THE UPHOLDING OF HUMAN RIGHTS BY THE COURTS DURING STATES OF EMERGENCY *

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UITTREKSEL

Die onafhanklikheid van die regbank met betrekking tot die toepassing van die fundamentele prosessuele menseregte in Suid-Afrika vorm die onderwerp van hierdie oorsigartikel. Die raamwerk waarteen die huidige toepassing van dié regte ondersoek word, is die effek van die noodtoestandregulasies in Suid-Afrika sedert 1985 op die voortbestaan van dié regte met besondere verwysing na die rol van die howe in dié verband. Hierdie toedrag van sake word gekontrasteer met die voorgestelde menseregteakte van die Suid-Afrikaanse Regskommissie, die ICLS (LWO) Declaration on Human Rights en die VN se Ontwerp Universele Deklarasie van die Onafhanklikheid van die Regbank. Die basiese internasionaal-erkende prosessuele menseregte word vervolgens kortliks bespreek. Na 'n uiteensetting van die Suid-Afrikaanse howe se interpretasie van die noodtoestandmaatreëls, word 'n aantal voorstelle vir die opname en implementering van die beginsels onderliggend aan die algemeen-aanvaarde prosessuele menseregte en die hierbovermelde dokumente gemaak.

1. INTRODUCTION

A synopsis of various measures concerning the independence of the judiciary as regards the protection of basic procedural rights in general and particularly in emergency situations as set out in internationally accepted ideas concerning

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in emergency situations as set out in internationally accepted ideas concerning due process of law and in three recent human rights documents is given with a view on providing a framework for this overview article. The most significant procedural human rights (as generally accepted in international and regional treaties) are enumerated. The three documents are the proposed South African Bill of Rights, the ICLS (LWO) Leuven Declaration on Human Rights Relating to the Legal Process and the United Nations Draft Universal Declaration on the Independence of Justice. This is followed by a brief outline of the inroads on these rights as effected by the present state of emergency in South Africa. In this regard the interpretation of the emergency measures by the courts will be discussed with a view to determine to what extent the courts have either interpreted these measures restrictively (in order to uphold individual liberty) or have by means of a positivist and wide interpretation of these measures indirectly contributed to the withering of personal freedom. In this regard the increasing curtailment (by means of legislative inroads, in particular the emergency provisions) of the inherent and statutory powers and functions of the South African Supreme Court (e.g. to act as the ultimate custodian of individual liberty and its powers of review) is analysed.

In conclusion the status quo (the existence of emergency measures and the attitude of the courts in this regard) is evaluated against internationally accepted norms of due process of law, the the proposed South African Bill of Rights, the ICLS (LWO) Leuven Declaration on Human Rights Relating to the Legal Process and the United Nations Draft Universal Declaration on the Independence of Justice. Finally a number of proposals as to the embodiment of the principles underlying these Declarations in South African judicial practice are made.

2. PROCEDURAL HUMAN RIGHTS (DUE PROCESS OF LAW)

Procedural human rights - also known as due process of law - consist of norms pertaining to arrest, detention, sentencing, punishment as well as the requirements of a fair trial (Van der Vyver 1976:83). Due process of law also prescribes the rules for the extent and validity of administrative and executive actions.

The following procedural human rights are internationally accepted as embodying the the minimum standard that has to be complied with by executive, administrative, legislative and judicial organs if the norm of fair and equitable administration of justice is to be fulfilled. This also applies to the exercise of administrative and executive powers. The most important norms pertaining to due process of law are the following (Lillich 1979:124-137; Mathews 1986:23-30; Van der Vyver 1976:58-59; 83-102):

