

**A CRITICAL ANALYSIS OF SECTION 49 OF THE CRIMINAL PROCEDURE
ACT 51 OF 1977 - 'THE SHOOT TO KILL DEBATE'**

by

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DECLARATION

STUDENT NUMBER: 28454202

I declare herewith that the research paper titled 'A critical analysis of section 49 of the Criminal Procedure Act 51 of 1977 - *The shoot to kill debate*', is my own work and that all sources used and referred to were acknowledged in full.

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SUMMARY

'A critical analysis of section 49 of the Criminal Procedure Act 51 of 1977 - *'The shoot to kill debate'* sought to investigate the rationale and necessity behind the call for yet another amendment of section 49, that purports to clarify the rules under which police are allowed to use their firearms. Bold statements emerged from South Africa's leaders and several politicians, urging the police to 'shoot to kill', and may have the effect of threatening the country's young and vulnerable constitutional democracy.

The research comprised an historical overview of section 49, encompassing the use of force pre- and post- Judicial Matters Second Amendment Act 122 of 1998, followed by an overview of the current section 49.

On the face of it, section 49 violates some constitutionally protected rights, among which are the right to life, to freedom and security, against cruel, inhuman or degrading treatment or punishment and to a fair trial, which includes the right to be presumed innocent. The 'new' section 49 however, withstood Constitutional muster as set out in *Re: S v Walters & another*.

The research proceeded to contrast the current section 49, against the common law defence of private defence. A private individual invoking the defence of private defence is weighed against the law enforcement official invoking the defence under section 49. It is argued that the level of proof in the latter is higher as opposed to the former, resulting in the contention that the law enforcement officer is unfairly discriminated against. The reverse onus, whereby the onus is shifted onto the arrestor, is further canvassed.

In an endeavour to interpret the Bill of Rights of the Constitution of South Africa Act 108 of 1996, the researcher considered international instruments such as the Canadian Constitution, where the use of force in effecting an arrest is regarded as legitimate, under certain conditions.

In concluding the research it was established that the voiceferous calls, for the police to be able to 'shoot to kill', is both unnecessary and irresponsible. Section 49 has survived constitutional scrutiny. The use of force when effecting an arrest is sanctioned, provided that it is in line with the constitutional provisions where the sanctity of human life is respected and emphasized.

The police do not need more powers to use deadly force because they already have all the powers that they need!

There is a lack of knowledge and understanding by the leaders on the application and interpretation of section 49. Proper and effective training of police in Criminal Procedure and Criminal Law, specifically in the interpretation and understanding of section 49, with proper guidelines to limit the potentially excessive scope of section

49, is identified. The training should also include the mind set that ‘shooting to kill’, should not be taken lightly, should be limited and confined to what is reasonable and proportional in the circumstances and should only be exercised as a last resort. A fully capacitated and well resourced police force will also empower and enable police officials.

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CHAPTER 1

1. AN INTRODUCTION

In recent months media reports and international news were dominated by the controversial statements made by several politicians, including Commissioner Bheki Cele, National Chief of Police, Mr. Nathi Mthethwa, the Minister of Police, Mr. Fikile Mbalula, the Deputy Minister of Police, and the President of the Republic of South Africa, Mr. Jacob Zuma¹ that the police must "shoot to kill" and calls were made for the amendment of Section 49 (2)² that will give police more powers.³ These bold statements may have the effect of potentially threatening or compromising the constitutional principles of the country's young and vulnerable constitutional democracy. The rationale behind the proposed 2010 Amendment Bill and the increasing use of lethal force by the police, will be discussed in this chapter.

1.1 THE RATIONALE BEHIND THE PROPOSED 2010 AMENDMENT BILL

National Police Commissioner Bheki Cele called for a change in legislation "*that would allow police to open fire on suspects without having to worry about what happens after that*".⁴

¹ *South Africa's Zuma urges police to shoot to kill amid fears crime will put fans off attending World Cup*, Daily Mail, 29th September 2009 [Online] Available at: www.dailymail.co.uk/news/worldnews/article-1216952,

² *South Africa, Criminal Procedure Act, no. 51 of 1977 (as amended)*, Pretoria: Government Printer, 1977.

