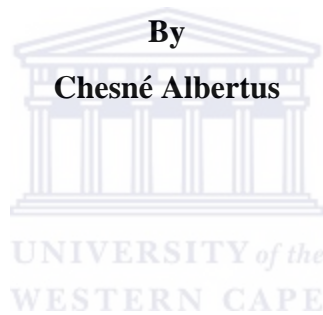


**THE CONSTITUTIONALITY OF USING DEADLY FORCE AGAINST A
FLEEING SUSPECT FOR PURPOSES OF ARREST**

**Submitted in partial fulfillment of the requirements of the degree LLM
(Constitutional Litigation)**



ABSTRACT

The advent of the supreme Constitution signaled the beginning of an era during which the South African legal system must be intolerant to human rights violations. All laws and conduct must conform to the Constitution. If it does not then the law or conduct must be declared invalid to the extent that it is inconsistent with the Constitution. This Paper questions the constitutionality of the use of deadly force against a fleeing suspect in terms of section 49 of the Criminal Procedure Act. In particular this Paper sets out the circumstances in which section 49 justifies the use of deadly force against fugitives. In doing the latter the constitutional principles of interpretation are applied to determine whether section 49 is reasonably capable of bearing a construction that is in harmony with the Constitution. International and comparative law is also considered to determine the state's obligations with regard to the use of deadly force. Furthermore this Paper explores whether a constitutional balance can be struck between the circumstances in which section 49 permits the use of deadly force against fugitives and the constitutional rights of suspects. The starting point in this Paper is thus to acknowledge that no right in the Bill of Rights is absolute, yet any limitation of a right protected under the Bill of Rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In applying the latter it is conceded that the use of deadly force against a fugitive inevitably infringes upon the right to life, to dignity and security of the person. These rights form the basis of a free and democratic society and since section 49 results in its complete negation a high level of justification is needed to save section 49 from invalidity. This Paper seeks thus to determine whether there are reasons sufficiently compelling to justify the limitations caused by section 49. This Paper sets out the implications of section 49 to the extent that it permits the use of deadly force against fleeing suspects and also proffers recommendations for restricting the use of deadly force against fugitives within the constitutional parameters.

CONTENTS

	<u>Page number</u>
1. CHAPTER 1: INTRODUCTION	
1.1. Problem: Is the new section 49 constitutional?	1
1.2. Issues	2
• The use of deadly force on grounds not covered by the common law principle of private defence.	5
• The use of deadly force by civilians	6
1.3. Significance of the problem	7
1.3.1. The prevalence of crime in South Africa.	7
1.3.2. Number of suspects that are shot.	8
1.3.3 The use of weapons by civilians	9
1.4. Argument	11
1.5. Outline of thesis	11
1.6. Methodology	13
CHAPTER 2: SOUTH AFRICAN LAW	
2. Position Prior to 1994	14
2.1. Meaning of the old section 49	14
2.2. Limitations placed on section 49	17
2.2.1 Objective limitations on the conduct of arrestors.	17
2.2.2 Imposition of an objective standard on the belief of arrestors	19
2.2.3 Placing a reverse onus on arrestors.	20

2.3. Critique of section 49	21
2.3.1 Lack of proportionality between the force used and the offence committed by the suspect.	21
2.3.2 The unsuitability of a Schedule 1 offence in order to use deadly force.	22
2.4. Post 1994 Jurisprudence	24
2.4.1 Legislative changes	
2.4.1.1 Special Service Order	24
2.4.1.2 Judicial Matters Second Amendment Act 122 of 1998	26
2.4.2 Judicial interpretation of the old section 49	26
2.4.2.1 The decision of <i>Govender</i> regarding the interpretation of section 49(1)	26
2.4.2.2 The declaration of invalidity of section 49(2) in the <i>Walters</i> case	28
2.5. The new legal framework	31
2.6. Questions to be answered	32



CHAPTER 3: INTERNATIONAL AND COMPARATIVE LAW

3.1. Section 39(1) of the Constitution	33
3.2. International law	
3.2.1 The Universal Declaration of Human Rights	33
3.2.2 International Covenant on Civil and Political Rights	35
3.2.3 The African [Banjul] Charter on Human and Peoples' Rights	37

3.2.4 The European Convention on Human Rights	38
3.2.4.1 The ‘absolutely necessary’ requirement	39
3.2.5. The American Convention on Human Rights	41
3.3 Soft law	42
3.3.1 The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.	43
3.3.1.1 Means of reducing harm	43
3.3.1.2 Guidelines in circumstances where the use of lethal force is inevitable	44
3.3.1.3 Circumstances in which firearms may be used	45
3.3.1.4 Law enforcement officials	45
3.3.2 The UN Code of Conduct for Law Enforcement Officials	46
3.4 Comparative law	46
3.4.1 Canada	47
3.4.2 United States of America	51
3.4.3 Germany	53
3.4.3 Australia	55
3.5 Conclusions	57
3.5.1 International Law	57
3.5.2 Comparative law	58
3.5.3 The salient principles	59

CHAPTER 4: INTERPRETING SECTION 49

4.1	Introduction	61
4.2	The structure of the constitutional analysis.	61
4.3	Prerequisites for the use of deadly force against a fleeing suspect in terms of section 49.	62
4.4	Section 39(2) principles of interpretation.	64
4.5	The conflict between section 49 and the rights in the Bill of Rights	65
4.6	Justifiability in terms of the constitutional limitations clause	66
4.6.1	The nature of the rights limited	66
	(a) The right to human dignity	67
	(b) The right to life.	69
	(c) The right to security of the person	70
	(d) The right to be free from all forms of violence from either public or private sources	71
4.6.2	Importance of the purpose of the limitation	72
4.6.3	The nature and extent of the limitation	74
4.6.3.1	‘Arrestor’ for the purpose of section 49	74
	(a) Factors relevant to empowering civilians to use deadly force	76
	(b) The impact by the Firearm Control Act 60 of 2000	77
4.6.3.2	‘Suspect’ for the purpose of section 49	79
4.6.3.3	The arrestor’s belief on reasonable grounds	79
4.6.3.4	The grounds for the use of deadly force	81

(a) Section 49(2)(a)	
(i) The period covered by section 49	83
(ii) The dangerousness of a suspect	85
(iii) The commission of an offence as an implied	
ground for the use of deadly force	88
(b) Section 49(2)(b)	90
(c) Section 49(2)(c)	91
4.6.4 The link between the limitation and its purpose	93
4.6.5 Less restrictive means to achieve the purpose	95
4.7 Conclusion	97
5. CHAPTER 5: IMPLICATIONS OF SECTION 49 AND	
RECOMMENDATIONS	102
6. BIBLIOGRAPHY	109



CHAPTER 1: INTRODUCTION

The constitutional soundness of the South African criminal justice system depends not only on the prosecution of criminals through fair trials¹, but also on the manner in which they are brought before the judiciary. The methods² used to compel suspects to stand trial should thus be employed in a manner, that it too does not unjustifiably violate the constitutional rights of suspected criminals. The general challenge presented to the justice system by the transition to constitutional democracy is therefore to adopt an approach towards suspects that would guarantee that they are apprehended and prosecuted in a fashion that is consistent with the values and ethos of the Bill of Rights.

Section 49 of the Criminal Procedure Act³ (hereafter the old section 49), which allowed arrestors to use force⁴ and in some instances deadly force⁵ against suspects, was declared unconstitutional by the Constitutional Court⁶ because it made unjustifiable inroads to the right to life, the right to human dignity and the right to physical integrity of suspects.⁷ Consequently the old section 49 was replaced by a new section 49 (hereafter the new section 49).⁸

¹ Section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that every accused person has the right to a fair trial.

² Section 38 of the Criminal Procedure Act 51 of 1977 provides four methods to secure the attendance of accused persons in court. These methods include arrest, summons, indictment and written notice.

³ 51 of 1977.

⁴ Section 49 (1).

⁵ Section 49(2).

⁶ See *S v Walters and Another* 2002 (2) SACR 105 (CC).

⁷ Sections 11, 10 and 12 Constitution Act 108 of 1996.

⁸ Section 7 Judicial Matters Second Amendment Act 122 of 1998.

1.1. PROBLEM: Is the new section 49 constitutional?

From its wording it is apparent that the new section 49 differs substantially from the old one. The question that arises, however, is whether the new section 49 is constitutional to the extent that it permits the use of deadly force against a fleeing suspect. Can the inevitable inroads that it (the new section 49) makes to the right to life, human dignity and security of the person be said to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom?⁹ This question lies at the heart of this paper and will ultimately determine whether the new enactment, in its present form, will remain part of our law.

Under the old section 49 an arrestor could use deadly force to overcome resistance by a suspect or to prevent the latter from escaping arrest.¹⁰ For reasons that will become more obvious later, the judiciary showed immense dissatisfaction with the grounds on which an arrestor was allowed to use deadly force in terms of section 49. It therefore limited such force to cases where a suspect posed an immediate threat of serious physical harm or where a suspect had already committed an offence involving the infliction of such harm and then took flight.¹¹ The latter grounds for the use of lethal force appeared to be more acceptable and were accordingly confirmed by the Constitutional Court in 2002.¹²

The circumstances in which lethal force could be used against fugitives were modified on several occasions through judicial interpretation. Notwithstanding these changes,

⁹ Section 36 of the Constitution.

¹⁰ This was provided that the suspect committed an offence listed in schedule 1 of the CPA 51 of 1977.

¹¹ This interpretation was given to section 49 (1) in *Govender v Minister of Safety and Security* 2001 (2) SACR 197 (SCA).

¹² *Walters supra* para 39.

provision has always been made for cases where a suspect's resistance against arrest threatened the life or limb of the arrestor or other persons. In other words, besides the common law principle of private defence¹³ (or self-defence as it is more popularly known), the law pertaining to the use of lethal force, excused arrestors from criminal liability if they used such force to repel unlawful attacks either upon their own or other persons' lives during the course of effecting arrests.¹⁴

In mid-2003, however, when the new section 49 came into operation, it replaced the legal framework for the use of lethal force as created by the courts. The enactment provides that:

'[F]or the purpose of this section-

(a) 'arrestor' means any person authorized under this Act to arrest or to assist in arresting a suspect; and

(b) 'suspect' means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without

¹³ Bruce 2003, 434. In the latter article the author contends that the use of lethal force for the purpose of arrest is different from the purpose of private defence, but that section 49(2) contained an element of private defence to serve as protection against allegations that the arrestor was actually the aggressor.

¹⁴ In *S v Makwanyane* 1995 (6) para 138 the Court confirmed the position of the private defence principle in our law, by stating that the approach in South African law is to balance the rights of the aggressor against the rights of the victim and to favour the life of the innocent over the life of the guilty party.

the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent

the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds-

(a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

(b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or

(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.'

1.2 ISSUES

The new section 49, to the extent that it provides for the use of lethal force raises at least three issues that may prevent it from passing constitutional muster. These issues, which will be outlined below in more detail, include two grounds for the use of lethal force outside the parameters of private defence and the empowerment of civilians to use deadly force for purposes of arrest.

- **The use of deadly force on grounds not covered by the common law principle of private defence.**

Section 49 expressly provides two grounds for the use of lethal force. The first ground arises in cases where deadly force is necessary to protect the life or bodily integrity of either the arrestor or any other person, from an imminent attack by the suspect. In other words, section 49 permits the use of deadly force in circumstances that are covered by the common law principle of private defence. In addition to the latter ground section 49 also provides that lethal force may be used to prevent a suspect from causing death or grievous bodily injuries to persons in the future.

Notably the new section 49 authorizes the use of lethal force to prevent the escape of a suspect who is believed to pose a threat of future harm, but it does not expressly state that such force may be used against a fleeing suspect on the sole ground that he committed an offence. It is submitted here, however, that the 'future harm' ground creates the latter possibility, because often it will be the commission of an offence that triggers the decision to use deadly force to prevent future harm.

On the basis of the future harm concept and the consequent implied ground for the use of lethal force described above, section 49 allows the use of such force in circumstances that fall outside the parameters of private defence. Since the principle of using deadly force to protect the interests of persons unlawfully attacked by others, is universally recognized,¹⁵ the question of applying lethal force to overcome resistance against lawful

¹⁵ Burchell 1997, 136.

arrest is not as problematic¹⁶ as the issue of using deadly force in circumstances outside the parameters of private defence. The question whether lethal force should be permitted in cases not covered by private defence thus becomes highly relevant for the purpose of determining the constitutionality of section 49.

- **The use of deadly force by civilians.**

The question as to who may invoke the powers to use lethal force in terms of section 49 may have implications for the constitutionality of the provision. The enactment merely refers to an arrestor as someone who is 'authorized to arrest' in terms of the Act, but sections 42 and 47 of the CPA denotes that ordinary citizens may utilize these powers too. The danger that lies in this dimension of the new section 49 is a contentious and controversial issue that may gravely affect the constitutional status of section 49.

In light of the issues outlined above i.e. the two grounds for the use of lethal force outside the private defence parameters and the empowerment of civilians to use such force, it is relevant to ask whether section 49 will pass constitutional muster when it is eventually challenged before the judiciary. Since the Constitutional Court in the *Walters* case specifically refrained from expressing any view on the new section 49, the primary aim of this paper shall be to test its constitutionality to the extent that the provision permits the use of deadly force against a fleeing suspect.

¹⁶ In *Walters supra* para 23 Kriegler, J maintained that the use of force to overcome resistance to an attempted arrest is in itself problematic, but the more difficult part has always been the authorization to use such force to prevent the escape of a fleeing suspect.

1.3. SIGNIFICANCE OF THE PROBLEM

The question whether section 49 is constitutionally valid presents a significant problem as the use of lethal force for the purpose of arrest is affected by three factors, which even if they are viewed in isolation from each other is cause for deep concern. The three factors include an extremely high crime rate, an unacceptable amount of suspects that are shot and the prevalence and use of weapons by civilians. For the purpose of clarity the mentioned factors shall be discussed respectively below, after which an attempt shall be made to illustrate briefly the danger of these factors insofar as they relate to each other.

1.3.1 The prevalence of crime in South Africa.

In 1990, the year in which the transition to democracy in South Africa began, crime increased dramatically.¹⁷ Assaults increased by 18 percent, rape by 42 percent, robbery by 40 percent, vehicle theft by 34 percent and burglary by 20 percent.¹⁸ The only crime that decreased was the murder rate, but this can be ascribed to the fact that there was a visible decline in political violence.¹⁹ In 1994 however, the murder rate was still relatively high as in that year 14,920 people were killed.²⁰

In more recent times the Crime Information Analysis Centre (CIAC) reported the following national crime statistics for the period April to March in 2003/2004: 19, 824 murders; 52,733 rape cases; 30,076 attempted murders; 260,082 assaults with the intent to inflict grievous bodily harm; 280,942 common assaults; 133,658 robberies with

¹⁷ Sarkin 2000, 151.

¹⁸ *Ibid.*

¹⁹ Sarkin 2000,151.

²⁰ *Ibid.*

aggravating circumstances; 95,551 common robberies; 9,302 indecent assaults.²¹ In addition to these statistics the South African Police reported that between the financial year 1994/95 and 2002/03, the incidence of serious crime increased by 10,3 percent.²² The total number of serious crimes was two million during the 1994/95 financial year while it was 2.6 million in 2002/2003.²³ This is an increase of thirty percent.²⁴ Taking the level of crime in South Africa into consideration it is acceptable to assert that section 49 may become a license for abuse.

1.3.2 Number of suspects that are shot.

Section 205(3) of the Constitution provides that ‘the objects of the police are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.’ Fulfilling their duties in terms of section 205(3) has without a doubt not been easy for the police since the levels of crime in South Africa increased across the board.

The 2004 ICD report reflects that between April 2002 and March 2003 the ICD received 528 reports of deaths in custody and as a result of police action. It states also that police used lethal force while conducting an arrest or stopping a suspect from fleeing in 189 cases and that despite the Constitutional Court’s ruling in 2002 against lethal force where there was no threat to life, it had been used without justification. In the latter regard it referred specifically to a case where a Vaalbank police officer had in September 2002

²¹ Crime Information Analysis Centre- South African Police Service.

²² Cronje 2004, 395.

²³ *Ibid*

²⁴ *Ibid*

shot and killed a sixteen-year-old boy when he fled into a forest to escape arrest for breaking bottles at the roadside.

The Independent Complaints Directorate (ICD) reported that between April 2003 and March 2004 384 people were killed as a result of police action and a further 309 died while in police custody.²⁵ The ICD further reported that statistics indicate that there had been an increase in deaths of forty two percent over the previous year (2003).²⁶

1.3.3 The use of weapons by civilians.

The new section 49 does not reserve the extreme powers it confers on arrestors, exclusively for trained police officers, but extends it to private persons too. This creates cause for concern as the Institute for Security Studies (ISS) in its 2003 National Victims of Crime survey, reported that many South Africans are fearful of crime and that this fear has prompted many people in arming themselves.²⁷

In recognition of the horrid effects²⁸ that the use of firearms has had on the South African society, the government has decided to replace the 1969 Arms and Ammunition Act with a new Firearms Control Act 60 of 2000²⁹, which is aimed at establishing a comprehensive and effective system of firearms control. To achieve this goal the Act lays down stricter requirements for obtaining firearm licenses. It requires that all

²⁵ Bruce 2004, 1. See also Amnesty International Report 2004, 2.

²⁶ Amnesty International Report 2004, 2.

²⁷ Du Plessis 2004, 1.

²⁸ See Meek 2004. According to the National Injury Mortality Surveillance System (NIMSS) it collected data from fifteen mortuaries in five provinces, which shows that in 2000 there were 18876 fatal firearm injuries and that in 44 percent of the fatalities the manner of death was homicide.

²⁹ The Minister of Safety and Security announced that the new Act would be implemented on 1 July 2004.

applicants complete a basic training course at an accredited institution first and be subjected to a background assessment by the police, before a certificate may be issued.³⁰

Evidently the new firearm legislation is a positive step towards controlling the use of firearms in the long run, but since all licenses issued in terms of the Arms and Ammunition Act that are valid on the 30 of June 2004 will remain valid until they are renewed in terms of the new Act, the extent of the improvement it is to make shall not be seen soon. It should also be borne in mind that persons lawfully in possession of more than two hundred rounds of ammunition on June 30 of 2004 would not face prosecution as this limitation applies only to firearms licensed in terms of the new Act.

Over time all individuals will be compelled to renew their licenses in terms of the Firearms Control Act, but this process might only be completed by the end of 2008 in respect of private individuals and 2006 for institutions that own firearms including security service companies.