1. Right not to be arrested and detained arbitrarily (Mathews 1986:62-100; 200-204; Rudolph 1984; Van der Vyver 1975:138-147; 1976:28, 86-105).
2. Freedom from inhuman treatment (Dugard 1979:278-281).
3. Right of recourse to legal proceedings (Ackerman 1988:112-119; Van der Vyver 1975:21; 23; 25; 33; 41; 147-155; 1976:63).
4. Right not to be a witness against oneself (Van der Vyver 1975:169-172; 1976:85-89; 94; 98; 103).
5. Right not to be subjected to arbitrary exile (Van der Vyver 1976: 83; 86; 123).
6. Right not to be subjected to cruel punishment (Van der Vyver 1975:181-182; 1976:83-89; 103; 156).
7. Right not to be subjected to double jeopardy (Van der Vyver 1976:85-88; 103; 105).
8. Right not to be subjected to punishment not prescribed by law (Van der Vyver 1976:87; 108).
9. Right not to be subjected to retroactive law (Van der Vyver 1975:178-181; 1976:84-89; 122).
10. Right not to be subjected to unreasonable searches and seizures (Mathews 1986:185-189; Van der Vyver 1975:23; 114; 1976:84; 103).
11. Right not to give evidence (Van der Vyver 1976:86).
12. Right to appeal (Van der Vyver 1976:100).

13. Right to be confronted by witnesses against oneself (Van der Vyver 1975:24-39; 159-164; 1976:85; 87; 89; 103).
14. Right to be presumed innocent (Du Plessis & Olivier 1989:226-239; Van der Vyver 1975:24-41; 137; 155-157; 1976:84-88).
15. Right to defend oneself (Van der Vyver 1976:69; 87-89).
16. Right to a fair trial (Van der Vyver 1975:23-39; 172-178; 1976:83-88).
17. Right to give evidence (Van der Vyver 1976:94).
18. Right to habeas corpus procedure (Van der Vyver 1975:26-38; 140; 1976:16; 86-94).
19. Right to be informed of charges against oneself (Van der Vyver 1975:23-38; 137-139; 163-164; 1976:85-88; 103).
20. Right to legal representation (S v Khanyile and another 1988 (3) SA 795 (N); Van der Vyver 1975:26-39; 121; 137-148; 159-169; 1976:85-97; 103-104).
21. Right to the necessities of life while being detained (Van der Vyver 1976:94-95).
22. Right to obtain witnesses in one's favour (Van der Vyver 1976:85; 103).
23. Right to prepare one's defence (Van der Vyver 1976:87).
24. Right to a public trial (Van der Vyver 1976:85-87; 103).
25. Right to reasonable bail (Van der Vyver 1975:21-26; 145-147; 1976:86; 101-102).
26. Right to services of an interpreter (Van der Vyver 1975:26-39; 1976:86-87).
27. Right to speedy trial (Van der Vyver 1976:84-93; 102-103).
28. Right to trial by an independent and impartial tribunal (Van der Vyver 1976:86-89; 103-114).
29. Right to witness fee (Van der Vyver 1976:96).

3. SA LAW COMMISSION

The SA Law Commission[1] published Working Paper 25 on Project 58: Group and human rights in March 1989.[2] This research project resulted from a request in April 1986 by the Minister of Justice, Mr. H.J. Coetzee, to the SA Law Commission (1989:1):[3]

> to investigate and make recommendations on the definition and protection of group rights in the context of the South African constitutional set-up and the possible extension of the existing protection of individual rights as well as the role the courts play in connection with the above.

The project group invited oral and written submissions, and also made extensive use of published local and international research as well as of international treaties and foreign national legislation.

The project group describes its basic point of departure in the following words (1989:1):

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[1] Established by the South African Law Commission Act 19 of 1973. It consists of judges, members of the Bar and Law Society, academics and officials of the Department of Justice. Its present chairman is Mr. Justice H.J.O. van Heerden (Appellate Division), and its vice-chairman Mr. Justice P.J.J. Olivier. From time to time ad hoc members are appointed if the Commission deems their specialised knowledge to be indispensable for the proper conduct of a particular research project. The Commission is also assisted by a number of full-time officials who are responsible for research and the compilation of reports as determined by the Law Commission.

[2] The project leader was Mr. Justice P.J.J. Olivier and the project team consisted of full-time researchers of the Law Commission.

[3] cf also Hansard (1986-04-23) 4014-4015.

The subject of fundamental human rights, a bill of rights, and group rights is a controversial one. We have tried to approach the matter as objectively as possible, from a practical legal point of view.

