).

the passport and the travel documents of a person arrested in terms of an arrest *tamquam suspectus de fuga*.<sup>1</sup>

The Constitutional Court has considered two challenges based on the right of freedom of movement and residence to certain aspects of a health care providers licensing scheme. In *Affordable Medicines Trust & Others v Minister of Health of RSA & Another*, the licensing scheme at issue linked the license to dispense medicines to a particular premises.<sup>2</sup> The Constitutional Court dismissed the freedom of movement and residence challenge in the following terms:

The applicants contended that the requirement to apply for a new licence whenever a medical practitioner is moving to new premises interferes with the freedom of movement. I think that it can be accepted that the right to practise a profession includes the right to decide where one will practise one's profession. This being a right relating to the practice of a profession, it is subject to regulation under section 22. The requirement of a licence does not take away the right to choose where to practise medicine. But what it does is merely to require that if the practice is to involve compounding and dispensing of medicines, this should be done from premises in respect of which a licence to dispense medicines has been issued. This does not infringe the right to freedom of movement as contemplated in section 21 of the Constitution. There is nothing in the regulations to suggest that medical practitioners will be prevented from practising their profession from wherever they choose.<sup>3</sup>

The *Affordable Medicines Trust* Court thus preferred to view the matter in terms of the right to practice a profession rather than the right of freedom of movement and residence.<sup>4</sup> Similarly, in *Coetzee v Comitis*, a challenge to restraint of trade, worded at times in the language of the freedom of movement, was ultimately decided by the Cape High Court in terms of the right to practice one's profession.<sup>5</sup>

#### **(d) The relationship of freedom of movement and residence to other constitutional rights**

##### **(i) Dignity**

In *Dawood v Minister of Home Affairs*, the right to dignity was understood to encompass a right of spouses to live together.<sup>6</sup> An immigration regulation requirement that an application for permanent residence had to be made from outside the country would have forced spouses to choose between leaving South Africa or separating from one another. The Court held such a choice to be a

<sup>1</sup> *Alliance Corporation Ltd v Blogg: In re Alliance Corporation Ltd v Blogg & Others* [1999] 3 All SA 262 (W)(Detention of person's travel documents and limitation on freedom of movement not justified once conditions for an internationally enforceable judgment have been satisfied.)

<sup>2</sup> 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC)(*Affordable Medicines Trust*).

<sup>3</sup> *Ibid* at paras 102-103.

<sup>4</sup> *Ibid* at para 134 (Related challenge to a regulation on the basis of the right of freedom of movement and residence was also dismissed.)

<sup>5</sup> *Coetzee v Comitis & Others* 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C), [2001] 1 All SA 538 (C)(Declared invalid a restraint of trade clause that limited a football player's movement from one club to another.)

<sup>6</sup> 2000 (1) SA 936 (CC), 2000 (8) BCLR 837 (CC). See also *Booyesen v Minister of Home Affairs* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)(Extended *Dawood* to further classes of migration regulation.)

violation of the right to intimate association protected by FC s 10.<sup>1</sup> In *Minister of Home Affairs v Watchbeneka*,<sup>2</sup> the Supreme Court of Appeal used the right to dignity to strike down an official policy barring ‘asylum seekers — people who claim to be taking refuge in this country from persecution or conflict elsewhere — from being employed and from studying while they are waiting to be recognised as refugees.’<sup>3</sup>

(ii) *Equality*

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, gay and lesbian persons challenged an immigration regulation that did not extend the same benefits to same-sex life partners as it did to opposite-sex life partners.<sup>4</sup> The Constitutional Court ultimately ordered that permanent residence permits be made available to persons in same-sex life partnerships.

In *Khosa v Minister of Social Development*, the Constitutional Court struck down a legislative scheme that limited the right to social benefits to South African nationals.<sup>5</sup> The Court held that permanent residents — in this case former refugees from Mozambique — were entitled to equal treatment and equal access to social assistance.

However, refugees and foreign nationals are not always accorded equal treatment under our basic law. In *Union of Refugee Women*, a majority of the Constitutional Court found that a bar on refugees being employed as security service providers did not violate the refugees’ right to equality.<sup>6</sup>

<sup>1</sup> The South African approach differs from the Zimbabwean approach to this issue. See *Rattigan & Others v Chief Immigration Officer & Others* 1994 (2) ZLR 54 (S); *Salem v Chief Immigration Officer & Another* 1994 (2) ZLR 287 (S); and *Koblbaas v Chief Immigration Officer & Another* 1997 (2) ZLR 441 (S).

<sup>2</sup> 2004 (4) SA 326 (SCA), 2004 (2) BCLR 120 (SCA).

<sup>3</sup> *Ibid* at para 1.

<sup>4</sup> 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) (The right of freedom of movement had been argued as an alternative basis for the ruling in the lower court.) See also *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 1999 (3) SA 173 (C), 1999 (3) BCLR 280 (C), [1999] 1 All SA 643 (C).

<sup>5</sup> *Khosa & Others v Minister of Social Development & Others; Mablaule & Another v Min of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

<sup>6</sup> *Union of Refugee Women & Others v The Director: The Private Security Industry Regulatory Authority & Others* CCT 39/06 (as yet unreported decision of 12 December 2006).