Collectively the rampant crime rate, the number of suspects that had been shot during the course of effecting arrests and the added danger of the prevalence of firearms in our society and empowering civilians to use deadly force against their fellow citizens highlights the significance of the problem created by section 49. The issue as raised in this paper is as a result a profound one which deserves close scrutiny.

³⁰ Ellis 2004, 10.

1.4. Argument

On the basis of the issues mentioned earlier it may be argued that the new section 49 will not pass constitutional muster. It is believed that if the constitutional validity of the provision is to be challenged before the courts it would have to be declared invalid to the extent that it allows the use of deadly force against suspects in circumstances that do not fall within the parameters of private defence. The reason for the latter contention lies in the fact that the use of deadly force on the grounds permitted by section 49 makes unjustifiable inroads to the rights of suspects.

The authorization of private citizens to use lethal force against persons suspected of having committed offences will to a great extent influence the determination of the constitutionality of section 49. Section 49 must be clear enough for civilians to enforce as civilians are generally not informed in the basic principles of arrest and the use of deadly force whereas police officers can be reasonably expected to be trained in this regard. The main reason for the aforementioned position stems from the fact that the authorization of private persons to use deadly force particularly in terms of the new section 49 enhances the prospects of unjustifiably limiting the rights of suspects.

1.5. Outline of thesis

To address the broader question as to whether the new section 49 is capable of passing constitutional muster, the investigation that is to follow shall specifically focus on the narrower aspect of this provision namely, the issue of using deadly force against a fleeing suspect for the purpose of effecting an arrest. The investigation shall proceed (in Chapter

Two) with an analysis of the South African law relating to the use of deadly force for the purpose of arrest. The position with regard to the old section 49 as it was prior to 1994 shall be discussed with reference to case law and reliance on commentary by academic writers. Legislative changes as well as the post-1994 jurisprudence on this topic shall also be discussed in chapter two and in this regard the Constitution itself, as relied upon in the case law shall form the backbone to the discussion. In order to facilitate coherence in the discussion, chapter two shall set out the questions that should be answered in order to determine the constitutionality of the new section 49.

Given that section 39 of the Constitution requires that international and comparative law be considered when interpreting the Bill of Rights, Chapter Three in this paper shall look at various international and regional human rights instruments relevant to the issue at hand. Other 'soft' international law such as declarations and principles, which give content to the issue, shall also be referred to. Pursuant to the fulfillment of the obligation in terms of section 39 of the Constitution to consider foreign law, Chapter Three shall for the second part of its analysis consider the issue as it is dealt with in comparative foreign jurisdictions.

Chapter Four of this paper, which could be seen as the main part of the investigation, shall interpret the new section 49. To achieve the aforesaid case law and especially post-1994 jurisprudence will be drawn upon. Direct commentaries on the issue by academic writers will also be assessed in this regard as well as the experiences in the comparative jurisdictions as discussed in Chapter Three. Chapter Five of this paper will be the final

chapter in which the implications of the new section 49 on our constitutional democracy will be discussed.

1.6. Methodology

The question whether the use of deadly force against a fleeing suspect is constitutional is by its nature a complex issue to pursue. In order to research the issue properly legislation relevant to it will be considered. In this regard the Constitution will inevitably have to be considered as the most important legislative source. Contemporary law textbooks, law journal articles, international instruments as well as South African and foreign case law shall also be relied upon in this regard.



CHAPTER 2: SOUTH AFRICAN LAW

INTRODUCTION

The old section 49 remained in force for a period of almost 165 years,¹ because for the greater part of its existence it had not been subjected to the requirement of conforming to the values and standards of a supreme Constitution. This did, however, not mean that the real effects of the provision went unnoticed. The provision had always been heavily criticized and the courts had attempted on a number of occasions to limit the scope of the powers conferred by it.

In an effort to shed light as to why the old section 49 was eventually declared unconstitutional, the provision shall be discussed with reference to the meaning it had in practice, the limitations placed on it and the main point of criticism lodged against it. For the purpose of sketching an accurate background to the new section 49, the manner in which the courts dealt with the old provision after 1994, shall be discussed in turn.

2. POSITION PRIOR TO 1994

2.1 Meaning of the old section 49

Section 49 of the Criminal Procedure Act of 51 of 1977, read as follows:

‘Use of force in effecting an arrest-

- 1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person-*
 - a) resists the attempt and cannot be arrested without the use of force; or*

¹ Section 49 can be traced back to section 1 of Ordinance 2 of 1837 (Cape), section 44 of the Criminal Procedure and Evidence Act 31 of 1917 and section 31 of the Criminal Procedure Act 56 of 1955.

b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome resistance or to prevent the person concerned from fleeing.

2) Where the person concerned is to be arrested for an offence referred to in Schedule 1 or to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed justifiable homicide.'

Section 39(1) of the South African Police Service Act² prescribes the manner of effecting an arrest. It provides that if circumstances so require, that the body of the arrestee is to be 'forcibly confined'. Section 49 of the CPA then makes more detailed provision for the use of force in effecting an arrest. It contemplates two situations where force may be used i.e. (a) to overcome resistance by suspects against arrest and (b) to prevent a suspect from fleeing. Section 49 (1) deals with force in general, where the suspect is injured but not killed, while section 49(2) deals with 'justifiable homicide', which referred to cases where the force used, caused the death of a suspect.³

² 68 of 1995.

³ Watney 1999, 28 *f.* See also Burchell 2000, 202 where it was claimed that section 49(2) did not create the need for an arrestor to distinguish between a suspect who resisted arrest and one who fled.

To invoke the powers under section 49(1), it was required that the arrestor prove on a balance of probabilities⁴, that: (a) he was authorized under the Act to arrest the suspect; (b) an attempt to arrest the suspect was made; (c) the suspect resisted arrest and could be restrained only with the application of force; (d) or the suspect fled while it was clear to him that an attempt was being made to arrest him; (e) his flight could not be prevented without the use of force; (f) the force used was reasonably necessary in the circumstances⁵

Section 49(2) dealt with the use of deadly force. Where an arrestor thus killed a fugitive or suspect who physically resisted the attempt to be arrested, the latter section created the defence of justifiable homicide. In order to rely on the said defence an arrestor was required to prove on a preponderance of probabilities that⁶: (a) he intended⁷ to arrest the now deceased suspect and that he was authorized to do so in terms of the CPA; (b) his knowledge or suspicion⁸ that the suspect committed a Schedule 1 offence⁹ was the reason for the intended arrest; (c) the deceased took flight or resisted as a result of the attempt¹⁰ by the arrestor to effect the arrest; (d) if the suspect was killed while he was escaping, he must have been aware¹¹ of the fact that an attempt was being made to arrest

⁴ See *R v Britz* 1949 (3) SA 321(A). See also *S v Swanepoel* 1985 (1) SA576 (A) where the reverse onus upheld in the latter decision was confirmed.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See *R v Malindisa* 1961 (3) SA377 (T) where the court stressed that the arrestor must intend to arrest the offender.

⁸ Where the person effecting the arrest is doing so on a suspicion, he must reasonably suspect that the suspect committed a Schedule 1 offence. The test is therefore an objective one. In other words a reasonable person in like circumstances should come to the same conclusion.

⁹ It was believed that the Schedule contained more serious offences.

¹⁰ An arrestor may not kill without attempting to arrest first.

¹¹ *S v Barnard* 1986 (3) SA 1 (A).

him; (e) no other reasonable manner existed to effect an arrest or prevent the deceased from escaping; (f) he intended to kill the deceased.¹²

The last mentioned requirement meant that if the accused (the arrestor) denied that he intentionally killed a suspect and the State failed to prove beyond a reasonable doubt that there was such an intention, section 49(2) did not apply.¹³ The accused, in such a case could, however, be found guilty of culpable homicide, provided the State was able prove beyond a reasonable doubt all the elements of culpable homicide including negligence.¹⁴

2.2. Limitations placed on section 49.

In hindsight it is evident that the courts had done its utmost to limit the unbridled scope of section 49. The attempt included, *inter alia*, placing objective limitations on the conduct of the arrestor, the requirement that the arrestor's belief had to be reasonable and moreover placing the onus on the arrestor to prove on a preponderance of probabilities that he had acted in terms of the section, all of which shall be discussed respectively below.¹⁵

2.2.1 Objective limitations on the conduct of arrestors.

In recognition of the effects of the unacceptably wide powers conferred to arrestors by section 49, the judiciary tried to place a certain degree of limitation on the conduct of arrestors who acted under the section, by requiring that their conduct during arrest have

¹² Watney 1999, 29. This view finds support in the *obiter dictum* of *Swanepoel supra* para 588 I-J

¹³ Du Toit 2004, 32.

¹⁴ *Ibi*.

¹⁵ See *Britz supra* and *Swanepoel supra*.

to be reasonable. Due to the wide protection afforded to arrestors by section 49(2) the court in *Mazeka v Minister of Justice*,¹⁶ held that Parliament could not possibly have intended that recourse to killing should be had lightly and that circumstances will be closely scrutinized to ensure that conditions for protection are completely fulfilled. The test should thus be to determine whether the arrestor's conduct was reasonable in the circumstances.

To assess the reasonableness of the arrestor's conduct in the circumstances reference was often made to the description of such conduct by Rumpff CJ in *Matlou v Makhubedu*.¹⁷ *In casu* it was held that an arrestor who pursued a fleeing suspect should, if the circumstances permitted him to do so, give an oral warning of his intention to arrest him,¹⁸ and thereafter, if the suspect does not heed the verbal warning, fire a shot in the air or into the ground.¹⁹ If after the warning had been given to the suspect, the latter was still reluctant to submit to the attempt to be arrested, the arrestor should have tried to shoot the suspect in the leg.²⁰

In its final analysis of the statutory provision, the court in *Matlou*, stressed that each case should be judged on its own merits. Put differently, it was indicated that in every case it had to be determined whether an arrestor who killed a suspect, could have avoided the escape of the suspect or have overcome his resistance against the intended arrest, in a

¹⁶ 1956 (1) SA 312 (A).

¹⁷ 1978 (1) SA 946 (A).

¹⁸ *Matlou supra* 947 GH.

¹⁹ *Ibid*

²⁰ *Ibid*

manner that would not have resulted in the death of the suspect.²¹ Due consideration should therefore have been given to the fact that an armchair approach by the courts would not be appropriate in circumstances where quick decisions had to be made in the face of imminent danger.²²

2.2.2 Imposition of an objective standard on the belief of arrestors.

In *S v Barnard* it was recommended that an arrestor who invokes the powers in terms of section 49 should show that he mistakenly believed that he acted in terms of the provision, but that such belief was reasonable.²³ With regards to section 49(1) specifically the courts emphasized that an arrestor should not indiscriminately have recourse to force.

In *S v Basson*²⁴ a police officer fired a shot at a car that ignored his order to stop, and wounded one of the passengers. It transpired that the officer had mistakenly believed that the occupants in the car were two armed convicts who were fleeing in a stolen vehicle. The court held, however, that the policeman did not have reasonable grounds to believe that the convicts could be in the car he fired at. It further stressed that despite the fact that the failure to stop was an offence in itself and in certain circumstances a policeman would have the right to shoot at a car in order to force the driver to stop, there was no general power to do so.

²¹ *Matlou supra* 947 GH..

²² *Wantey* 1999, 28; *R v Arlow* 1960 (2) SA 449 (T) at 453 G; *S v Scholtz* 1974 (1) SA 120 (W) at 124 G–125 C, *Macu v Du Toit* 1983 (4) SA 629 (A) at 636 (A) at 636 B-C.

²³ *Burchell* 2000, 202.

²⁴ 1961 (3) SA 279 (T).

Consistent with its reasoning above, the court denoted that it was satisfied that to seriously assault an offender for the type of offence in the said case i.e. failing to heed a policeman's order to stop a vehicle, could only be justified provided the offender had been informed of the intention to arrest him and had offered resistance or attempted to escape. *In casu* the policeman was therefore found guilty of assault with the intent to commit serious bodily harm as his mistaken belief was not reasonable.²⁵

In recognition of the dangers that the powers of section 49, when applied by private individuals held, the courts warned that private persons should use these powers sparingly and with extreme circumspection. In *S v Martinus*²⁶ it therefore cautioned that the use of a firearm to effect an arrest should be resorted to with great caution. In an attempt to bring about a certain degree of restriction on the powers in terms of section 49 it (the court) contended that a private person who invoked these powers should bear in mind that his actions will be judged according to the standard of the reasonable person and not according to his own *bona fide* subjective evaluation of the situation.²⁷

2.2.3 Placing a reverse onus on arrestors.

The requirement that an arrestor had to reasonably believe that he acted in terms of section 49 made it more difficult for arrestors to justify their conduct under this section, but it was the decision in *S v Swanepoel* that placed greater restrictions on arrestors. In the latter case Rabie CJ held that the reverse onus adopted in the *Britz* case almost forty

²⁵ *cf S v Oostenhuizen* 196 (1) SA 604 (T) and also *Government of the Republic of South Africa v Basdeo* 1996 (1) SA 355 (A).

²⁶ 1990 (2) SACR 568 (A).

²⁷ See *Jooste v Minister of Police* 1975 (1) SA 349 (E), *cf Minister van Polisie v Chetty* 1977 (2) SA 855 (A).

years earlier, applied to section 49, too. This meant that a full legal burden of proof was placed on the arrestor. The State would thus not have to prove beyond a reasonable doubt that the arrestor's conduct was not justified under section 49 and an arrestor would be liable for conviction if he failed to discharge the onus on a balance of probabilities.

2.3. CRITIQUE OF SECTION 49

Both subsections 1 and 2 of the old section 49 were heavily criticized for the wide powers it afforded arrestors. The main heads of criticism, which shall be discussed in turn below, revolved around the lack of the requirement of proportionality between the force used by the arrestor and the seriousness of the offence committed by suspects and the inadequacy of the requirement that a suspect should have committed a Schedule 1 offence in order for the arrestor to use deadly force.

2.3.1 Lack of proportionality between the force used and the offence committed by the suspect.

The requirements for the use of deadly force were intended to place adequate restrictions on arrestors when contemplating to make use of such force, but in practice section 49 attracted severe criticism. It was contended, that section 49(2) made no distinction between persons who resisted arrest and those who tried to escape from it. In turn this meant that the degree of force used by an arrestor did not have to be commensurate to the resistance encountered.²⁸

²⁸ Burchell 1997, 195.

As a result of the abovementioned inadequacy it was further argued that the killing of a suspect did not have to be weighed against the seriousness of the offence committed by the latter. In light of the fact that reasonableness was thus not a requirement when contemplating the use of the power to kill it was possible that even a child could be shot at and killed for stealing an apple and fleeing when an attempt to arrest him was made²⁹

2.3.2 The unsuitability of a Schedule 1 offence in order to use deadly force.

Inherently the old section 49 was capable of allowing the proverbial killing of a child who fled after he had stolen an apple.³⁰ The belief that Schedule 1 guaranteed that only those who committed serious offences could be killed was a misperception. Closer perusal of the schedule revealed that it included minor offences like theft and fraud, which do not necessarily include an element of violence. This proved that the nature of the offence committed by a suspect did not place any restriction of noticeable measure on arrestors and hence the reference that the section made to offences contained in Schedule 1 had no rationale basis.

In practice this meant that if a thief or fraudster tried to flee or resist arrest they could fall prey to the powers under section 49. The example of shooting a fleeing child who had stolen an apple was therefore not merely an exaggerated hypothetical scenario used to

²⁹ Burchell 1997, 195..

³⁰ In *Raloso v Wilson and Others* 1998 (4) SA 369 (NC) a policeman shot and killed a ten year old boy whom he mistakenly believed was guilty of housebreaking with the intent to commit theft. The policeman contented that his conduct was justified under section 49(2) as he would not have been able to trace the child later and that there was no other means to prevent the child from fleeing.

emphasis the awesome powers of arrestors, but was an accurate description of exactly what the legislator allowed.³¹

The reference made to Schedule 1 gave rise to what may be termed absurd results in certain cases. One example of the aforesaid may be seen in the case of *R v Denysschen*³². In the later case a man trespassed on the accused person's land, and when an employee of the accused tried to arrest him, he attempted to escape. To prevent him from escaping the accused then shot and killed the trespasser. Despite the fact that trespassing is a trivial offence and that it was not contained in Schedule 1, the court ruled that that the accused could successfully rely on the defence of justifiable homicide as the fact that the deceased tried to escape from an arrest was an independent offence which was in fact contained in Schedule 1. The accused was consequently acquitted.³³

Section 49 and especially subsection 2 was clearly more than a law that merely allowed arrestors to use force in order to overcome resistance from suspects or to prevent them from escaping. In the absence of adequate limitations on the impugned law, it indeed turned out to be a license for the wanton killing of people suspected and not even convicted yet of committing crime.³⁴

³¹ See the facts of *Raloso supra*. In *Government of the Republic of South Africa v Basdeo* 1996 (1) SA 355 (A) 368 D-E, the Court held that the awesome power conferred on arrestors had to be exercised with great circumspection and strictly within the prescribed bounds to avoid the wanton killing of innocent people

³² 1955 (2) SA81(O).

³³ See *R v Meterlerkamp* 1959 (4) SA 102 (E) where the correctness of the latter case was doubted.

³⁴ *Ibid*

2.4. POST 1994 JURISPRUDENCE

In the period before constitutionalism in South Africa, laws which made apparent inroads to the fundamental rights of people could not be assessed in light of a Constitution. Post-1994, however, the inception of the Constitution heralded an era in which all laws and conduct that unjustifiably encroached upon the rights of persons would not be tolerated. This was particularly evident from the manner, as shall be seen below, in which both the judiciary and policymakers grappled with the old section 49.

2.4.1 LEGISLATIVE CHANGES

2.4.1.1 Special Service Order

In January 1997 the Commissioner of the South African Police Service issued a Special Service Order.³⁵ The Order dealt with the use of force under section 49 in light of the Interim Constitution. It reiterated the general requirement contained in section 13(3)(b) of the South African Service Act 68 of 1995, that whenever a member of the police was authorized to use force, only the minimum degree of force necessary in the circumstances might be used. The Order also gave strict instructions to all members of the police to limit the use of force under section 49 pending its amendment.³⁶

The Order specifically indicated that force may only be used if it is considered on reasonable grounds to be necessary to overcome resistance from a suspect or to prevent a suspect from fleeing,³⁷ that the force had to be proportional to the seriousness of the crime committed and most importantly, that deadly force is only permitted where the

³⁵ *Walters supra* para 20.