Fundamental human rights such as personal freedom and due process of law were explicitly recognised by Roman-Dutch law (the South African common law). These (and other) fundamental freedoms have on account of especially the race-based ideologies of successive South African governments been increasingly eroded. This resulted in dissatisfaction and a rapid increase in resistance to such policies (initially peaceful, but soon violent). This precipitated the perception that the threat of disorder could best be curtailed by the introduction of measures that were deemed to ensure internal security (Olivier 1987:197-207). Needless to say, the vast powers granted to the Executive were extended by leaps and bounds. Conversely, the common law concept of inalienable basic human rights and the inviolable power of review of the courts were pari passu eroded. This encroachment finally resulted in the 1985 emergency and the successive emergencies since 1986 (the 1989 emergency having been proclaimed on 9 June 1989).

In the view of the South African Law Commission (1989:476-485) an enshrined and justiciable Bill of Rights is a conditio sine qua non for the recognition and acceptance of human rights in South Africa. In terms of its recommendations the Supreme Court will be entrusted with the protection and enforcement of these freedoms and will be empowered to invalidate existing and new legislation as well as executive and administrative acts. Its inherent powers will also have to be reinstated and even extended.

The SA Law Commission is also of the opinion that the inclusion of procedural safeguards in its proposed Bill of Rights is non-negotiable. This will result in the upholding of individual freedom and will also succeed in striking the necessary balance between the interests of the state and those of the individual.

Article 23 protects the right to personal freedom and safety. This entails that no person shall in principle be deprived of his freedom . However, lawful arrest or detention (in order to appear before a court) may be effected on the ground of a reasonable suspicion of a crime having been committed or for the purpose crime prevention. Detention subsequent to conviction is also allowed.

Arrest and detention must, however, also be in accordance with generally applicable prescribed procedures (whereby fundamental rights to spiritual and physical integrity are recognised).

The rights of a arrested and detained person (article 24) provide for the detention and feeding under conditions consonant with human dignity as well as the furnishing of reasons for the detention and of the crime with which he is charged. He is also to be informed his right to remain silent and that he need not make any statement. He must also be be brought before a court within forty-eight hours and in writing be charged or in writing be informed of the reason for his detention. If this condition is not met, he must be released, unless a court orders his further detention. He must also be tried within a reasonable time after his arrest and is entitled to release pending the hearing (subject to bail being imposed in the court's discretion). His right to communicate and to consult with legal representatives of his choice, and to communicate with and to receive visits from his family or friends is also guaranteed. Finally, all forms of torture, assault or cruel or inhuman or degrading treatment are prohibited.

Article 25 provides for the rights of accused persons to a speedy and fair trail. Convictions and sentences may only take effect subsequent to a fair and public trial in accordance with the generally applicable procedural and evidential rules. An accused is also to be treated as innocent until the contrary is proved by the state. He is also entitled to remain silent and to refuse to testify during the trial. The right to legal representation is guaranteed. In serious cases where the accused is unable to afford legal representation, the state is obliged to provide and remunerate a legal representative. Inhuman or degrading punishment is not permitted. No person may be convicted of crimes that were retroactively introduced or receive penalties heavier than that which was applicable at the time when the offence was committed. No-one may be convicted of a crime of which he was previously convicted or acquitted (except in the case of appeal or review proceedings connected with such conviction or acquittal). There exists an absolute right to appeal or review to a court superior to the court which tried him in the first instance. Finally, all convicted persons must be informed as to the reasons for the conviction and sentence.

It is clear that the recommendations of the SA Law Commission in this regard embody the principles underlying the generally acknowledged procedural rights (as set out above).

The Commission is of the opinion that the scrapping of all existing measures (and that would also include the present emergency regulations) contrary to the wording and the spirit of its proposed Bill of Rights is a prerequisite to the introduction thereof (1989: 313).

Reference must also be made of the often heard objection that the application of a Bill of Rights will necessarily lead to the downfall of the state. The Commission refutes this argument by referring to the experience in other countries which have faced security threats for a considerable period of time but that nonetheless have been able to uphold basic freedom and to safeguard procedural rights (1989: 313-314).