³⁶ *Ibid*

³⁷ *Ibid*

arrest is for a relatively serious offence listed in the Schedule to the Order.³⁸ In addition the Order also included the limitation on the conduct of an arrestor as defined in *Matlou*, as it was denoted that if an officer intends to shoot at a suspect, the shooting should be preceded by a verbal warning and /or a warning shot where reasonably possible.³⁹

One of the primary principles, that arrest is not the only preparatory means to ensure that a suspect is brought before court, was also emphasized in the Order. This is evident from the instruction that if the identity of a suspect was known and he can be picked up later, the use of force to prevent the latter from escaping, would not be justified regardless of the crime committed.

The Order, although it may have been seen as an improvement on the old section 49, was no more than an internal police regulation and had as a consequence no force of law.⁴⁰ Police officers who violated the Order, but whose conduct fell within the parameters of the old section 49, could therefore still invoke the protection offered by the section. As an internal police regulation, the provisions of the Order could not bind persons who were not members of the South African Police force. Civilians, private security guards as well as ‘peace officers’ could thus, because they were not members of the South African Police force, use the powers in terms of section 49 without having regard to the Order.

³⁸ *Walters supra* para 20.

³⁹ *Ibid.*

⁴⁰ Bruce 2003, 6.

2.4.1.2 Judicial Matters Second Amendment Act 122 of 1998.

To bring the South African position in line with the constitutional requirements, the legislator intervened by passing section 7 of the Judicial Matters Second Amendment Act 122 of 1998. The latter section contained the new section 49. Its coming into effect was characterized by much debate and hesitation. It was adopted in October 1998, assented to by the President on 20 November 1998 and published on 11 December 1998. Given the nature of section 49 the Minister of Safety and Security and the Minister of Justice agreed that the new law should be kept in abeyance to allow police training to take place.⁴¹

Towards the end of June 2000 the Minister of Justice advised the President to implement the new law from 1 August 2000.⁴² The Acting President Zuma, at the time, however, informed the Minister of Justice that the police would not be able to give effect to the new law.⁴³ During 2001 the Minister of Safety and Security and the Minister of Police maintained that the new law should be referred back to Parliament for revision.⁴⁴ This did however not happen.

2.4.2 JUDICIAL INTERPRETATION OF THE OLD SECTION 49

2.4.2.1 The decision of *Govender* regarding the interpretation of section 49(1).

In 2001, in *Govender v Minister of Safety and Security*,⁴⁵ a seventeen-year-old boy who tried to flee from the police after he had stolen a car was shot in the spine and paralyzed as a result. It was submitted by the respondent that the force applied in the present case

⁴¹ *Walters supra* para 73.

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ *Ibid*

⁴⁵ 2001 (2) SACR 197 (SCA).

was justified in terms of section 49(1) as shooting at the suspect in question was the only reasonable means to prevent him from escaping. Against this it was contended that the use of force was not justified as the impugned section violated suspects' right to life, the right to human dignity and the right to physical integrity.

In its analysis of section 49(1) the Supreme Court of Appeal referred to the test in the *Matlou* case, which required the force used by the arrestor to be proportional to the seriousness of the offence committed by the suspect. It rejected this threshold requirement as being too low⁴⁶ and instead referred to the United States Supreme Court decision in *Tennessee v Garner*⁴⁷ where a young suspect was shot at and killed by police who had acted in terms of the Tennessee Statute which was couched in similar terms to section 49(1).

In the *Garner* case the court held that if a suspect poses no immediate danger to anyone, the harm resulting from failing to apprehend the suspect does not justify the use of potentially deadly force. It further held that deadly force should only be used if there are reasonable grounds to believe that the suspect poses an immediate threat of serious bodily harm or committed a crime involving the infliction or threatened infliction of serious bodily harm.⁴⁸

The Supreme Court of Appeal accepted the approach that the US Supreme Court had taken with regards to the use of deadly force. Section 49(1) was thus saved by placing

⁴⁶ *Govender supra para 16.*

⁴⁷ 471 (1985) US 1.

⁴⁸ *Govender supra para 24.*

the said interpretation on it. The court emphasized that the use of a firearm or similar weapon, for purposes of overcoming resistance or avoiding escape from arrest is excluded unless there are reasonable grounds to believe that the suspect poses an immediate threat of serious bodily harm to the arrestor or members of the public or if the suspect committed a serious offence involving the infliction of serious bodily harm.⁴⁹

As a result of the approach adopted in the *Govender* case, the shooting at and killing of a fleeing thief for example was no longer permissible in terms of South African law. In making the latter clear, the court had upheld the importance of recognizing that everyone, including suspected criminals are entitled to the right to life, the right to human dignity, the right to physical integrity, the right to be presumed innocent until proven guilty by a court of law, the right to equality before the law and to equal protection of the law.

2.4.2.2 The declaration of invalidity of section 49(2) in the *Walters* case.

Subsequent to the *Govender* case, the constitutionality of section 49(2) was questioned before the Constitutional Court in the *Walters* case. In the latter case a father and son claimed protection under section 49(2), after they had shot and killed a fugitive who had tried to break into their bakery.

As was expected the Court in its evaluation of the impugned provision, expressed the seriousness of the impact that the said law had on the rights of suspects. In this regard it referred to the *Makwanyane* decision where O' Reagan J had stated that the right to life is

⁴⁹ *Govender supra* para 24.

‘ antecedent to all other rights’⁵⁰ and that the Constitution ‘[sought] to establish a society where the individual value of each member of the community is recognized and reassured’.⁵¹ Commenting directly on the use of deadly force for the purpose of effecting an arrest Chaskalson P, stated that ... ‘greater restriction on the use of lethal force may be a consequence of establishing a constitutional State which respects every persons right to life.’⁵²

In the Court’s referral to the *Makwanyane* case it was made clear that shooting at a fugitive under section 49(2) should only be used as a last resort if it is impossible to arrest a criminal in any other way or there are no other means with which to secure the suspect’s attendance at his own prospective trial.⁵³ The Court held that the rights violated by section 49 are ‘individually essential and collectively foundational’ to our value system and should as a result not be compromised.⁵⁴ Given the status of these rights any limitation to it can only be justified by a very compelling public interest.⁵⁵

The Court explained that the nature of arrest is such that it limits the right to freedom, the right to human dignity and bodily integrity to a certain extent.⁵⁶ If in addition force is used to arrest then the limitation of the aforementioned rights are even greater and where deadly force is used these rights, including the right to life, are completely negated. To

⁵⁰ *Walters* para 5.

⁵¹ *Ibid*

⁵² *Walters* para 25.

⁵³ *Ibid*

⁵⁴ *Walters* para 28.

⁵⁵ *Ibid*

⁵⁶ *Walters supra* para 30.

justify such a limitation the Court had to find a balance between the public interest protected by section 49 and the right it limited.⁵⁷

In engaging in the exercise of finding a balance between the public interest protected and the rights violated, the Court reiterated that the judgment did not affect the right of arrestors to act in private defence, in any way.⁵⁸ Section 49 was aimed at preventing suspects from escaping too readily from arrest and to bring them to justice, but this needed to be done whilst respecting the fact that a fleeing suspect does not become an outlaw. In trying to find the correct balance it had to be established whether the limitations brought about by section 49 was reasonable and justifiable in an open and democratic society based on freedom and equality.

In the above regard the Court accepted the interpretation given in the *Govender* case that lethal force can only be used if the suspect inflicted serious bodily harm or poses a threat of doing so. It recognized that the Legislator wished to limit the use of lethal force to cases where serious offences are committed, but its means of doing so, i.e. requiring that the offence committed should be one listed in Schedule 1 was inappropriate as the Schedule included both petty and serious offences. It was thus held that the Constitution demands respect for the rights violated by section 49 even if it is a disadvantage to the administration of justice to allow criminals to escape sometimes. The Court highlighted that the high crime rate cannot be used to justify extensive and inappropriate violations of suspects' rights.

⁵⁷ *Walters supra* para 30.

⁵⁸ *Walter supra* para 33.

The old section 49(2) was found unconstitutional and declared invalid by the Constitutional Court. The Court thus provided guidelines in order to prevent the continuance of past patterns of abuse. It emphasized that by declaring section 49(2) unconstitutional, it did not mean that dangerous criminals should be allowed to escape when the use of deadly force is all that can stop them.⁵⁹ Consequently it also confirmed the principle adopted in the *Govender case*, which sanctioned the use of lethal force if a suspect posed an immediate threat of serious bodily harm to the police or public or has committed a crime involving the infliction or threatened infliction of such harm.⁶⁰

2.5. THE NEW LEGAL FRAMEWORK

The decision by the Constitutional Court, in *Walters supra*, meant that the powers enunciated by the old section 49(2) could no longer be applied in practice. The Court's confirmation of the interpretation of section 49(1) adopted in *Govender*, thus became the framework for the use of lethal force. On 18 July 2003, however, five years after it had been passed by Parliament, the new section 49 came into force effectively replacing the legal framework created by the judiciary. Despite much debate and hesitation, the new enactment has finally become the only source of authority for the use of lethal force insofar as arrests are concerned.

⁵⁹ *Walters supra* para 51.

⁶⁰ *Walters supra* para 54.

2.6. QUESTIONS TO BE ANSWERED

When the Constitutional Court declared the old section 49 invalid it refrained from commenting on the constitutional status of the new enactment. The question whether the new section 49 will pass constitutional muster is, therefore open for discussion and shall be addressed in this paper by way of posing and investigating the following two questions: (1) Is it constitutionally permissible to use lethal force against a fleeing suspect?; (2) Should civilians be allowed to invoke the powers to use deadly force for the purpose of arrest? In the next Chapter, international law and comparative law shall be considered in order to assist in answering these questions.



CHAPTER 3: INTERNATIONAL AND COMPARATIVE LAW

3.1 Section 39(1)(b) of the Constitution

As guardian of the Constitution the Constitutional Court in *S v Makwanyane* went to great lengths to capture the essence of the rights fundamental to our society. It articulated the level of protection required for these rights with a degree of accuracy that placed the Court in *Walters* in a position to declare the old section 49(2) inconsistent with the rights central to our society without difficulty.

The survival of the new section 49 depends exclusively on its capacity to pass constitutional muster. Furthermore its compliance with international standards is a strong indicator of its constitutional strength since section 39(1)(b) of the Constitution places a positive obligation on the judiciary to consider international law when interpreting the Bill of Rights. In keeping with this obligation conferred an overview of the use of such force for the purpose of effecting arrests as it is dealt with at international law, shall follow next.

3.2 International Law

3.2.1 The Universal Declaration of Human Rights (UDHR)¹

In its preamble the UDHR's relevance to the issue at hand is triggered as it commands recognition of the inherent dignity and equal inalienable rights of all. These rights form the foundation of freedom, justice and peace, which are the values that would become casualties in the quest to apprehend persons suspected of committing crimes, should arrests be allowed to occur outside the parameters of the UDHR.

¹ UN GA Res 217 A (III) of 10 Dec 1948.

Article 3 of the UDHR states that every individual has a right to life, to freedom and to security of the person. The right to life is expressed in such a manner that it may be inferred that the right is absolute. This right is better understood when considered within the context of article 5 which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and article 9, which states that no one shall be the subject of arbitrary arrest, detention or exile.²

Article 3 is relevant to the discussion at hand as it comprises of the three rights which are inevitably impacted on when deadly force is used. The right to life entails, *inter alia*, the ability and right to survive. The right to freedom requires that individuals enjoy the right to move about. The right to security of the person demands the right of the individual not to be interfered with by the State or non-State actors.³

The UDHR does not criminalize or prohibit the use of deadly force for arrest purposes, but its stringent protection of the rights affected by the use of such force sets clear boundaries for domestic laws. The prohibition of arbitrary arrests under article 9 of the instrument is important in this regard as domestic laws that do not comply with it will also violate article 3 insofar as the right to liberty is concerned. In turn the likelihood that the right to security of the person and the right to life might be affected, increases as persons who are arrested arbitrarily are arguably likely to protest or resist arrest. The threshold requirements for the use of deadly force should at national level thus be very high in order to meet the standards of the UDHR.

² Alfredsson (1999, 89).

³ *Ibid*

3.2.2 International Covenant on Civil and Political Rights (ICCPR)⁴

The ICCPR provides that every human being has the inherent right to life and that this right shall be protected by law. In the ICCPR the protection of the right to life is not absolute for it warns that no one shall be deprived of life arbitrarily.⁵ In this regard the Human Rights Committee (HRC) describes the right to life as a supreme right with both a positive and a negative component.⁶ The negative component manifests as a right not to be arbitrarily or unlawfully deprived of life by the State or its agents and the positive component in that the State must adopt measures conducive to allowing one to live.⁷

The HRC asserts that State parties should not only take steps to punish and prevent the taking of human life by criminal acts, but is compelled to ensure that arbitrary deprivation of life by their own agents does not occur.⁸ States should thus strictly control and limit the circumstances in which a person's life may be terminated by the authorities.⁹ This is especially important in light of the fact that the term 'arbitrary' is a broader concept than 'unlawful'.¹⁰ In other words a killing may breach the right to life in terms of the ICCPR even though it is authorized in terms of domestic law.¹¹ Life must thus never be taken in unreasonable or disproportionate circumstances.¹²

The ICCPR allows the imposition of the death penalty on individuals but cautions that it may only be imposed for the most serious offences in accordance with the law in

⁴ GA Res 2200A (XXI) of 23 Mar 1976.

⁵ Art 6(1).

⁶ Joseph 2000,108ff.

⁷ *Ibid*

⁸ *Ibid*

⁹ *Ibid*

¹⁰ Joseph 2000,110.

¹¹ *Ibid*

¹² *Ibid*

force at the time of the commission of the offence and that it must not be contrary to the ICCPR.¹³ The death penalty may only be carried out pursuant to a final judgment by a competent court and any one who is sentenced has the right to seek pardon or commutation of the sentence.¹⁴

The ICCPR prohibits the imposition of the death penalty upon persons below the age of eighteen years¹⁵ and on pregnant women. In addition cognisance should be taken of the Second Optional Protocol to the ICCPR Aimed at the Abolition of the Death Penalty¹⁶ should State parties to the latter are precluded from executing persons within their jurisdictions and each party is urged to take the necessary steps to abolish the death penalty in its jurisdiction.

The procedure with regard to the death penalty suggests that there ought to be certainty as to the legal guilt of the person on whom the sentence is imposed. It also makes it evident that even after such guilt has been established the person ought to be given a chance to apply for a pardon or commutation of the sentence. Although the issue of the death penalty differs vastly from that of using deadly force for arrests, demonstrates that the right to life may not be derogated from easily.

The ICCPR unequivocally prohibits all persons from being subjected to torture or cruel, inhuman and degrading treatment or punishment.¹⁷ The right to liberty and security of the person is also provided for and consequently arbitrary arrests are also

¹³ Art 6(2).

¹⁴ *Ibid*

¹⁵ Art 6 (1) of the Convention on the Rights of the Child GA Res 25/44 1989 recognises that every child has the right to life.

¹⁶ GA Res 44/128 of 1989.

¹⁷ Art 7.

prohibited.¹⁸ Where a person is, however, lawfully deprived of liberty the ICCPR dictates that such a person should be treated with humanity and with respect for his inherent dignity.¹⁹

3.2.3 The African [Banjul] Charter on Human and Peoples' Rights [AfCHPR]²⁰

The African Charter is widely regarded as an enormous achievement for the advancement of human rights in Africa. The AfCHPR sets out that human beings are inviolable and that every person shall be entitled to respect for his life and the integrity of his person.²¹ It also prohibits the arbitrary deprivation of life and protects the right to dignity²² and security of the person.²³

The abovementioned rights find protection as fundamental rights under the South African Constitution, but this in itself does not mean that South Africa, as a State Party to the Charter, has fully complied with its obligation under the Charter. The guarantee of these rights in terms of the Constitution satisfies the requirement to protect them only in theory. State Parties are by implication obliged to clearly establish the circumstances in which the rights enunciated by the Charter may be lawfully limited.

¹⁸ Art 9.

¹⁹ Art 10.

²⁰ (21 ILM 58 (1982))

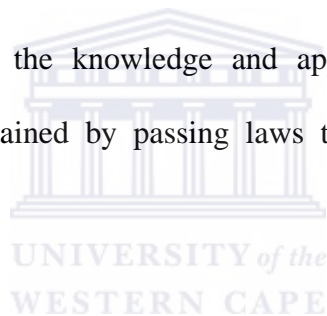
²¹ Art 4.

²² Art 3.

²³ Art 6.

The obligations engendered by human rights generate a four-fold duty namely the duty to respect, protect, promote, and fulfil these rights.²⁴ The duty to respect requires the State to refrain from interfering with the enjoyment of rights, while the duty to protect requires that the State protect right-holders against other subjects by legislation and the provision of remedies.²⁵ The duty to promote obligates the State to ensure that individuals are able to exercise their rights by, for example promoting tolerance and raising awareness. The duty to fulfil the rights under the Charter is a ‘more positive expectation on the part of the State to move its machinery towards the actual realisation of the rights.’²⁶

With regard to the duty to fulfil the State should take positive steps to ensure that arrestors are equipped with the knowledge and appropriate weaponry in arrest situations. This may be attained by passing laws that informs law enforcement officials what is permissible.



3.2.4 The European Convention on Human Rights.²⁷ [the ECHR]

The ECHR provides that everyone has the right to life, but does so in a manner that renders the right not absolute. This is evident from the fact that it mentions four circumstances in which the right may be lawfully limited i.e. where a court of law imposed the death penalty²⁸, in circumstances where the use of force is absolutely necessary to defend a person against unlawful violence,²⁹ to effect a lawful arrest,

²⁴ Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2001-2002 http://www.achpr.org/english/doc_target/documentation.html?..?activity_repoerts/activity_15_en.pdf, 36 accessed 24th of June 2005.

²⁵ http://www.achpr.org/english/doc_target/documentation.html?..?activity_repoerts/activity_15_en.pdf, 36 ff accessed 24th of June 2005.

²⁶ *Ibid.*

²⁷ 87 UNTS 103 Adopted in 1950.

²⁸ Art 2(1).

²⁹ Art 2(2)(a).

prevent the escape of a person lawfully detained³⁰ and in action lawfully taken for the purpose of quelling a riot or insurrection.³¹

Since the ECHR sets out the circumstances in which the right to life may be limited it follows that any termination of life outside the listed grounds will result in liability.³² In *Stewart v UK*³³ it was accordingly stated that the expressly mentioned exceptions in which the right under the ECHR may be limited is exhaustive and should be narrowly interpreted.

3.2.4.1 The ‘absolutely necessary’ requirement

The ECHR permits the limitation of human life only when it results from the use of force that is ‘no more than absolutely necessary’ for one or more of the authorized purposes.³⁴ In *Stewart*³⁵ the words ‘absolutely necessary’ was interpreted to mean that the force used is ‘strictly proportionate to the achievement of the permitted purpose.’³⁶ It was also held that when considering the question of proportionality regard must be had to the nature of the aim pursued, the dangers to life and limb inherent in the situation and the degree of risk that the force employed might result in the loss of life.³⁷ The Commission in its investigations must accordingly have due regard to all the relevant circumstances.³⁸

³⁰ Art 2(2)(b).

³¹ Art 2(2)(c).

³² Harris 1995, 44.

³³ No 10044/82, 39 DR 162 at 169 (1984).

³⁴ Harris 1995, 47.

³⁵ *Stewart supra* at 169.

³⁶ *McCann and others v UK* 27 Sep Series A no 324, 148-149.

³⁷ *Ibid.*

³⁸ *Ibid.*

The right to life enjoys protection to the extent that in peacetime no derogation from it is allowed.³⁹ In *Androniou and Constantinou v Cyprus* where the right to life was limited for the purpose of protecting someone against unlawful violence as contemplated in terms of the ECHR the Court held that the right was a fundamental right and that it enshrines one of the basic values of the democratic societies making up the Council of Europe.⁴⁰ The Court concluded that the term ‘absolutely necessary’ indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether state action is necessary in a democratic society.⁴¹

Regard should be had to the actions of state agents, as well as to all the surrounding circumstances.⁴² It was held that where the right to life is limited for one of the purposes permitted in terms of the Convention, such a limitation, even if it turns out to be mistaken may be justified if it was based on an honest belief which is perceived for good reasons, to be valid at the time of the deprivation.⁴³ The Court deemed the latter acceptable as holding otherwise would place ‘an unrealistic burden on the State and its law enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others.’⁴⁴

In the *McCann* case the Court compared the standards of the national law with that of the right to life in terms of the ECHR. It noted that there was a difference between the standard of justification for the use of force which results in the deprivation of life

³⁹ Art 15.

⁴⁰ (ECHR) 9 Oct 1997 para 171.

⁴¹ Ibid.

⁴² Ibid.

⁴³ *Andronicou and Constantinou* para 192.

⁴⁴ Ibid.

between the ECHR and the Gibraltar Constitution. In the latter the standard of justification is 'reasonably justifiable' as opposed to the former where the only justification is that the force must have been 'absolutely necessary'. The standard in the ECHR appeared to be much stricter than that in the Constitution, but the Court held that the difference between the two standards alone is not so great to establish a violation of the right to life.

3.2.5 The American Convention on Human Rights ⁴⁵

This Convention states that every person has the right to life and that no one shall be arbitrarily deprived thereof.⁴⁶ It also provides that in countries where the death penalty have not been abolished yet, executions may only take place in respect of the most serious offences and pursuant to a final judgment rendered by a competent court of law.⁴⁷ The Convention further guards against the imposition of the death penalty in respect of persons under the age of eighteen years or above the age of seventy years⁴⁸ and allows persons sentenced to death an opportunity to apply for amnesty, pardon or commutation of sentence.

Although the American Convention has no binding effect on South African law, its provisions, especially with regard to the right to life and the limitation thereof serves as a positive guidance to us. The Convention clearly allows for the limitation of the right to life, but shows through the strict and unambiguous formulation of the circumstances in which it may be limited, the invaluable nature of the right. Any law which could potentially limit the fundamental rights of individuals should thus be

⁴⁵ (1144 UNTS 123; 9 ILM (1970))

⁴⁶ Art 4(1).

⁴⁷ Art 4 (2).

⁴⁸ Art 4(5).

couched in a manner that takes cognisance of the value of the rights it could potentially limit.

3.3. “Soft” law

The international instruments discussed above provide guidance insofar as giving recognition to the fundamental rights that are violated by the new section 49 is concerned. This benefits the investigation into the constitutionality of the new section 49 only to a limited extent. In addition to an appreciation of the importance of the rights that are violated, an understanding of the law that limits these rights is necessary in order to determine if the impugned limitations are justifiable. The instruments discussed above clearly falls short of doing the latter adequately.

For the purposes of the discussion which follows below it is necessary to note that certain forms of international law are more compelling than others. All international law instruments can thus not be relied on in the same way.⁴⁹ Treaties have a binding effect on all states that have signed and ratified them. If a state thus fails to comply with an obligation contained in a treaty to which it is a signatory such a state is in violation of international law.⁵⁰

Contrary to the status of treaties, declarations, principles, standards and codes are not legally binding on states.⁵¹ The latter are drafted by experts and state representatives and are indicative of what the accepted norms are.⁵² Codes, standards, principles and declarations do thus not create formal obligations for states. Such instruments can,

⁴⁹ Thompson 2002, 17.

⁵⁰ *Ibid*

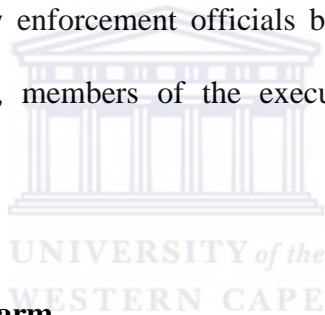
⁵¹ *Ibid*

⁵² *Ibid*

however, be instructive in that they are often very detailed and can provide guidance on the enforcement of a right.⁵³ Additionally such instruments although termed ‘soft international law’ may be used to support arguments before international tribunals or courts.⁵⁴ It thus has persuasive force despite the fact it may not be the sole basis for bringing proceedings.⁵⁵

3.3.1 The United Nations Basic Principles on the Use of Force and Firearms by Law enforcement Officials.

This instrument (hereafter UN Basic Principles)⁵⁶ calls upon Governments to consider and respect it within both the framework of their national legislation and in practice.⁵⁷ Governments are as a result required to bring the UN Basic Principles to the attention of not only law enforcement officials but also other persons such as judges, lawyers, prosecutors, members of the executive and legislature and the public.⁵⁸



3.3.1.1 Means of reducing harm.

The UN Basic Principles expressly require that Governments keep the ethical issues related to the use of force under constant review⁵⁹ and insist they develop a range of means as broad as possible and to equip law enforcement officials with various types of weapons and ammunition that would allow for differentiated use of force and firearms.⁶⁰ Governments are also advised to develop ‘non-lethal incapacitating weapons’ for use in appropriate situations to prevent as far as possible the application

⁵³ Thompson 2002, 17.

⁵⁴ *Ibid*

⁵⁵ *Ibid*

⁵⁶ Adopted on 7 September 1990 by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders.

⁵⁷ *Ibid*

⁵⁸ See the introduction of the UN Basic Principles.

⁵⁹ Principle 1.

⁶⁰ Principle 2.

of means capable of causing death or serious injury to persons.⁶¹ Such weapons should however be carefully evaluated to minimize the risk of injury to innocent bystanders.⁶²

To limit the number of fatalities and injury further it is required that law enforcement officials be protected by providing them with 'self-defensive equipment' such as shields helmets, bullet-proof vests and bullet-proof means of transportation as these are considered to be capable of substantially reducing the need to use weapons of any kind.⁶³ Furthermore law enforcement officials are discouraged from resorting to the use of force and firearms by being required to apply non-violent means first and as far as possible.⁶⁴ Forceful means may only be opted for where non-lethal means prove to be ineffective or incapable of achieving the intended result.⁶⁵

3.3.1.2 Guidelines in circumstances where the use of lethal force is inevitable.

The UN Basic Principles deal specifically with the situation where the use of such force is lawful and recourse to firearms are unavoidable. It obligates law enforcement officials to do the following: exercise restraint in the application of force and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; minimise damage and injury, and respect and preserve human life; ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment; ensure that relatives or close friends of the injured person are notified at the earliest possible moment.⁶⁶

⁶¹ Principle 2.

⁶² Principle 3.

⁶³ Principle 3.

⁶⁴ Principle 4.

⁶⁵ Ibid.

⁶⁶ Principle 5.

3.3.1.3 Circumstances in which firearms may be used.

The UN Basic Principles generally prohibit the use of firearms against persons, with the exception of circumstances where law enforcement officials seek to act in self-defence as a result of an imminent attack upon their own or that of other persons' lives.⁶⁷ Principle 9 provides that firearms may be used to prevent serious crimes involving grave threats to human life, to arrest a person presenting such a danger and resisting the authority of law enforcement officials or to prevent the escape of a suspect. In these circumstances too the instrument requires that lethal force only be used if less extreme measures are insufficient to achieve these objectives.⁶⁸

Principle 10 provides that where it becomes necessary to use force law enforcement officials shall first identify themselves as such and give a warning of their intention to use firearms.⁶⁹ Warnings should then be followed by enough time for it to be observed, unless to do so would put the official at risk or would create the risk of death or serious harm to other persons.⁷⁰ Warnings may only be dispensed with where it is clearly inappropriate or pointless in the circumstances of the incident.⁷¹

3.3.1.4 Law enforcement officials

Governments are obligated to ensure that law enforcement officials are selected by proper screening procedures.⁷² Law enforcement officials should have appropriate moral, psychological and physical qualities for the effective exercise of their functions

⁶⁷ Principle 9.

⁶⁸ Principle 9.

⁶⁹ Principle 10.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Principle 18.

and receive continuous and thorough training. Their continued fitness to perform these functions should be subject to periodical reviews and it is also expressly required that law enforcement officials receive training and are tested in accordance with appropriate proficiency standards in the use of force.⁷³

3.3.2 The UN Code of Conduct for Law Enforcement Officials.⁷⁴

The Code of Conduct defines law enforcement officials as all officers whether appointed or elected, who exercises police powers, especially the powers of arrest and detention⁷⁵ and instructs them to protect human dignity and to maintain and uphold human rights of all persons.⁷⁶ It allows officials to use force only when it is strictly necessary and to the extent required by their duties.⁷⁷ In the commentary to the latter it is asserted that the use of firearms is extreme measures to be employed only when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are insufficient to restrain or apprehend the offender.

An awareness of the duties set out above becomes imperative in arrest situations. This is especially true with regard to the duty to maintain and uphold the human rights of all persons as arrestor might perceive suspected offenders as persons who become disentitled to their rights.

3.4 Comparative law

The South African Constitution at section 39(1)(c) states that when interpreting the Bill of Rights regard may be had to foreign law. Given the fact that South Africa is

⁷³ Principle 19.

⁷⁴ UN GA Res 34/169 of 17 Dec 1979.

⁷⁵ Commentary to Art 1.

⁷⁶ Art 2.

⁷⁷ Art 3.

still in the early stages of its democracy it follows that the exercise of comparing our law to that in other foreign democracies may greatly benefit our legal system. For this reason the law on this topic in Canada, the United States of America, Germany and Australia shall be discussed.⁷⁸

3.4.1 Canada

Canada has a detailed Charter of Rights and Freedoms which covers a wide field of fundamental rights. Section 7 of the Charter provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 7 is also subject to section 1 which provides that the Canadian Charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society. In this respect the South African Constitution and the Canadian Charter of Rights are similar because the Constitution also allows the limitation of rights provided such limitation is reasonable and justifiable in an open and democratic society.

Section 25(4) of the Canadian Criminal Code, which deals with the use of force for the purpose of arrest reads as follows:

‘A peace officer who is proceeding lawfully to arrest, . . . any person for an offence for which that person may be arrested . . ., and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.’

⁷⁸ South Africa, America and English law developed from the same common law principles. See Watney 1999,30.

Section 25(4) gives arrestors very broad powers which could result in death or serious physical harm to suspects who resisted arrest. In *R v Douglas Lines* Hawkins J, in the Ontario Court of Justice, explained that the ‘fleeing felon’ rule developed at a time when most felonies were punishable by death and therefore a felon could be executed on conviction it became acceptable to some that the killing of a fleeing felon was not disproportionate.⁷⁹

Those who protested that the summary killing of fleeing felons amounted to ‘execution before trial’ were met with the response that the fleeing felon could not have been ‘terribly interested in a trial or he wouldn’t have fled in the first place.’ Hawkins J, held that this rationale for the rule no longer exists in civilized societies as the death penalty is not applied in most of them any longer.

The Court noted that police officers of the Royal Canadian Mounted Police (RCMP), Ontario Provincial police (OPP) and Metropolitan Toronto forces all receive instructions as well as guidelines that limit their use of deadly force more narrowly than section 25(4) does.⁸⁰ It was also stated that the common feature of all these limitations is the requirement of actual or reasonably perceived danger to the officer or any other person of death or bodily harm.⁸¹

In *Lines* the public interest in the use of force for the purpose of law enforcement and preventing the escape of criminals was acknowledged. It also addressed the belief held by some that if criminals come to know that they may flee from arrest with

⁷⁹ *R v Douglas Lines*, Ontario Court of Justice (General Division) April 26, 1993.

⁸⁰ *Ibid*

⁸¹ *Ibid*

impunity, they will do so and chaos will result. Notwithstanding this it was held that section 25(4) violates the right to life, and security of the person and the prospect of deprivation thereof for the most trivial offence is not in accordance with the principles of fundamental justice. The use of force to prevent flight was clearly aimed at securing the detention of a suspect. On the other hand, however, the use of deadly force for the latter purpose was disproportionate. Section 25(4) was accordingly declared an unjustifiable limitation of a suspect's rights under the Charter.

In *Lines* the Court held that any replacement of section 25(4) would be inundated with questions. These questions would include: 'Does the seriousness of the crime committed matter or is the sole question the danger present? And what is the danger? Bodily harm? Grievous bodily harm? Serious physical injury? And what is the risk level, 'might' or 'may' 'its likely to' or poses a substantial risk of? And who is protected . . . [t]hose immediately present, both spatially and temporarily, or those more remotely at risk. The fleeing rapist may have slaked his lust, but for how long?' The Court concluded that these questions are political and must be decided by those responsible to the electorate.

The Canadian Parliament amended section 25 of the Criminal Code. In doing so it added the requirement of a threat and retained the requirement that the offence be one that justifies an arrest without a warrant. The new section 25 reads as follows:

(3) 'Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

- (4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if
- (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
 - (b) the offence for which the person is to be arrested is one which that person may be arrested without a warrant;
 - (c) the person to be arrested takes flight to avoid being arrested;
 - (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
 - (e) the flight cannot be prevented by reasonable means in a less than violent manner.

In both Canada and South Africa, the rights threatened by the use of lethal force are, although protected, not absolute.⁸² The Canadian Charter and the South African Constitution do, however, require the limitation of fundamental rights to be reasonable and justifiable in a democratic society.

Textually the South African and Canadian provisions appear to be almost identical, but it should not be taken for granted that the two are comparable and that the one is capable of informing the interpretation of the other. Before such a conclusion may be reached the context within which each provision operates as well as the underlying rationale of each are important factors to consider in the determination of whether the Canadian provision can be prolifically used in giving meaning to the new section 49.

⁸² Section 36 of the Constitution and section 1 of the Canadian Charter of Rights and Freedoms allows for the limitation of fundamental rights.

The difference in context should also be taken into account. Canada has a relatively low violent crime rate⁸³ compared to South Africa. This means that arrestors in Canada may not have to use lethal force as often as those in South Africa. In South Africa it is thus important that law providing for the use of lethal force should be as clear as possible with regard to the circumstances in which lethal force may be resorted to.

3.4.2 United States of America

The common law permitted the police to use deadly force to stop escaping felons as a last resort and such killings were deemed excusable homicides.⁸⁴ It was thus held that the 'killing of a felon resulted in no greater consequence than those authorised for the punishment of the offence'.⁸⁵ Felonies included murder, rape, manslaughter, robbery, sodomy, mayhem, burglary, arson, escape from prison and larceny.⁸⁶ In respect of misdemeanours, however, arrestors could not ordinarily resort to deadly force even to overcome resistance or to prevent the suspect from fleeing as it is considered 'better to allow one guilty of a misdemeanour to escape altogether than to take his life.'⁸⁷

Many States have limited the application of the fleeing felon rule by specifying the kinds of felonies in respect of which deadly force may be used. In this regard States either limited the use of deadly force to 'forcible felonies' or adopted the approach of the Model Penal Code.⁸⁸ The Model Penal Code prohibits the use of deadly force with the exception of cases where the force used does not create a substantial risk of

⁸³ Munroe 2003.

⁸⁴ Torcia 1989,76.

⁸⁵ De Roma 1970, 9.

⁸⁶ Rinch 1976, 365.

⁸⁷ *Reneau v State* (1879) 70 Tenn 720.

⁸⁸ Robin 1987, 82.

injury to innocent persons and the officer believes that the crime involves the use or threatened use of deadly force or there is a substantial risk that the offender will cause serious bodily harm if the apprehension is delayed.

In the 1985 appeal in *Tennessee v Garner*⁸⁹ case, the US Supreme Court had an opportunity to review state law. The statute under review was the Tennessee Statute, which provided that if after a police officer has given notice of intent to arrest a suspect, the suspect flees or forcibly resists, “the officer may use all the necessary means to effect the arrest.”

Acting within the scope of the Tennessee statute a police officer who was reasonably sure that a burglar who tried to escape arrest was unarmed, shot and killed the burglar. It later turned out that the suspect was 15 years old and had stolen \$10 and a purse. The majority of the Court held that where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or to others the use of deadly force to prevent the suspect from escaping is reasonable.⁹⁰ An officer may also use deadly force where a suspect threatens the officer with a weapon or if there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious bodily harm and tries to escape. The Court indicated that where it is feasible to do so some warning should be given before using deadly force.⁹¹

⁸⁹ 471 U.S 1 (1985).

⁹⁰ *Garner supra* 10.

⁹¹ *Ibid.*

3.4.3 Germany

At article 2 of the Federal Constitution the right to life and physical integrity of every person is entrenched. The use of force by members of the police is, however, dealt with in various legislative provisions.

Legislation

Gesetz Über Den Unmittelbaren Zwang Bei Ausübung Öffentliche Gewalt Durch Vollzugsbeampte Des Bundes (uzwG)

This federal Act regulates the use of direct force by all federal law enforcement officials. The Act provides as follows:

3. Limitation of fundamental rights

In so far as direct force is lawfully applied in the exercise of official powers, the right to life, physical integrity, freedom of the person and inviolability of the home, which are entrenched in the first and second sentences of articles 2(2) and 13(1) of the Constitution, are limited

4. Fundamental principle of proportionality

(1) Law enforcement officials must, where they apply direct force and more than one measure [form of force] may be used and will be suitable, use that measure [form of force] which will result in the least infringement of the rights [rights of] and individual or the general public.