3. UNITED STATES' DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS

The UN Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities prepared a Draft Universal Declaration on the Independence of Justice, the final version of which was published on 20 July 1988.[4] This draft Declaration will shortly be put before the General Assembly for acceptance and ratification by member states.

The objectives and functions of the judiciary are inter alia (article 1):

1. to administer the law impartially irrespective of who the parties may be;

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[4] E/CN/.4/Sub.2/1988/20/Add.1.

2. to promote, within the proper limits of the judicial function, the observance and the attainment of human rights, and

3. to ensure that all peoples are able to live securely under the rule of law.

In the exercise of their judicial function and discretion, judges individually shall be free, and it shall be their duty to decide matters before them impartially in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (article 2). In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Judges are obliged to exercise their functions with full responsibility of the discipline of law (article 3). The judiciary shall furthermore be independent of the Executive and Legislature (article 4).

The courts shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, including issues of its own jurisdiction and competence. The establishment of ad hoc tribunals is prohibited. The right of detained persons to be tried with all expedition and without undue delay by the ordinary courts or judicial tribunals under law (subject to review by the courts) is guaranteed (article 5).

The role of the courts during states of emergency is specifically dealt with in article 5(d)-(e). Emergency measures may only be proclaimed to the extent as not being inconsistent with internationally accepted minimum standards and must without exception be subjected to review by the courts. Detention without trial must also be subjected to review by the courts or an independent body, which will have the power to compel the detaining authority to produce the detainee, enquire into alleged maltreatment, and to order his release:

> 5(d) Some derogations may be permitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, only to the extent strictly consistent with internationally recognised minimum standards and subject to review by the courts.

(e) In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts, and, detention of persons administratively without charge shall be subject to review by courts or other independent authority by way of habeas corpus or similar procedures so as to ensure that the detention is lawful and to inquire into any allegations of ill-treatment.

No administrative, executive or legislative power shall be so exercised as to interfere with the judicial process and the executive shall not be empowered to close down or suspend the operation of the courts (article 5(g)-(h)). The Draft Declaration provides for the absolute prohibition of the the executive to directly or indirectly pre-empt the judicial resolution of a dispute or frustrates the proper execution of a court decision (article 5(i)).

The promulgation of legislation or executive decrees subsequent to a court decision in order to reverse such a decision or to change the composition of the court to affect its decision-making, is specifically forbidden (article 6). Article 37 provides for the responsibility of a judge to ensure the fair conduct of the trial and inquire fully into any allegations made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

The independence of the legal profession is deemed to constitute an essential guarantee for the promotion and protection of human rights (including due process of law - article 74-75):

75. There shall be a fair and equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

The absolute right to legal representation and the duty of the state to provide such representation in cases of need to establish economic, social and cultural as well as civil and political rights is guaranteed by article 76.

In terms of article 91 lawyers shall be entitled to confidentiality of the lawyer-client relationship and the right to refuse to give testimony if it impinges such confidentiality; the right to travel and to consult with their clients freely; the right to visit, to communicate with and to take instructions from their clients.

5. ICLS LEUVEN DECLARATION ON HUMAN RIGHTS RELATING TO THE LEGAL PROCESS

The ICLS Leuven Declaration on Human Rights relating to the legal process was adopted on 26 August 1986 by the Fourth International Congress on Legal Science.[5]

This Declaration provides for the right to be directly heard in the making and changing of law (article 2); the right to be sufficiently informed about the contents of the law (article 5), as well as to receive sufficient information on the law applicable to his case (article 6); the absolute right to the content of the record of the court (article 12); the right to legal aid and legal services (article 14); the right to be informed personally of the judgment in his case (article 15).

This Declaration deems it a prerequisite for the implementation of human rights that District and Supreme Human Rights Courts (as well as Regional Human Rights Courts and an International Human Rights Court) be established (article 21-24).

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[5] ICLS DOC.G.20.