(2) The damage which could be expected to result from the use of a particular form of direct force, must not be recognizably disproportionate to the purpose for which it is used.

10. The use of firearms against persons

(1) Firearms may only be used against individual persons, to prevent the imminent commission or continuance of an unlawful act which, in the light of the surrounding circumstances, constitutes

(a) a crime or

(b) a misdemeanour, which is being or will be committed with the use of firearms or explosives;

(2) to arrest a person who attempts to escape arrest by fleeing, where such person

(a) is caught in the act while committing an unlawful act which, in the light of the surrounding circumstances, constitutes a crime or a misdemeanour, where the latter is committed with the use of firearms or explosives or by perpetrators in possession of firearms or explosives

(b) is urgently suspected of committing a crime

(c) is urgently suspected of committing a misdemeanour and there are reason to believe that such person will make use of a firearm or explosives;

(3) to prevent the escape from lawful custody or to effect the re-arrest of a person who escaped from lawful custody where such person is or was in lawful custody

12. Special directions concerning the use of firearms

(1) Firearms may only be used after the application of other forms of direct force have proved to be fruitless or will obviously not bring about the desired result. There use against person is only permissible where the desired result cannot be achieved through the use of weapons against property.

(2) The purpose with the use of firearms may only incapacitate a person to prevent him from attacking or from fleeing. A law enforcement official is prohibited from shooting when such officer realises that there is a greater chance that an innocent person will be endangered, except when the shooting against a group of persons as provided for in section 10(2) cannot be avoided.

(3) Firearms may not be used against persons who, from outer appearance, seem to be children.

13. Warning

(1) The use of a firearm should be preceded by a warning. The firing of a warning shot is regarded as a warning. In the case of a group of people the warning must be repeated.

(2) The use of water canons and service vehicles against a group of persons should be preceded by warning.

Compared to the South African law, German law appears to be much stricter in its approach to the use of force that may result in the limitation of the right to life. This may be inferred from the fact that German law appears to be very detailed and specific as to the offences for which lethal force may be used as well as from the law

which provides that firearms may only be used in private defence of oneself or another person.

3.4.3 Australia

Australia is a commonwealth country and does not have a Bill of Rights. The use of lethal force for effecting arrest is generally dealt with in terms of legislation. As in most jurisdiction the use of force for the purpose of arrest is allowed in circumstances where a suspect resists arrest or flees from an attempt to be arrested. The use of force is deemed lawful provided the decision to do so is both subjectively and objectively reasonable.⁹² If the suspect attempts to use a lethal weapon against the arrestor the latter may lawfully offer lethal violence in return, provided it is reasonable to do so.⁹³

It should be noted here that the fleeing felon – rule has as discussed in the countries *supra* been rejected by the Australian Law Reform Commission report in 1975.⁹⁴



Legislation

Criminal Code

Section 231 provides as follows:

‘It is lawful for a person who is engaged in the lawful execution of any sentence, process, or warrant, or in making any arrest, and for any person lawfully assisting him, to use such force as may be reasonably necessary to overcome any force used in resisting such execution or arrest.’

Crimes Act 1914 –

Section 3zc

⁹² Gillies 1997,372.

⁹³ Gillies 1997, 373.

⁹⁴ Hogan 1988,84.

‘Use of force in making arrest

(1)

A person must not, in the course of arresting another person for an offence use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.

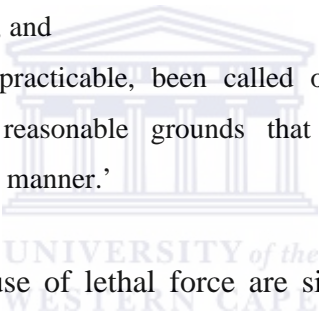
(2)

Without limiting the operation of subsection (1), a constable must not, in the course of arresting a person for an offence

(a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); or (b) if the person is attempting to escape arrest by fleeing—do such a thing unless:

(i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); and

(ii) the person has, if practicable, been called on to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.’



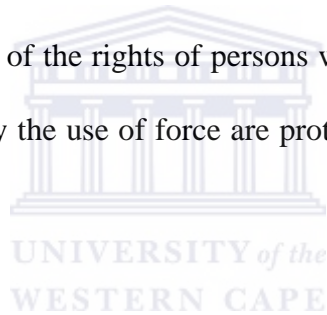
The basic principles on the use of lethal force are similar to that in South African law. Much emphasis is placed on the principle of reasonableness insofar as the decision to use lethal force is concerned. The principle of proportionality also plays a vital role in deciding upon the degree of force that should be used as it expressly requires that the degree of force should not be more than is necessary and reasonable to arrest a person or prevent that person from escaping arrest. The Australian law on the use of lethal force appears to be rather broad compared to that in the other countries discussed.

3.5 Conclusions

3.5.1 International law

In the preceding discussion of international law instruments it is clear that the question of using lethal force for the purpose of arrest is seldom dealt with directly. Despite the lack of direct international law authority, however, the importance of the question is consistently reinforced by the fact that the rights violated by section 49 enjoys, in some of them, unfettered protection and in those where limitations are permitted, stringent requirements for doing so is laid down.

The use of force for the purpose of arrest is, with the exception of the ECHR, not dealt with by international law instruments. This does not mean that states may allow conduct that is non-observant of the rights of persons who resist or attempt to escape arrest as the rights affected by the use of force are protected in terms of international law.



At international law the limitation of these rights may not occur arbitrarily and/or unlawfully. States should thus ensure that the right to use lethal force in arrests is exercised in terms of its domestic laws and that the law in turn clearly prohibits the arbitrary termination of human life. This means, as had been found by the HRC, that life must never be taken in unreasonable or disproportionate circumstances. Persons authorised to use force should thus be made aware of the circumstances in which force may lawfully be applied and also of the degree of force that may be used.

The UN Basic Principles, with its status as a persuasive source of international law, is instructive as it clearly sets out how states are to select persons who will be authorised

to use lethal force, how they should be equipped and what officers faced with no choice but to invoke their power to use lethal force should do in such circumstances. States would do well to incorporate these principles in their domestic laws and even more so to take cognisance of the comprehensive scheme of the instrument as a whole.

3.5.2 Comparative law

The lethal force provisions of the various countries discussed above all inculcate the requirements of “reasonableness” and “proportionality” in the application of such force. Furthermore the use of deadly force in private defence of the arrestor or a third party is consistently recognised by the countries discussed.

Germany appears to have comprehensive laws on the use of deadly force as it sets out the specific circumstances in which deadly force may be used, deals with the use of firearms and gives what may be perceived as adequate guidance as to how officers are to conduct themselves when faced with a situation where the use of a firearm is unavoidable. This is not to say that South Africa has nothing to glean from the provisions of the other States. The clarity and well balanced quality of the *Garner* principle may be invoked to provide guidance as to how the new section 49 is to be enforced and the similarity in the content of section 25 of the Canadian Criminal Code with section 49 may help to inform how we ought to construe the provision in practice.

3.5.3 The salient principles

In terms of both international and comparative law it appears that it is recognised that the apprehension of a person does in itself constitute a major encroachment on the rights of such a person and as a result arbitrary arrests are consistently prohibited. This denotes that law has been sensitized to the impact that an arrest (even without the use of force) has on the individual rights of a suspect. It thus stands to reason that the use of deadly force may only be used in very limited circumstances.

In terms of international and comparative law the use of lethal force may only be invoked as a last resort after non-lethal methods prove to be ineffective in achieving the legitimate goal pursued. This position is encouraged as the State has a duty to respect the rights of everyone including suspected criminals. Where the use of lethal force is unavoidable warnings should be given of the intention to use such force and sufficient time should be allowed to heed such warnings. If it is impossible or impracticable to warn the suspect, warnings may be dispensed with, but arrestors should then ensure that they use the least degree of force to achieve its objective. In contemplating to use deadly force an arrestor also has an obligation to assess whether the decision to use such force would result in death or serious injury to innocent bystanders.

To prevent unlawful or arbitrary killings states should have a clear chain of demand over officials. It should also be recognised that arrestors often have to make decisions in the heat of the moment. States would thus do well to follow the guidelines of the UN Basic Principles insofar as it suggests that law enforcement officers should be

selected subject to an intensive screening system and that they should be evaluated on a regular basis.

Lastly, in the event where lethal force had been resorted to and serious injury or death is caused, it must be ensured if possible that all injured persons, including the suspect, is afforded medical assistance and that relatives and friends are informed (see 3.3.1 (b) above). The latter provision reflects a humane dimension to the manner in which suspects should be treated despite the crimes they are suspected of having committed.



CHAPTER 4: INTERPRETING SECTION 49

4.1 Introduction

The commencement of the supreme Constitution introduced the ultimate yardstick for testing the validity of all law and conduct. Any law or conduct which unjustifiably offends any of the rights in the Constitution is invalid to the extent of its inconsistency with the Constitution.¹ The primary aim in this Chapter is to determine whether the use of deadly force against a fleeing suspect is constitutional. This means that the answer to the question posed in this paper is rooted in testing the constitutionality of section 49 to the extent that it permits the use of deadly force against a fleeing suspect.

The starting point in determining the main question posed in this paper is to determine when deadly force may be used against a fleeing suspect in terms of section 49. In other words the prerequisites for the use of deadly force against fleeing suspects as provided in terms of section 49 shall be set out. Such prerequisites shall then be subjected to constitutional scrutiny to determine whether it guards against unjustifiable inroads to the constitutional rights of suspects or not.

4.2 The structure of the constitutional analysis.

When it is claimed that a law makes inroads to rights that are protected in the Bill of Rights, the starting point in constitutional practice is to define the right(s) alleged to be violated. This requires that it is ascertained who are the bearers of the right and whom, due to the nature of the right, is responsible for the protection thereof.²

¹ Section 2 The Constitution of the Republic of South Africa Act 108 of 1996.

² Steytler 1998, 14-17.

The next step, after defining the constitutional rights affected, is to determine the proper meaning of the challenged law. Once the proper meaning of the challenged law is determined it must be asked whether the law conflicts with the rights in the Bill of Rights. If it does, it must be determined whether the conflict is reasonable and justifiable in an open and democratic society.³

If there is an infringement that is reasonable and justifiable then the provision should continue to exist in its present form, but if it is found that the law gives rise to unjustifiable limitations of rights, then the law is inconsistent with the Constitution and ought to be declared invalid to the extent that it is not in harmony with the Constitution.⁴

A constitutional remedy should then be applied to correct the law or conduct.

4.3 Prerequisites for the use of deadly force against a fleeing suspect

The existence of conflict between section 49 and the constitutional rights of suspects is indisputable as shall be evident from the discussions below. Hence the first part of the constitutional analysis which entails defining the rights limited, interpreting section 49 and ascertaining whether a conflict indeed exists, does not merit a detailed discussion at this stage. For the sake of coherency, however, the preconditions for the use of deadly force against a fleeing suspect shall be briefly set out below and thereafter a discussion of the principles of constitutional interpretation shall follow.

³ Section 36 Constitution.

⁴ Section 2 Constitution provides: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

Section 49 sets out six prerequisites for the use of deadly force. The first two requirements emanate from section 49(1). Section 49(1)(a) defines an ‘arrestor’ as ‘any person authorized under this Act to arrest or to assist in arresting a suspect’ and section 49(1)(b) defines a ‘suspect’ as ‘any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence’. In order to invoke the powers in section 49 an arrestor should first consider whether he is an arrestor for the purposes of section 49 and, whether the suspect can be defined as such for the purposes of section 49.

Section 49(2) deals with the use of deadly force against a fleeing suspect. It provides that an arrestor shall be justified in using deadly force if he believes on reasonable grounds that one of the grounds for deadly force as provided by the provision exists. A belief based on reasonable grounds is thus the third prerequisite for the use of deadly force.

Section 49(2) further lists three grounds for the use of deadly force. The first ground appears in section 49(2)(a) and provides that deadly force may be used if it is ‘immediately necessary for the purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm’. The second ground is embedded in section 49(2)(b) which requires that a ‘substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed’ must exist. The third ground is covered by section 49(2)(c) which requires that ‘the offence for which the arrest is sought is in progress and is of a

forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.’

To summarize, it is evident that section 49 requires first that an arrestor must be authorized in terms of the CPA to effect an arrest. The second prerequisite is that the arrestor must have a reasonable suspicion that the suspect committed an offence and is thus a suspect for purposes of section 49. The third prerequisite is that the arrestor must believe on reasonable grounds that one of the grounds justifying the use of deadly force exists. The last three prerequisites are the grounds for the use of deadly force. At least one of these grounds must exist in order to invoke deadly force.

4.4 Section 39(2) principles of interpretation

When interpreting section 49 it must be borne in mind that the Constitution requires that legislation be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights.⁵ To ensure compliance with this requirement South African courts apply the principle that legislation which is capable of more than one interpretation be given the meaning which is consistent with the Constitution provided such interpretation can reasonably be ascribed to the legislation.⁶

The nature of the principle commands cognizance of the legislature’s duty to pass reasonably clear and precise laws, enabling those affected to understand what is expected

⁵ Section 39(2) Constitution.

⁶ *In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 23; *De Lange v Smuts NO and Others* 1998 (3) SA 785(CC) para 85; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) para 23-24; *S v Bhulwana*; *S v Gwadisa* 1996 (1) SA 388 (CC) para 28.

of them.⁷ Courts are thus prohibited from adopting unduly strained interpretations of legislation for the sake of saving it from invalidity.⁸

When interpreting legislation a balance must be struck between parliament's obligation to pass laws that are not vague and the courts' obligation to adopt constitutionally unstrained interpretations where it is possible to do so.⁹ In some cases this could mean that a law which is open to an unconstitutional meaning, but also reasonably capable of an interpretation in harmony with the Constitution, can be upheld.¹⁰ When interpreting section 49 these principles shall thus be applied.

4.5 The conflict between section 49 and the rights in the Bill of Rights

When an arrestor uses deadly force against a fleeing suspect the latter either sustains bodily injuries or dies. As a result it may be asserted at the outset that section 49 limits the right to life, the right to human dignity, the right to security of the person and the right to be free from violence from both public and private sources.¹¹ In light of the unavoidable limitations which results from section 49 the greatest hurdle to passing constitutional muster thus lies in the question of justifiability in terms of section 36 of the

⁷ *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) para 47-48.

⁸ *Hyundai supra* para 24.

⁹ *Ibid*

¹⁰ *Ibid*

¹¹ *S v Walters* 2002 (4) SA 613 (CC) para 3.

Constitution. Put differently, section 49 will only be saved from constitutional invalidity provided the inroads it makes to the rights of suspects are justifiable under section 36.¹²

Section 49 inevitably results in the limitation of constitutional rights. Hence the prerequisites for the use of deadly force can logically be discussed within the framework of the constitutional limitations clause. The meaning of the constitutional rights limited by section 49 may also be discussed within the boundaries of section 36 and particularly within the context of section 36(1)(a) which requires the consideration of the nature of the constitutional rights subjected to limitation.

4.6 Justifiability in terms of the constitutional limitations clause

Section 36 declares that the rights in the Bill of Rights may be limited by a law of general application. The effect of this is that no right in the Bill of Rights is absolute. Section 36 also states that a limitation of a right is allowed only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It provides further that all relevant factors should be considered. Five specific factors are listed. These factors shall be applied below to determine whether the inroads made by section 49 are justifiable.

4.6.1 The nature of the rights limited

In *Walters* it was held by Kriegler J that a provision authorizing the use of deadly force inevitably raises “constitutional misgivings about its relationship with . . . the right to life,

¹² In *Walters supra* para 30 the Court held that ‘However narrowly the [old] section [49] is construed, its main thrust necessarily affords a prospective arrestee statutory authority for conduct that could significantly impair an arrestee’s right to claim protection of each of the three core rights in question.’

to human dignity and to bodily integrity.”¹³ These rights are fundamental to the existence of a constitutional state and as a consequence they do not operate on a factual basis, but apply to all persons including the most dangerous criminals. For the purpose of the limitation analysis the nature of the right to life, human dignity, security of the person and to be free from violence from public and private sources shall be dealt with respectively below.

(a) The right to human dignity

The general structure of the Constitution holds ‘human dignity’ as an underlying value of a constitutional society.¹⁴ The importance of human dignity is accentuated by the fact that no right in the Bill of Rights may be limited unless such a limitation is justifiable in an open and democratic society based *inter alia*, on human dignity.¹⁵

The right to human dignity is a core constitutional right.¹⁶ Section 10 of the Constitution provides that ‘everyone has inherent dignity and the right to have their dignity respected and protected’. Human dignity is also listed as a non-derogable right in the Constitution and enjoys protection in its entirety under the Constitution. Section 37(5) prohibits any legislation or action taken in a state of emergency from derogating from the listed rights which includes the right to dignity.

¹³ *Walters supra para 3.*

¹⁴ See sections 1, 7(1) and 39 of the Constitution respectively.

¹⁵ See section 36 of the Constitution.

¹⁶ De Waal *et al* 2001, 230.

In *Makwanyane* O'Regan J, held that '[r]ecognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern'.¹⁷ In later cases the Court reiterated that '. . . the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society'¹⁸ and that '[acknowledgment of the right to human dignity] . . . includes an acceptance by society that . . . even the vilest criminal remains a human being possessed of common human dignity.'¹⁹

The right to human dignity is vital for the existence of a democratic society and has therefore been given a prominent place in the Bill of Rights. It deserves the highest degree of protection possible and any infringement of the right must comply strictly with the requirements of reasonableness and justifiability in a society based on freedom, equality and dignity, as set out in the limitations clause of the Constitution.

Whenever the right to human dignity came under threat the Constitutional Court has gone to great lengths to instill an understanding that dignity is a core value underpinning the South African society. In relation to the use of deadly force against a suspect the importance of the right to dignity dictates that such force must be strictly controlled to avoid unjustifiable limitations.

¹⁷ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) para 328.

¹⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 28.

¹⁹ *S v Williams* 1995 (3) SA 632 (CC) para 58.

(b) The right to life

Section 11 of the Constitution states that ‘everyone has the right to life’ and mentions no qualifications to the right. This distinguishes the right to life in the South African Constitution from many foreign constitutions in which the right to life appears alongside express provisions containing circumstances in which the right may be limited.²⁰ The absence of express qualifications to the right does, however, not mean that the right to life may never be limited. Section 36 of the Constitution provides that any right in the Bill of Rights may be limited provided such limitation complies with the criteria of reasonableness and justifiability.²¹

In *Makwanyane* the right to life was described as antecedent to all other rights in the Constitution.²² The Court held that the right to life was not included in the Constitution simply to guarantee the right to existence, but to ensure that every individual enjoys the right to ‘human life’.²³ The right to human life encompasses the right to human dignity.²⁴ It has therefore been held that the right to human dignity and the right to life are like ‘two sides of the same coin’²⁵ and are the two most important rights in the Bill of Rights which vest in all persons.²⁶

²⁰ The constitutions of the United States of America, Canada, Hungary and India all qualify the right to life. See De Waal 2001, 239

²¹ See De Waal 2001, 240 where it is stated that the right to life, in the sense of the right not to be killed is not an absolute right. The right may be limited provided the limitation is justifiable in terms of section 36 of the Constitution. See also *Makwanyane supra* para 138 where Chaskalson P held that the law may legitimately permit killing in self-defence and that lethal force may legitimately be used by the state to kill a hostage taker to save an innocent hostage whose life is in real danger.

²² *Makwanyane supra* para 326.

²³ *Ibid*

²⁴ *Makwanyane supra* para 327.

²⁵ *Makwanyane supra* para 311.

²⁶ This fact was stressed by Chaskalson P in his rejection of an argument in *Makwayane* para 137 that convicted murderers forfeit their right to life.

The right to life and the right to human dignity is the source of all other personal rights.²⁷ Consequently, the right not to be killed is a core dimension of the right.²⁸ This was confirmed by the Constitutional Court when it held that at the very least the right to life should be understood to incorporate the right not to be deliberately and systematically killed by the state.²⁹ This point seeps through in the *Makwanyane* judgment where Chaskalson P held that ‘[g]reater restriction on the use of lethal force may be one of the consequences of establishing a constitutional state, which respects every person’s right to life.’³⁰

The right to life which is closely linked to the right to dignity is the precursor to all other rights. If it is negated then all other rights cease to exist. It should thus as far as reasonably possible not be interfered with. Any law which limits this right must be tailored in a fashion that makes it clear that the right to life may only be limited in circumstances that makes the limitation reasonable and justifiable as envisaged in section 36. In practice this means that section 49 has to direct arrestors in identifying the circumstances in which deadly force would be constitutionally permissible.

(c) The right to security of the person

Section 12(1) provides that the right to security of the person includes the right to be free from violence from either public or private sources.³¹ The right to security of the person

²⁷ *Makwanyane supra* para 44.

²⁸ De Waal 2001, 240.

²⁹ *Makwanyane supra* para 269.

³⁰ *Makwanyane supra* para 140

³¹ Sections 12(1)(c).

is primarily aimed at protecting individuals against invasions of their physical integrity.³² ‘Physical integrity’ in turn has been said to be a feature of the right to dignity.³³ Consequently the right to security of the person enjoys an elevated status within the Bill of Rights.

When deadly force as permitted by section 49 is used against a suspect there is no doubt that his/her right to security of the person is violated. It also becomes relevant to ask whether the use of such force encroaches upon the individual’s right to be free from violence from both public and private sources.

(d) The right to be free from all forms of violence from either public or private sources

Section 12(1)(c) provides for the right to be free from violence from both public and private sources places a dual obligation on the state. Firstly, the state through its agents must refrain from using force against persons and secondly, it should proscribe violence by individuals.³⁴ In *Christian Education South Africa v Minister of Education*³⁵ the Court held that the right to be free from violence from private and public sources together with the obligation under section 7(2) of the Constitution, which requires the state to respect, protect, promote and fulfill the rights in the Bill of Rights, places the state under an obligation to take ‘appropriate steps’ to reduce violence in private and public life.³⁶

³² De Waal *et al* 2001, 248. See also *R v Video Flicks et al* (1985) 14 DLR (4th) 10 at 48, where the concept ‘security’ was said to be included by the physical and mental integrity of the person.

³³ Steytler 1998, 70.

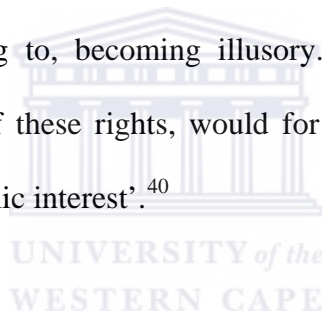
³⁴ De Waal *et al* 2001, 258.

³⁵ 2000 (4) SA 757 (CC).

³⁶ *Christian Education supra* para 47, *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 69 – 71.

To give effect to section 12(1)(c) it often becomes necessary for the state to allow its agents or individuals to use a certain measure of force where the rights of innocent persons are violated or threatened.³⁷ An absolute bar on violence is thus not always possible, but since it is the envisaged status for a constitutional state, absolute clarity and control of the use and degree of force must exist.

In *Walters*, it was held that the right to life, to human dignity and to bodily integrity are ‘individually essential and collectively foundational to the value system prescribed in the Constitution.’³⁸ As such these rights are not to be compromised as doing so would result in the society we are aspiring to, becoming illusory.³⁹ The Court added that any significant limitation of any of these rights, would for its justification demand a very ‘compelling countervailing public interest’.⁴⁰



4.6.2 Importance of the purpose of the limitation

The purpose of arrest is to bring a suspected offender to court. Section 49, however, is not directed at achieving this purpose as it permits the use of force which could result in the death of a suspect. This obviates the possibility of a suspect facing a criminal trial in a court of law. The rationale underlying the use of deadly force against a suspect is also not to punish the latter. It is submitted that the purpose of using deadly force against a

³⁷ One of the instances where the state would allow the limitation of fundamental rights is in the case of self defence. In *Makwanyane supra* para 138, the Court held that self-defence is recognized by all legal systems. It further held that where a choice between two lives has to be made the life of the innocent will be given preference over the life of the aggressor as denying the innocent the right to act in self-defence is tantamount to denying that individual his right to life.

³⁸ *Walters supra* para 28.

³⁹ *Ibid*

⁴⁰ *Ibid*

fugitive is to maintain law and order because if a dangerous criminal is allowed to flee he may not only escape prosecution, but may also continue to commit serious offences if he is not stopped forthwith. In *Walters*⁴¹ the purpose of the old section 49 was articulated in similar terms. The Court held that the objects of section 49 are to ‘protect the safety and security of all through the deterrence of an effective criminal justice system, thus preventing lawlessness and a loss of state legitimacy.’⁴²

These are legitimate purposes⁴³ in a society which is based on equality, freedom and dignity. Despite this the Constitutional Court has recognized that although crime control is important it does not justify extensive and inappropriate invasions of constitutional rights.⁴⁴

It is submitted that a society that aspires to be recognized as one that is based on constitutional democracy must distinguish between effective crime control and crime control at all costs. Effective crime control is essential to a society based on human dignity, freedom and equality, whilst crime control at all costs has the potential to undermine these values. Effective crime control aims to protect the rights of all persons and allows the limitation of rights in circumstances that are constitutionally justifiable. Conversely, crime control at all costs is strictly focused on eliminating criminals to the extent that sight is lost of the parameters created by the Constitution.

⁴¹ *Walters supra* para 36.

⁴² *Ibid*

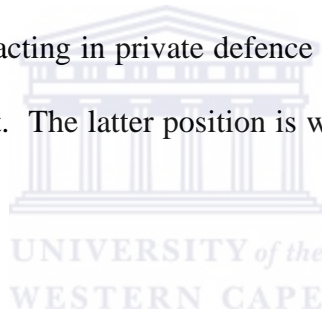
⁴³ *Sv Mbatha* 1996 (2) SA 464 (CC) para 16; *S v Manamela* 2000 (5) BCLR 491 (CC) para 27; *Beinash v Ernst & Young* 1999 (2) SA 116 (CC); *Walters supra* para 39.

⁴⁴ *S v Zuma* 1995 (1) SACR 568 (CC) 570 AB.

As submitted earlier, section 49 serves a legitimate and important purpose. Whether it achieves such purpose through constitutionally acceptable means is, however, to be discussed below.

4.6.3 The nature and extent of the limitation

Section 49(2) provides that an arrestor may use force that is ‘intended or is likely to cause death or grievous bodily harm to a suspect’. It suffices thus to conclude that it allows the use of deadly force against a suspect. Furthermore, it will be evident later in this Chapter that section 49 also permits the use of deadly force against a fleeing suspect.⁴⁵ This confirms that the provision extends beyond private defence, more commonly known as self-defence, because a person acting in private defence is only justified in using force if the unlawful attack is imminent. The latter position is widely accepted and is as a result not questioned here.⁴⁶



The main issue in this Paper is confined to the question of the constitutionality of using deadly force to stop a fleeing suspect. In order to determine the nature and extent of the limitation caused by section 49, the prerequisites as outlined at paragraph 4.3 above shall be discussed in greater detail below.

4.6.3.1 ‘Arrestor’ for the purpose of section 49

Since section 49 replaced the old section 49 it automatically operates within the framework of the CPA. Everyone who was authorized to exercise the powers of arrest

⁴⁵ At paragraph 4.6.3.2.

⁴⁶ See note 37 in this regard.

afforded under the old section 49 may thus also use deadly force against a fleeing suspect.

In terms of the CPA police officers and peace officers⁴⁷ are authorized to arrest persons reasonably suspected of committing crime. Section 42 makes provision for private persons to arrest without warrant suspected criminals in certain circumstances⁴⁸ and section 47 compels male persons between the ages of sixteen and sixty years old to assist in arrests when called upon to do so by police officials unless they have sufficient cause not to comply.⁴⁹

⁴⁷ Section 40 Criminal Procedure Act 51 of 1977.

⁴⁸ Section 42 provides:

“Arrest by private person without warrant.—(1) Any private person may without warrant arrest any person—

(a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1;

(b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;

(c) whom he is by any law authorized to arrest without warrant in respect of any offence specified in that law;

(d) whom he sees engaged in an affray.

(2) Any private person who may without warrant arrest any person under subsection (1) (a) may forthwith pursue that person, and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein.

(3) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorized thereto by such owner, occupier or person in charge, may without warrant arrest the person so found.”

⁴⁹ Section 47 provides:

“Private persons to assist in arrest when called upon.—(1) Every male inhabitant of the Republic of an age not below sixteen and not exceeding sixty years shall, when called upon by any police official to do so, assist such police official—

(a) in arresting any person;

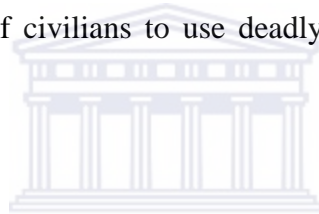
(b) in detaining any person so arrested.

(2) Any person who, without sufficient cause, fails to assist a police official as provided in subsection (1), shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.”

South African law on the use of deadly force in arrest situations differ from most comparative provisions in other jurisdictions as it does not govern the use of force by police officers only, but also that of ordinary persons. In *Walters* it was thus held that the use of deadly force by civilians adds a wider dimension⁵⁰ to the evaluation of the constitutionality of section 49. It was held that,

‘Police officers can reasonably be assumed to have been trained in the use of firearms and to have at least a basic understanding of the legal requirements for conducting an arrest unlike civilians. Police officers are also subject to the supervision and discipline of their superiors; none of these safeguards apply to civilians.’⁵¹

As a result the authorization of civilians to use deadly force shall be afforded greater consideration below.



(a) Factors relevant to empowering civilians to use deadly force

In *S v Botha en Andere*, Myburgh J held that private persons play an important role in the administration of criminal justice.⁵² The Court also accepted the contention that modern society had become so specialized that no police service could by itself investigate and prevent all crime.⁵³ The reasoning in the *Botha* case has great value, yet there are considerations which call for a degree of caution where civilians are permitted to use to deadly force. One consideration is an increasing sense of fear of crime experienced by South Africans.⁵⁴ The Institute for Security Studies (ISS) National Victims of Crime

⁵⁰ *Walters supra* para 32.

⁵¹ *Ibid*

⁵² (1) 1995 (2) SACR 598 (W) 603 H-I.

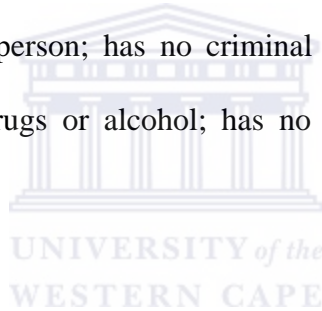
⁵³ *Ibid*

⁵⁴ Du Plessis 2004, 1.

survey⁵⁵ concluded that South Africans are much more fearful of becoming victims of crime today than they were in 1998 and that this “growing panic” has prompted a wide range of self-protective measures, including many people arming themselves in anticipation of a criminal encounter.⁵⁶

(b) The impact by the Firearm Control Act 60 of 2000.

The Act⁵⁷ is relevant to the issue at hand because it is aimed at preventing the unwarranted use of firearms by license holders⁵⁸ and sets strict requirements for the legal possession of firearms. It requires applicants to have a competency certificate issued by the South African Police Service⁵⁹ and provides that a certificate will only be issued if an applicant: is a fit and proper person; has no criminal convictions involving violence, sexual abuse, or the use of drugs or alcohol; has no history of mental or emotional



⁵⁵ See Mistry 2004, 8 where it is stated that national victim surveys are the most reliable supplements to police data. It is stated further that though there is a definite decline in crime levels public sentiment does not reflect it as feelings of safety are ‘much worse than they were five years ago.’

⁵⁶ Du Plessis 2004, 1. See also South Africa.info 2004, 2 where it is reported that crime has stabilised between 1998 and 2003, but that the Institute for Security Studies (ISS) warns that public perceptions about crime are ‘much less positive’ in that a study showed 53 percent of those surveyed believed that crime has increased. The ISS thus concluded that ‘violence remain the key challenge for the country.’

⁵⁷ The Firearms Control Act 60 of 2000 replaced the Arms and Ammunition Act of 1969. See Meek 2004, 1.

⁵⁸ Section 2 of the Act provides:

“The Purpose of this Act is to

- (a) enhance the constitutional rights to life and bodily integrity;
- (b) to prevent the proliferation of illegally possessed firearms and, by providing for the removal of those firearms from society and by improving control over legally possessed firearms, to prevent crime involving the use of firearms;
- (c) enable the State to remove illegally possessed firearms from society, to control the supply, possession safe storage, transfer and use of firearms and to detect and punish the negligent or criminal use of firearms;
- (d) establish a comprehensive and effective system of firearm control and management; and
- (e) ensure the efficient monitoring and enforcement of legislation pertaining to the control of firearms.”

⁵⁹ Section 9 of the Firearms Control Act 60 of 2000 read with regulations 13 and 14 of Government Gazette No 26664 20 August 2004.

instability; successfully completed the prescribed training and practical test for the safe and efficient handling of firearms.⁶⁰

The Act is aimed not only at removing illegally possessed firearms from society, but also at ensuring that license holders use firearms responsibly. Consequently it should impact positively on section 49. This is, however, not achieved as the Act requires only persons applying for licenses for the first time to have basic training in using firearms and to complete a practical test in safety and the efficient handling of firearms. Applicants for license renewals need only complete a test on knowledge of the Act.⁶¹ Once licenses are obtained continuous training is not required.

This is a far cry from the guidelines in the UN Basic Principles,⁶² which encourages continuous and thorough training. Most civilians do not have training in exercising the ordinary powers of arrest much less the use of lethal force to effect an arrest.⁶³ This is exacerbated by the fact that there are also no widely visible mechanisms in place to ensure public awareness of what section 49 really entails. This is contrary to the guidance set in the UN Basic Principles⁶⁴ which expressly requires that everyone be made aware of the principles on the use of force and firearms in their national legislation and in practice.

⁶⁰ Hood 2005, 19.

⁶¹ According to Hood *supra* at 19, in terms of section 11(3) of the transitional provisions relating to license renewals section 9(2)(r) of the Firearms Control Act, which requires applicants to have successfully completed the prescribed training and practical test on safety and efficient handling of firearms, in order to obtain a competency certificate, does not apply to persons who apply to have their licences renewed.

⁶² See in Chapter 3 of this Paper.

⁶³ In *Walters supra* para 32.

⁶⁴ See in Chapter 3 of this Paper.

In spite of the inherent problems in authorizing civilians to use deadly force it would be unwise to preclude them from acting under section 49 as there would be situations where it is necessary for them to assist in combating crime as was pointed out in the *Botha* case. The fact that civilians are permitted to invoke those powers consequently mean that section 49 must be reasonably clear for any person of average intelligence to understand what is expected of them. Moreover the person applying the law should have certainty that that which he is permitted to do in terms of the law is constitutional.

4.6.3.2 ‘Suspect’ for the purpose of section 49

Section 49(1)(b) provides that ‘suspect’ means ‘any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence’. This prerequisite is unambiguous and confirms that a suspect includes a person who is reasonably suspected of committing an offence and who flees subsequently.

4.6.3.3 The arrestor’s belief on reasonable grounds

An arrestor must believe on reasonable grounds that one or more of the grounds for the use of deadly force exists. This requires an arrestor to conform to what a reasonable person in his position would do. Bruce submits that the latter is a means of imposing greater accountability on arrestors who, he adds, should be able to justify shootings in which people are killed or injured.⁶⁵ Bruce,⁶⁶ however, criticises this standard of belief. He argues that the standard of a belief on reasonable grounds is accepted in a wide range

⁶⁵Bruce 2002, 10.

⁶⁶ Bruce 2002, 11.

of administrative decisions,⁶⁷ but that such decisions usually do not have the severe and irreversible consequences which flow from the use of lethal force.⁶⁸

In agreement with Bruce, it can be added that accountability by arrestors are imperative for ensuring that the powers under section 49 are not abused and moreover that the rights of suspects are not limited without constitutional justification. Whether the standard of belief employed by section 49 achieves this is debatable. In this regard his (Bruce's) argument which suggests that a stricter standard of belief is required is vital. Taking into account the importance of the rights that are limited his argument can indeed be strongly supported.

Burchell further criticizes the standard of belief by stating that it "unfairly discriminates" against persons who rely on private defence and those who rely on section 49.⁶⁹ A person who kills someone whilst genuinely, but incorrectly believing that he acted within the scope of section 49 will not be protected under section 49 if a court finds that the arrestor's belief was not reasonable.⁷⁰ He submits that, contrary to a person relying on section 49, a person who mistakenly acted under private defence and persuades a court that he genuinely believed that he was under attack, may be acquitted on a charge of murder or assault on the basis that mens rea is absent.⁷¹

⁶⁷ Bruce 2002, 11.