7. STATES OF EMERGENCY: SOUTH AFRICA

A partial state of emergency was proclaimed in 1985. After being terminated in early 1986, a general state of emergency was declared in June 1986. The second, third and fourth state of emergency were respectively declared on 12 June 1986, 11 June 1987, 10 June 1988 and 9 June 1989. In the course of 1987 and 1988 various loopholes were closed. In general it can be said that the 1988 Emergency Regulations (Du Plessis & Olivier 1988b:267-271) were re-enacted on 9 June 1989 (PR85 of 1989-06-09).

The relevant 1989 emergency measures (Du Plessis & Olivier 1989c:95-103) are:

1. The Security Emergency Regulations (PR86 of 1989-06-09) provide for arrest without warrant, detention without trial as well as for banning subject to conditions determined by the Minister of Law and Order. The common law jurisdiction of the courts to invalidate these measures and to enquire into the lawfulness of arrests and detentions have to a very large extent been excluded.

2. The Media Emergency Regulations (PR88 of 1989-06-09) prohibit the physical presence of journalists at scenes of unrest as well as the recording of security actions and the publication without permission of any unrest-related matters. Provision is also made for the suspension of newspapers and for the confiscation of the alternative press (i.e. those sectors of the press which are not registered as newspapers). The common law rules of audi alteram partem and the giving of notice to interested parties have been explicitly excluded. The Supreme Court's powers of review have also once again in effect been abrogated.

3. The Prison Emergency Regulations (PR 87 of 1989-06-09) consist of measures regulating the circumstances in terms of which detainees are to be imprisoned. The normal rules pertaining to ordinary awaiting trial prisoners apply only to a limited extent to emergency detainees.

4. The Educational Emergency Regulations (PR 89 of 1989-06-09) provide for the control of Black schools and tertiary institutions.

5. GN1220 of 1989-06-09 prevents the functioning of 32 organisations (in 1988 18 were prohibited).

6. GN1225-1230 of 1989-06-09 repeat the regulations concerning funerals.

7. ROLE OF THE COURTS

Initially there was a sharp divergency of opinion in the attitude of the various divisions of the Supreme Court (as in 1986 - see Du Plessis & Olivier 1987b:201-204; 207) as to the interpretation of the various emergency provisions. The courts differed sharply on inter alia

1. whether the interpretation of the empowering provisions (e.g. for arrest and detention) should be in favorem libertatis or in favour of the Executive, and
2. whether the onus to prove the validity of the initial arrest and subsequent detention was on the detainee or the state.

Since 1987 the trend has, however, been increasingly in favour of interpretations that on the one hand would not invalidate either the regulations themselves or executive acts, and on the other hand would continue to erode on basic substantive and procedural rights. This attitude can be identified in the following interpretations:

1. The emergency regulations authorises indefinite detention without trial (Minister of Law and Order v Swart 1989 (1) SA 295 (A)).

2. Access by lawyers is excluded (Bloem v Minister of Law and Order 1986 (4) SA 1063 (O); Omar v Minister of Law and Order 1986 (3) SA 306 (K); Spruyt v Minister of Law and Order 1987 (4) SA 555 (W)).

3. Audi alteram partem is excluded (Sisulu v State President 1988 (4) SA 731 (T)).

4. The decision to prolong the initial detention is in the sole discretion of the Minister of Law and Order (**Minister of Law and Order v Dempsey** 1988 (3) SA 19 (A)).

5. It is unnecessary to consider the possible use of the customary measures in stead of the emergency arrest and detention regulations (**Peters v Minister of Law and Order** 1987 4 SA 482 (NC)).

6. The onus is on the detainee to prove on a balance of probabilities the irregularity of his arrest and/or detention (**Ngqumba v Staatspresident, Damons v Staatspresident; Jooste v Staatspresident** 1988 (4) SA 224 (A); Du Plessis & Olivier 1989b:95-104).

7. Proclamations issued in terms of the emergency measures may be at variance with the ordinary law of the land (**Staatspresident v United Democratic Front** 1988 (4) SA 830 (A); Du Plessis & Olivier 1989b:95-104; Ferreira 1989:129-133).