⁶⁸ *Ibid*

⁶⁹ Burchell 2000, 208.

⁷⁰ *Ibid*

⁷¹ *Ibid*

The argument by Burchell suggests that a stricter and more concrete standard than a belief on reasonable grounds is necessary in order limit room for error within section 49. His argument can be supported as it is indeed unjust that a person who attempts to uphold the law, but does so erroneously because the law sets inadequate standards, ends up facing a trial and possible imprisonment or other punishment. Bearing in mind that the suspect could lose his life, the need for a strict and more concrete standard of belief is even greater.

There is apparent merit in the argument by Burchell, but it cannot be overlooked that a standard of belief that is too strict would place an unrealistic burden on the state and on private individuals who invoke section 49. In this regard *Andronicou and Constantinou*⁷² is instructive insofar as it was held that when assessing the lawfulness of the use of deadly force all the surrounding circumstances must be considered and even if the force was mistakenly used it should be regarded as justified if the mistake was based on an honest belief which is perceived for good reasons.

4.6.3.4 The grounds for the use of deadly force

Section 49 introduced three grounds for the use of deadly force against a fleeing suspect. In addition to compliance with the prerequisites discussed above, an arrestor who uses deadly force against a fugitive can only rely on section 49 if one of the grounds set out in the provision is present.

⁷² See in Chapter 3.

(a) Section 49(2)(a)

Section 49(2)(a) provides that deadly force is permissible if it ‘. . . is *immediately necessary* for the purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or *future* death or grievous bodily harm.’ This prerequisite shall be discussed below to the extent that it permits deadly force to prevent future death and grievous bodily harm only as the use of deadly force to prevent imminent danger is not questioned here as stated at paragraph 4.6.3.

The words “*immediately necessary*” read with “*to prevent future death or grievous bodily harm*” create an onerous task for arrestors. An arrestor must determine whether a suspect has committed or is committing an offence (see the definition of “suspect” above), consider whether there are reasonable grounds to believe that a suspect will cause death or grievous bodily harm in the future and decide if deadly force is immediately necessary to prevent such harm. Furthermore their task becomes even more overwhelming in light of the limited time and often violent circumstances in which they have to perform it.

The words “future death or grievous bodily harm” in section 49(2)(a) has attracted much criticism. Geller and Scott state that “. . .within the criminal justice policy community, ‘nobody –forensic psychologists, psychiatrists, parole boards, seasoned police officers – has yet demonstrated an ability to predict a given individual’s future dangerousness with anything approaching even 50 percent accuracy.’”⁷³ Burchell too asserts that the legislature introduced a vague criterion which is difficult to define. He expresses the

⁷³ Geller *et al* 1992, 255.

uncertainty created by section 49 succinctly by asking, ‘[d]oes “future” mean about to occur in a few minutes, hours, days or even months?’⁷⁴

Bruce emphasizes that section 49 has the potential to expose arrestors to a risk of prosecution as it requires them to decide whether or not a fleeing suspect is likely to cause harm in the future without providing guidance as to how “future dangerousness” is to be evaluated.⁷⁵ He also submits that section 49 presents problems to those who are responsible for ensuring accountability in relation to shootings as they have to evaluate shootings in terms of “speculative abstraction”.⁷⁶

These submissions have merit. Their arguments concern mainly the lack of guidelines to determine the future period covered by section 49 and the assessment of suspects’ future dangerousness. These points of criticism as well as other related issues shall be analyzed below.

(i) The period covered by section 49

Burchell’s question above as to what constitutes the future for purposes of using deadly force is vital in testing the constitutionality of section 49. In this regard it is submitted that the real constitutional test lies in whether section 49 succeeds in drawing clear constitutional boundaries in circumstances where even arrestors of average intelligence would normally not know whether deadly force is permissible. To illustrate this point one may have regard to the examples below.

⁷⁴ Burchell, 2000, 206. See also Bruce 2003, 446.

⁷⁵ Bruce 2002, 6.

⁷⁶ *Ibid*

One may consider the example of an arrestor who reasonably believes that a suspect plans to kill an innocent person within a month or a week. In such a case one would expect that independent of section 49 a person of average intelligence will refrain from using deadly force and would rely on alternative legal means to prevent the harm. The fact that section 49 does not provide any assistance in the latter example is not constitutionally fatal to the survival of the provision as it can be remedied by the application of the basic principles underlying arrests, principles of interpretation and reliance on common sense to a certain extent.

Where bank robbers kill a teller and try to flee thereafter, the issue of whether security officers may use deadly force against the robbers to prevent them from causing future death, depends on the meaning of 'future' in terms of section 49. If the ordinary meaning of 'future' is applied the security officers in this example may use deadly force if they reasonably believe that the robbers will cause death or grievous bodily harm at anytime subsequent to the killing of the teller. The ordinary meaning of the word 'future' thus gives rise to overbroad powers to arrestors and results in extensive invasions of constitutional rights.

The above example illustrates that should a court have to determine the constitutionality of section 49 to the extent that it allows deadly force to prevent 'future death or grievous bodily harm' it would, on the plain meaning of the word 'future', find the provision to be overbroad and unconstitutional. It is submitted here, however, that the concept 'future

death or grievous bodily harm' is reasonably capable of bearing an interpretation that is consistent with the Constitution. If a court adopts an interpretation of 'future' which closely resembles imminence, section 49 could be constitutionally applied as the use of deadly force where an attack of life or limb is imminent, is widely acceptable. It is accordingly submitted that 'future' in the context of section 49 should be interpreted as immediate or near future as such a construction is not unreasonable within the context of section 49. In other words to save section 49 from constitutionality invalidity the word 'future' must be read down.⁷⁷

The lack of guidance as to what constitutes future harm results in a precarious situation for arrestors. As Du Plessis puts it: 'If they err on the on the side of caution, they [may] lose their lives. If they err on the side of violence, they could lose their liberty.'⁷⁸ The extent of the limitation by section 49 is thus far reaching as it negates the rights of suspects. It is submitted therefore that section 49 is unconstitutional in its present form and that it can only be saved from constitutional invalidity provided it is read down as suggested above.

(ii) The dangerousness of a suspect

The submission by Geller and Scott⁷⁹ above suggest that arrestors have a difficult task in assessing a suspect's future dangerousness and that they therefore require clear guidelines

⁷⁷ At note 30 in *Walters* it is stated that 'reading in' is used to connote a possible constitutional remedy following on a finding of constitutional invalidity of such provision. On the other hand 'reading down' is a method of constitutional construction whereby a limited meaning is given to a provision where it is reasonably possible to do so to save the provision from inconsistency with the Constitution.

⁷⁸ Du Plessis 2004, 1.

⁷⁹ Geller 1992, 255.

to determine whether there are reasonable grounds to believe that a suspect will cause death or grievous bodily harm in the future.

Section 49 restricts the use of deadly force to circumstances where death and grievous bodily harm must be prevented. This, on the face of it seems to be an improvement on the old section 49 which gave arrestors too wide powers. On consideration of the case law relevant to the offence of grievous bodily harm it appears, however, that arrestors may experience great difficulty when contemplating the use of deadly force to prevent this offence from being committed in the future.

Arrestors may have difficulty in applying section 49 where they intend to prevent the future commission of grievous bodily harm as the said offence itself is vague. In *S v Mbelu*⁸⁰ it was held that the offence of grievous bodily harm can at most be said to connote bodily injuries which are of a more serious character than the ‘casual and comparatively insignificant and superficial’ injuries to be expected in the case of common assault. Contrary to this in *S v Madikane*⁸¹ where the application of electric shock to the body of another person which caused pain, distress and anxiety accompanied by violently jerking movements was held to be sufficient for a conviction of assault with the intent to do grievous bodily harm despite the absence of observable physical injuries.

In *S v Pasfield* it was held that a person who intentionally points a rifle at another person and firing it, even if only with blank cartridges, but with the intent to frighten that person

⁸⁰ 1966 (1) PH H 176 (N).

⁸¹ 1990 SACR 377 (N).

is guilty of common assault and not assault with the intent to do grievous bodily harm.⁸² Furthermore the fact that serious injury has been caused to a person is not per se decisive of a suspect's state of mind.⁸³ Consequently the nature of the actual injuries is not always an indication of the intent to do grievous bodily harm.⁸⁴

According to Bruce as mentioned earlier, section 49 does not explicitly provide guidelines for determining a suspect's future dangerousness. Despite this one may reasonably infer that a suspect's attempt to commit or commission of an offence may be considered as a factor in deciding his future dangerousness as it is this which triggers the contemplation of the use of deadly force in the first place. Apart from the latter factor section 49 provides no further assistance.

The offences already committed by a person are as indicated earlier often not an accurate indication of his future dangerousness. As a result the commission or attempted commission of an offence, although a valid factor to be considered, should not be the only factor to consider when determining whether there are reasonable grounds to believe that a suspect will cause death or grievous bodily harm in the future. Since this is the only implied factor emanating from section 49 the submission by Bruce earlier regarding the impact on those who enforce section 49 and those who are responsible for ensuring accountability, can be supported.

⁸² 1974 2 PH H92 (A).

⁸³ See *S v R* 1998 1 SACR 166 (W).

⁸⁴ *R v Maradze, R v Bonifasi* 1958 (3) SA (SR) at 544 D-E; *S v Voyi* 1962 (2) PH H 203 (T); *S v Bokane* 1975 (2) SA 186 (NC); *S v Mgcineni* 1993 (1) SACR 746 (E).

(iii) The commission of an offence as an implied ground for the use of deadly force

In the absence of sufficient guidelines to assess a suspect's future dangerousness arrestors have no option, but to consider only the offences already committed by suspects. The suspect's commission or attempted commission of an offence thus becomes a reasonably implied ground for the use of deadly force. Accordingly the question whether it is constitutional to use deadly force against a fleeing suspect on the ground that he committed or attempted to commit an offence arises.

In *Garner* it was held that if a suspect poses no immediate danger the harm resulting from failing to arrest him does not justify the use of deadly force.⁸⁵ This principle was confirmed in *Walters*.⁸⁶ Based on this principle the question whether it is constitutional to use deadly force against a fugitive on the ground that he committed an offence may be answered in the negative provided only that the fleeing suspect poses no immediate danger.

The conclusion reached above was, however, qualified by the courts as it held that if there are reasonable grounds to believe that a suspect committed a crime involving the infliction or threatened infliction of serious bodily harm deadly force may be used.⁸⁷ The effect of this was that deadly force could be used against a fleeing suspect who posed no immediate danger, but who committed or attempted to commit an offence involving the infliction or threatened infliction of serious bodily harm.

⁸⁵ 471 US 1 (1985) 11.

⁸⁶ *Walters supra* para 39.

⁸⁷ *Govender supra* para 19.

In adopting the above position the Court in *Govender* tried to strike a balance between law-and-order interests and the constitutional rights of suspects. This is evident from the contrasts in its reasoning. The Court held that suspects should not be able to escape from arrest on a “more or less” frequent basis as the efficiency of the justice system as a deterrent to crime would be undermined.⁸⁸ Conversely, it also stressed that fugitives are never beyond the protection of the law.⁸⁹

The Constitutional Court in *Walters*⁹⁰ confirmed the position adopted in *Govender* and in doing so, it not only clarified the position under the old section 49, but also defined the constitutional parameters for the use of deadly force on the ground of the commission of an offence. In short this means that any law permitting the use of deadly force on the latter ground has to comply with the threshold requirement approved by the Constitutional Court, namely that the suspect must have committed or threatened to commit an offence involving serious bodily injury.

The position adopted in *Walters* can be supported as it succeeds in striking a balance between law-and-order interests and the rights of suspects. This position recognizes that violence impedes a constitutional state and that violent crime must therefore be dealt with in a manner that brings South Africa closer to the type of state envisaged by the Constitution. The innocent should be protected and those who are guilty of crime must be treated in a manner consistent with the constitutional values underlying the state.

⁸⁸ *Govender supra* para 12. Finch 1976, 372,

⁸⁹ *Govender supra* para 13.

⁹⁰ *Walters supra* para 46.

It could be argued that because deadly force is permitted to prevent death or grievous bodily harm it follows that the offence already committed must be of a similar dangerous nature. This argument is refuted, however, because although the infliction or threatened infliction of serious bodily injury could be decisive in determining a suspect's future dangerousness, it is not a factor which section 49 specifically requires for the use of deadly force to be justified.⁹¹ Section 49 does also not expressly require that there should be a reasonable suspicion that the suspect specifically committed an offence involving death or grievous bodily harm.

(b) Section 49(2)(b)

Section 49(2)(b) permits the use of deadly force where there is '... a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed'. The words 'if the arrest is delayed' imply that there should be an urgent need to prevent the suspect from causing death or grievous bodily harm. Taking into account that this conclusion is also reached in respect of the words 'immediately necessary' which appears in section 49(2)(a) reference to 'if the arrest is delayed' seems superfluous.

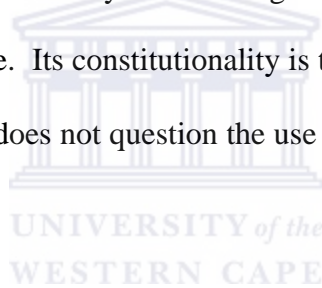
It is mentioned in Chapter 3 that the American Model Penal Code justifies the use of deadly force if there is a substantial risk that the offender will cause serious bodily harm if the arrest is delayed. It appears thus that Parliament borrowed this part of section 49 from the Model Penal Code. The purpose of doing so is, however, not evident because what is authorized under section 49(2)(b) is equally provided for in terms of section

⁹¹ See Tshela 2002, 1 where it is stated that the new section 49 does not use the nature of the offence as the determining factor in using deadly force.

49(2)(a). Plainly put the two provisions are capable of the same effect. Both permit deadly force if it is urgently necessary to prevent death or grievous bodily harm. Section 49(2)(b) is as a result less significant in the general scheme of the provision.

(c) Section 49(2)(c)

In terms of section 49(2)(c) deadly force may be used if ‘ . . . the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.’ This subsection is couched in fairly clear terms. On closer scrutiny it seems that this part of the provision covers the use of deadly force on a ground akin to private defence more popularly known as self-defence. Its constitutionality is thus not readily questionable and as mentioned earlier this paper does not question the use of deadly force on the ground of private defence.



In passing laws Parliament has a duty to ensure that those affected by the law knows what is expected of them. Arguably compliance with this duty becomes of paramount importance in the case of section 49 where the rights which forms the basis of a constitutional state is at stake.

Section 49 permits an arrestor to limit the rights of a suspect for the purpose of preventing imminent or future death and grievous bodily harm. In other words section 49

is aimed at the prevention and control of crime. These are legitimate purposes⁹² in a society which is based on equality, freedom and dignity. Despite this the Constitutional Court has recognized that although crime control is important it does not justify extensive and inappropriate invasions of constitutional rights.⁹³

It is submitted that a society that aspires to be recognized as one that is based on constitutional democracy must distinguish between effective crime control and crime control at all costs. Effective crime control is essential to a society based on human dignity, freedom and equality, whilst crime control at all costs has the potential to undermine these values. Effective crime control aims to protect the rights of all persons and allows the limitation of rights in circumstances that are constitutionally justifiable. Conversely, crime control at all costs is strictly focused on eliminating criminals to the extent that sight is lost of the parameters created by the Constitution.

By failing to define or provide adequate guidance as to the meaning of “future” section 49 sends a message that crime must be prevented at all costs. There is thus too much emphasis on the purpose of the limitation whilst the fundamental rights which are affected are not given sufficient credence by section 49. This is contrary to the Constitutional Court’s finding that crime control should not be attained by resorting to extensive and inappropriate invasions of constitutional rights.

⁹² *Sv Mbatha* 1996 (2) SA 464 (CC) para 16; *S v Manamela* 2000 (5) BCLR 491 (CC) para 27; *Beinash v Ernst & Young* 1999 (2) SA 116 (CC); *Walters supra* para 39.

⁹³ *S v Zuma supra* 570A-B.

The level of justification required for the constitutional limitation of rights depends on the extent of the limitation.⁹⁴ ‘The more invasive the infringement, the more powerful the justification must be.’⁹⁵ There must thus be compelling reasons why deadly force should be permitted against a fugitive.

In summary section 49 allows the irremediable negation of the constitutional rights of suspects. Furthermore it permits any person to use deadly force against anyone who is reasonably suspected of committing an offence. This is not in itself an evil. Despite this, however, in the absence of adequate guidance as to what constitutes future dangerousness and limitations on the period covered by the provision, the authorization of civilians in using deadly force could contribute to unjustified limitations of rights. It is further submitted that such guidelines are necessary despite the fact that an arrestor need only reasonably suspect that a suspect will cause death or grievous bodily harm in the future.

4.6.4 The link between the limitation and its purpose

Section 49 allows any person to use deadly force against any other person suspected of committing a crime. It requires that the force must be reasonably necessary and proportionate to the threat, but does not inform arrestors what these principles generally entail. In this regard the reasoning by the Court in *Steward v UK*⁹⁶ is instructive. The Court held that when considering the question of proportionality the nature of the aim pursued, the dangers to life and limb inherent in the situation and the degree of risk that the force employed will result in the loss of life must be considered. This does not

⁹⁴ *Walters supra* para 44.

⁹⁵ *Ibid*

⁹⁶ This case is discussed in Chapter 3 of this Paper.

necessarily mean that section 49 should duplicate the latter factors, but it does indicate that it is not sufficient to simply mention that the force must be proportionate to the threat posed.

Further section 49 permits deadly force to prevent imminent or future death or grievous bodily harm as well as where a suspect committed an offence and flees. Section 49 does not assist arrestors in determining future dangerousness nor does it define the nature of the offence committed.

From the above summary it is apparent that section 49 provides arrestors with wide powers for purposes of crime control and crime prevention. The link between section 49 and its purpose is thus indisputable. This does, however, not tilt the constitutional scale in favour of section 49 as the question of justifiability turns not simply on the existence of a link between the limiting measure and the purpose it serves. To be constitutionally reasonable and justifiable the connection between section 49 and the purpose it serves should be rational.⁹⁷

It is submitted that the link between section 49 and constitutional crime control is not rational. The powers afforded to arrestors, in the absence of adequate and unambiguous guidelines, are overbroad and give rise to misgivings about the application of deadly force. In practice this means that section 49 defies the judiciary's finding that "[t]he state [must] set an example of measured, rational, reasonable and proportionate responses to

⁹⁷ *Makwanyane supra* 184.

antisocial conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors.”⁹⁸

4.6.5 Less restrictive means to achieve the purpose

The existence of measures that are less invasive of constitutional rights than the measure complained of is given weighty consideration in the limitation analysis. This is provided such measures are capable of fully serving the purpose that the measure complained of seeks to achieve. Insofar as section 49 is concerned there are a number of measures that may be employed to control crime constitutionally. In specific the judiciary’s position in *Walters* that broad but clear principles as opposed to hard and fast rules be adopted insofar as the use of deadly force is concerned, would result in greater protection of constitutional rights than the vague wording in section 49.

A reasonable person of average intelligence equipped with the basic principles underlying arrests and the use of deadly force as set out in *Walters* would have access to the primary ingredients to assess any arrest situation. Bearing in mind also the constitutional template for reasonable and justifiable limitations, an arrestor’s reliance on his own common sense, although it inevitably plays a vital role, does not run the risk of being overburdened as in the case of section 49.

The UN Basic Principles are instructive (see 3.3.1(a)) in reasonably limiting the use of deadly force. If, as it recommends, the ethical issues relevant to the use of deadly force is constantly reviewed and steps are taken to develop a wide range of weapons including

⁹⁸ *Walters para 47.*

non-lethal incapacitating weapons, the use of deadly force would be limited at a practical level.

In addition to the above an explicit requirement that arrestors should minimize damage or injury and respect and protect human life would foster an attitude of non-aggression on the part of arrestors. Arrestors would be rightly encouraged thereby to focus only on preventing further violence by implementing the least destructive measures available to them. Following the suggestion in the UN Basic Principles that it should be ensured that assistance is rendered to injured persons at the earliest possible moment would add a humane dimension to legislation.

A law which empowers any person to implement a crime control measure as drastic as the use of deadly force must be crafted in a manner that insulates it from misuse. The inclusion of clear guidelines in a statutory provision guards against such abuse only in theory however. As such it cannot be said that the provision allows for constitutional crime control. To reasonably shield such a provision from erroneous application a requirement that the state should raise public awareness of what the law involves is necessary. Ideally such a requirement should be built into the provision itself. The state may then not shirk its duty in controlling the limitation of the fundamental rights at stake.

The preceding discussions make it evident that there are several measures that may be employed, without great difficulty, which would control and prevent crime without

unreasonably violating the constitutional rights of a suspect. These measures are far less invasive than section 49 which can only be saved if the word ‘future’ is read down.

4.7 Conclusion

Referring to the old section 49, the Court in *Walters* stated that the use of force to overcome resistance to an arrest was in itself problematic, but that the more difficult part of the problem was the use of force against a fleeing suspect.⁹⁹ This problem continues to exist although in a different form. The introduction of the new section 49 into the South African legal system does not cease the battle for constitutional harmony between law-and-order interests and the fundamental rights of suspects.

The battle for constitutional harmony may be attributed mainly to the fact that parliament did not heed the judiciary’s rulings on the values and consequent fundamental principles underlying constitutionalism. This submission is supported by the fact that in *Walters*, which was handed down after the new section 49 was passed, the Constitutional Court highlighted that in *Makwanyane* where several considerations were in issue the ‘ . . . [common] thread that ran through all [the individual judgments] was the great store our Constitution puts on . . . the rights to life and to dignity.’¹⁰⁰

In sketching section 49 the South African Parliament borrowed extensively from specifically the Canadian legislation without properly considering the suitability thereof within its unique situation. Notwithstanding the latter it could be argued that because the

⁹⁹ *Walters supra* para 23.

¹⁰⁰ *Walters supra* para 5.

future harm concept was borrowed it is capable of being clarified as it is also included in the Canadian Criminal Code. Against this it is asserted that the meaning ascribed to it must be responsive to the environment in which arrestors operate as well as the mechanisms in place to control and assess its lawful application.

Canada has lower levels of the use of force by the police and is better able to maintain administrative mechanisms which can enforce accountability with regards to such a standard than South Africa.¹⁰¹ Police officers in Canada do not face,

‘anywhere the same levels of violence in the day to day execution of their duties as do police in South Africa. Police use of force is rare, and there is little case law which defines the circumstances in which deadly force may be used.’¹⁰²

It is further stated that most Canadian police officers spend their entire careers without having to use their weapons.¹⁰³ On average there are only ten deaths per year resulting from police shootings in Canada.¹⁰⁴ The conditions in which deadly force may be used under Canadian law should thus not be applied in the South African context.

In light of the above it is clear that the South African state can only strictly control and limit the use of deadly force if it follows the guidance given by the judiciary. The starting point in this regard is to consider the framework created in *Walters*. In *Walters*, it was held that it is imperative to acknowledge that the circumstances that occur in

¹⁰¹ Bruce 2002, 6

¹⁰² Griffiths et al 1999, 255

¹⁰³ *Ibid*

¹⁰⁴ Griffiths et al 1999, 275.

human experience are infinite and that the adoption of hard and fast rules that bind arrestors in every conceivable situation are not feasible.¹⁰⁵ The guidance to be afforded in respect of the new section ought thus to be broad, but clear.

The South African parliament appears not to have considered that in the South African context a complete departure from its violent history demands that the greatest care be taken to discourage unjustifiable aggression and violence. Section 49 omits to do so in as far as it, *inter alia*, allows force that is intended to cause death or grievous bodily harm to be used in circumstances which it does not outline with any degree of clarity. In this regard it is submitted that when considering the use of deadly force cognizance should be taken of the research by Mr Bruce, referred to in *Walters*, which indicates that ‘force tends to begets force and violence, violence.’¹⁰⁶ It is also equally important to be mindful that the Court considered that where the use of firearms by the police has been cut down, criminals ‘tend to follow suit in their interaction with the police.’¹⁰⁷ The use of dangerous weapons such as firearms should thus be used as a last resort.

Section 49 places both arrestors and suspects particularly a suspect who tries to flee from arrest in a precarious position. The provision informs an arrestor that a person is a suspect if he is reasonably suspected of committing an offence and that deadly force may be used against such a suspect provided it is reasonably believed that he will cause death or grievous bodily harm in the future.

¹⁰⁵ *Walters supra* para 48.

¹⁰⁶ *Walters supra* para 16.

¹⁰⁷ *Ibid*

If one were to apply the above to the factual scenario in *Walters* where a burglar fleeing from a bakery was shot and killed by the owners of the bakery one would have great difficulty in deciding whether deadly force would be permitted in terms of the new section 49. On the face of it one may conclude that since the burglary did not involve death or the infliction of grievous bodily harm deadly force is not permissible. At the same time, however, one also needs to bear in mind that although a suspect did not commit one of the latter offences, it does not mean that he will not do so in the future. It must therefore be considered whether there are reasonable grounds to believe that the suspect would cause death or grievous bodily harm in the near future. In this regard arrestors need guidance from section 49.

The need for guidance in determining a suspect's future dangerousness is important albeit section 49 requires that an arrestor needs only to have a reasonable suspicion that the suspect will cause death or grievous bodily harm. This view is supported in *Walters*, where the Court highlighted that the state is called upon to ' . . . set an example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to condone, let alone promote, excessive violence against transgressors.'¹⁰⁸ To achieve the latter the need for guidance to prevent or at least minimize unreasonable errors in the application of deadly force speaks for itself.

The vague nature of section 49 prevents the provision from achieving its purpose in a constitutional fashion. More importantly, the profound negative impact that it has on constitutional rights results in the important purpose that section 49 seeks to serve

¹⁰⁸ *Walters supra* para 47.

becoming less significant. In order to reverse the latter position regard may be had to the reasoning in *Walters*, where Kriegler J held that the legal position regarding the use of deadly force is ‘quite simple’ in that the broad principles underlying arrest are clear enough to be understood and applied by anyone of average intelligence and common sense.¹⁰⁹

In *Walters* the broad principles governing arrest and the use of force were set out to clarify the legal position. For purposes of this Paper it is relevant to state these principles as it informs the operation of the new section 49 too. The first relevant principle is that when a suspect flees, force may only be used where it is necessary and then only the minimum degree of force that will be effective may be used.¹¹⁰ The second principle is that resistance or flight does not have to be overcome or prevented at all costs as arrest is not an objective in itself, but merely an optional means of bringing a suspect before a court of law.¹¹¹ The use of deadly force against a petty criminal who is likely to ‘get clean away if not stopped there and then’ is thus not permitted.¹¹² Deadly force may only be used if the arrestor reasonably believes that a suspect: poses an immediate threat of serious bodily injury to the arrestor or to the public; or the arrestor has committed a crime involving the infliction or threatened infliction of serious bodily harm.¹¹³ In addition deadly force in terms of the new section 49 may be used if there is a reasonable suspicion that a suspect will cause death or grievous bodily harm in the immediate future if he is not stopped forthwith.

¹⁰⁹ *Walters supra* para 48.

¹¹⁰ *Walters supra* para 49.

¹¹¹ *Ibid*

¹¹² *Ibid*

¹¹³ *Walters supra* para 52.

CHAPTER 5: IMPLICATIONS OF SECTION 49 AND RECOMMENDATIONS

The Bill of Rights does not expressly deal with the rights of a person suspected, but not yet formally accused of committing a crime as a specific category of subjects within the criminal justice system. A suspect does therefore not enjoy the protection of the rights in section 35 of the Constitution which protects arrested, detained and accused persons. This implies that a suspect enjoys all the rights and freedoms enshrined in the Constitution until the moment he is lawfully arrested.

Once the process of arrest is initiated an arrestor has much to consider. It has to be considered that '[the] state has a systematic interest in ensuring that suspects are brought to justice through trial and possible punishment [for] if [they] were able to flee successfully from arrest on a more or less regular basis, the threat of punishment would be weakened and the efficiency of the criminal justice system as a deterrent to crime undermined.'¹ At the same time an arrestor may not lose sight that the efficiency of the justice system cannot be enhanced by an overdependence on deadly or forceful measures.²

In light of the above it is recognized that no right in the Bill of Rights is absolute. Any constitutional right may be limited provided such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The

¹ *Govender supra* para 12.

² See Watney 2001, 849 where it is emphasized that a person fleeing from the police has not yet been convicted of an offence and that the presumption of innocence still operates in respect of such a suspect. It is also pointed out that the Court in *Walters* held that even an escaping convicted person enjoys the constitutional rights as enshrined in the Bill of Rights.

justifiability of the use of deadly force against a fleeing suspect was discussed at great length in Chapter Four of this Paper. It suffices thus to state only that the constitutionality of section 49 demands that one weighs the importance of protecting law-and-order interests against the rights of the suspect.

When weighing up the rights of a suspect against law-and-order interests it must be recognized that the South African legal system favours the rights of the innocent over the rights of the guilty. Furthermore it should be accepted that the latter principle may extend beyond private defence to certain instances where a suspect does not pose an imminent danger. In this regard the greatest degree of clarity is needed to avoid unjustifiable limitations of constitutional rights. This does not mean that section 49 should literally provide instructions that would cover every conceivable eventuality. Clear, broad principles, as was laid down in *Walters* must be established.

It is suggested here that the general rule which prohibits the use of deadly force against a fleeing suspect be applied as strictly as possible. This rule should not be deviated from unless a fugitive is reasonably believed to have committed an offence which involves death or grievous bodily harm or if it is reasonably suspected that if the suspect succeeds in escaping he will cause death or grievous bodily harm in the immediate future. In these circumstances deadly force should be used as a last resort. If there is any other effective measure that is less invasive of the rights of a suspect then such measure should be employed.

The abovementioned grounds for the use of deadly force are akin to the grounds which were confirmed in *Walters*. It is submitted that these grounds strike a balance between law-and-order interests and the constitutional rights of suspects. The rights of the suspect may be limited to protect the lives of his innocent victims. In such circumstances it should be clear that it would be unreasonable to allow the suspect to escape and moreover if the state requires an arrestor to allow a suspect to escape in the circumstances mentioned it (the state) would be in dereliction of its positive duty to protect the right to life.

It is submitted that it is imperative that cognizance be taken of the reality that even a reasonable person of average intelligence cannot readily be expected to familiarize himself adequately with a statutory provision that may never affect him. As a result there is a need to make the public aware of the law and what it provides. The state after all has a positive duty to protect every person from unwarranted violence from both public and private sources and section 49 empowers any person authorized to effect an arrest in terms of the CPA to use deadly force.

The above submission is supported by the fact that the rights offended by section 49 create the society envisaged in the Constitution. Section 49 not only limits the rights to life, to human dignity, to security of the person and to be free from violence from both public and private sources, but negates it irreversibly. The power to use deadly force to prevent future death or grievous bodily harm results in overbroad powers which is reasonably capable of giving rise to unjustifiable limitations of rights. What is more is

that section 49 creates an implied ground for the use of deadly force which is open to abuse as there is obviously no concrete indication that the suspected offence already committed must be of a nature that involves death or grievous bodily harm.

In essence section 49 does not only affect suspects, but society as a whole. The reality is that it destroys the prospects of progression towards the society envisaged in the Constitution. Every effort should accordingly be made to correct the position. This is a duty that the state cannot afford to shirk.

The need for the state to take positive action in protecting its citizens appears to have become pressing if one considers the findings by the ICD. The ICD reports that '[w]hile reform of the law on the use of lethal force . . . has been associated with decreases in the use of lethal force in other countries, the ICD statistics indicate that deaths in police shootings have risen sharply despite the implementation of the amended law.'³ Whilst it cannot be concluded with certainty that the new section 49 is the cause of the increase in police shootings it is submitted that if the use of deadly force is strictly limited to the grounds outlined above section 49 will not be open to abuse.

Public awareness of what section 49 entails has no bearing on the constitutional status of section 49. Notwithstanding this the ICD has identified a public perception of section 49 that creates cause for concern especially where ordinary citizens contemplate the powers under section 49. The ICD reports that '[d]espite the element of shock, though in the minds of the public most [suspects] who have died are already condemned as criminals

³ Bruce 2004, 1.

even though we do not know exactly what the evidence was against each them.’⁴ The ICD further states that ‘ . . . people are at best inclined to see these deaths as unfortunate qualified by a sense that they might have in some way “asked for” their fate.’⁵

It is accepted here that public opinion although relevant to the issue at hand is not a substitute for the duty to interpret the Constitution and to uphold the law as was held in *Makwanyane*.⁶ It is also understood that if the rights of citizens depended on public opinion, the protection of rights would be a duty conferred upon Parliament, which has a mandate from the public and is as a result accountable to the public.⁷ Despite the aforesaid it can, however, not be overlooked that section 49 empowers any person to use deadly force. If an individual who holds the above views contemplates the use of deadly force it is highly likely that such an individual is not informed on the basic rules underlying arrest. The public opinion of the issue here is thus important for the purpose of identifying the need to educate the public in the basic principles of arrest and deadly force. In turn the state in raising public awareness fulfils its duty to protect.

The public should be made aware that the purpose of using deadly force under section 49 is not to punish or torture a suspect. In instances where deadly force is unavoidable the purpose is to protect law and order related interests. Accordingly the greatest care should be taken to omit anything from section 49 that would send the message that a certain measure of aggression towards a suspect is ever permissible. Put plainly the wording of

⁴*Ibid*

⁵*Ibid*

⁶*Makwanyane supra* para 88.

⁷*Ibid*

section 49 should foster an attitude towards suspects that is cognizant of their rights and direct about the underlying purpose at which the use of deadly force is aimed.

At international law states are encouraged to exercise strict control over the limitation of life. The principle that the ethical issues related to the use of deadly force be constantly kept under review is thus imperative in this regard. As society progresses so too the law that governs it should change to avoid injustice. South Africa is in the progress of moving away from a history plagued by violence.⁸ It should therefore not employ the most violent measures to reduce violence. Moreover the need to develop non-lethal incapacitating weapons arises.

In our society even the vilest criminal is deserving of protection of the right to life, dignity and security of the person. As a result only factors relevant to the danger that a suspect poses should be considered. The need to consider such factors are inclusive in the principles of reasonableness and justifiability, but as submitted in Chapter Four it should be made explicit albeit in the form of general guidelines. In this way all remnants of the proverbial killing of a child who steals an apple and flees will be destroyed.

To the question whether it is constitutional to use deadly force against a fleeing suspect for purposes of arrest one may answer that provided it is used as defined in *Walters* it may be constitutional. As Watney⁹ puts it the interpretation that the SCA gave to the old section 49(1) goes much further in protecting the rights of fleeing suspects than the new

⁸ According to the Institute for Security Studies violence is still a key challenge for South Africa. See Throwing light on SA crime reality 2004, 1.

⁹ Watney 2001, 846.

section 49.¹⁰ There was thus no need for parliament to have brought the new section 49 into force.¹¹

In conclusion any court faced with determining the constitutionality of section 49 must accept that

‘[i]f the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification- a culture in which every exercise of power is expected to be justified . . . If the Constitution is to be a bridge in this direction, it is plain that the Bill of Rights must be its chief strut.’¹²

Section 49 will thus only survive provided it is interpreted in a manner that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.



¹⁰ Watney 2001, 851.

¹¹ Deane 2002, 108-10. In the latter article it was pointed out that Commissioner of Police and the Minister of Safety and Security argued that the old section 49 could be saved by interpreting it and confining the use of lethal force to serious crimes.

¹² Mureinik 1994, 32.

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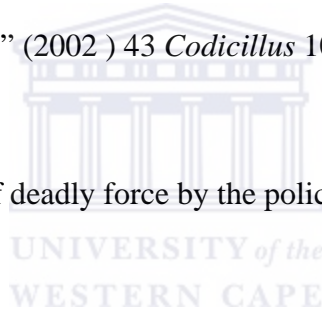
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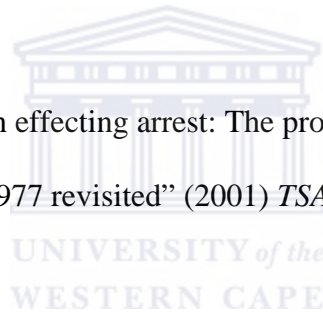
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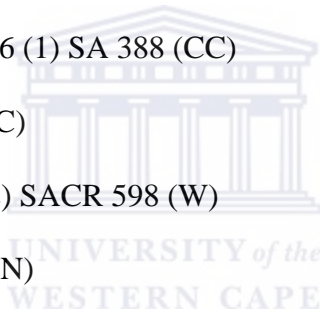
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