8. Emergency measures may no longer be invalidated on account of vagueness or uncertainty (**Ngqumba v Staatspresident, Damons v Staatspresident; Jooste v Staatspresident** 1988 (4) SA 224 (A); Du Plessis & Olivier 1989b:95-104).

9. Powers delegated to officials may only under very exceptional circumstances be reviewed. (**Ngqumba v Staatspresident, Damons v Staatspresident; Jooste v Staatspresident** 1988 (4) SA 224 (A); Du Plessis & Olivier 1989b:95-104).

10. Reasons for executive and administrative acts need never be furnished.

8. EVALUATION

A careful analysis of the provisions of the emergency regulations shows clearly that a great number of basic substantial and procedural rights have been abrogated. If all legislation should be in accordance with the specific provisions as well as the general tenor of the internationally accepted norms of due process and the three basic human rights documents (set out above) the conclusion is inevitable that the emergency regulations should be struck down. The same applies as far as the ambit of the vast powers granted to the executive and officials is concerned; in this regard it can be stated with safety that the exercise of those functions and powers would also in the great majority of cases be invalidated if measured against the internationally accepted norms of due process and the three documents discussed above.

As far as the courts are concerned five observations must be made:

1. The emergency regulations have to a very large extent severely limited the inherent powers of review of the South African courts. These powers of review in the past included the review of subordinate legislation as well as of executive and administrative acts.

2. The principle of Parliamentary sovereignty has in effect had the result that legislation empowering the declaration of emergencies as well as the granting of immensely vast proclamation and administrative powers can never be tested.

3. The courts themselves have increasingly been interpreting the measures and executive and administrative acts in such a way as not to invalidate them.

4. In this process the courts have in a number of instances gone further than the literal meaning of the measures themselves in order to validate the measures and governmental acts.

5. In effect the courts have to a marked degree renounced its function of being a watch-dog instead of a lap-dog. It can no longer be said that the

courts are in all instances the custodians of civil liberties and the primary criterion for interpretation and review is in favorem libertatis.

9. CONCLUSION

A comparison of the basic procedural rights on the one hand and the provisions of the emergency regulations on the other hand indicates that the majority of these rights have been abrogated and the remainder severely limited. Secondly the inherent common law powers of review of the courts have to a large extent been abrogated by these measures. Thirdly, the courts themselves have increasingly shown signs of a tendency to decline exercising its remaining powers. This has had the effect that it does no longer apply the maxim of in favorem libertatis as primary criterion for the interpretation of legislative measures; instead the perception prevails that the courts have waved their pivotal role as custos libertatis.

If this status quo is compared with the provisions of the proposed South African Bill of Rights, the ICLS (LWO) Leuven Declaration on Human Rights Relating to the Legal Process and the United Nations Draft Universal Declaration on the Independence of Justice as well as the internationally accepted norms of due process, it is clear that the following fundamental changes ought to be brought about:

1. The introduction of a Bill of Rights justiciable by the courts.

2. The abrogation of the principle of Parliamentary sovereignty on account of the fact that it excludes the testing right of the courts of Parliamentary as well as subordinate legislation.

3. The granting of powers of review to the courts as far as all forms of legislation (parliamentary and subordinate) are concerned.

4. The reinstatement and extension of judicial review for the invalidation of executive and administrative acts.

5. The recomposition of the South African judiciary to represent accurately the various segments of South African society.

6. The establishment of a separate human rights court structure to enforce human rights and to act as watch-dog against legislative and executive inroads as well as to remedy past and present injustices.

7. Participation of all South Africans in the law-making process by means of the fundamental democratisation of South African society and legal order to restore inter alia legitimacy to the legal system and its enforcement.

8. The repeal of all emergency measures.

9. The repeal of legislation that enables statutory and administrative inroads on human rights.

10. The ratification and enforcement of all international and regional treaties on human rights in general.

11. The ratification of regional and international human rights treaties and the voluntary submission to the jurisdiction of regional and international human rights agencies and courts.

Just and equitable administration of justice in South Africa will only be served if serious consideration to the above recommendations is given and a process for the implementation thereof is put into operation.

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