³ See *The Sunday Independent*; See also Newsflash the Law Society of the Northern Provinces www.gautenglaw.co.za/documents/document.cfm?docid=84 "Minister wants apartheid lethal force law reinstated" "Some clarity on what Police Minister Nathi Mthethwa hopes to achieve by tinkering with Section 49 of the Criminal Procedure Act has come to light in an interview in *The Sunday Independent*. He wants to reinstate what the paper notes is an apartheid-style law to give police more power to shoot and kill fleeing suspects. In an interview, Mthethwa intimated Section 49 – which stipulates that police can shoot only if their lives are threatened – must be changed to allow police to shoot fleeing suspects. The report points out that a controversial section of the 1977 Act, before it was amended by the democratic government, defined the killing of a fleeing suspect who had committed a serious crime as 'justifiable homicide'."

⁴ Smith, D. *South Africa considers 'shoot to kill' policing ahead of World Cup Plan prompts accusations of return to apartheid-era justice*, 16 September 2009 [Online] Available at: <http://www.guardian.co.uk/world/2009/sep/16/south-africa-police-world-cup>,

He received backing from Mr. Nathi Mthethwa: *"We are tired of waving nice documents like the constitution and the human rights charter in criminals' faces."*⁵

President Zuma's "shoot to kill" assertion has been widely criticised by human rights groups and several opposition political parties. However, Inkatha Freedom Party (IFP) leader, Dr. Mangosuthu Buthelezi, who was present during President Zuma's address, welcomed the President's determination to ensure that police are given more powers to use lethal force when confronted with dangerous criminals.⁶

The palpable difference in the views of human rights groups and that of the country's leaders prompted the writer to research whether the voiceferous calls for the amendment to the existing section 49 legislation is as a result of apparent ignorance in the understanding and application of the statutory and common law or the fact that a dire need does indeed exist to warrant such an amendment.

The necessity for an amendment was highlighted on the 28th of October 2009 by Police Minister Nathi Mthethwa, who told business leaders in Sandton, Johannesburg: "The amendments to section 49 are aimed at clarifying ambiguities. We need to point out that many in our society, including the media, have sensationalised and misinterpreted this issue".⁷

Mthethwa contended further: "There has been a general failure to recognise that the use of deadly force already applies in the current section 49 of the Criminal Procedure Act. Once effected, the changes will leave police in a situation where they will be less open to uncertainty when applying force. It needs to be made clear that the amendments to section 49 speak to our ability to deal with violent criminals who place lives of both police officers and the public in danger."⁸

1.2 THE INCREASING USE OF LETHAL FORCE BY POLICE

⁵ Smith, D. *South Africa considers 'shoot to kill' policing ahead of World Cup Plan prompts accusations of return to apartheid-era justice*, 16 September 2009 [Online] Available at: <http://www.guardian.co.uk/world/2009/sep/16/south-africa-police-world-cup>,

⁶ See www.sabcnews.com October 07 2009.

⁷ *Changes to clarify 'shoot to kill' law*. Sapa, 28 October 2009.

⁸ *Changes to clarify 'shoot to kill' law*, Sapa, 28 October 2009.

In an article “*An acceptable price to pay?*” by David Bruce,⁹ a Senior Researcher, at the Centre for the Study of Violence and Reconciliation, the author investigated the use of lethal force by members of the South African Police Service: “Police use of lethal force can only be controlled effectively if police leaders are committed to ensuring that suitable standards are adhered to. Unfortunately, this has not been a feature of police leadership in South Africa post-1994. There appears to be a lack of concern relating to the use of lethal force. This stems partly from the high levels of violent crime but may also be attributed to the fact that the victims of the use of lethal force, are not only criminals but even where innocent, are politically and socially marginal. Since 2005-2006, when deaths as a result of shootings by police reached their lowest levels, there has been a dramatic rise in such deaths with the total number having increased by over 100% (102%) from 281 to 568, the highest figure recorded by the Independent Complaints Directorate. Statistics over the four years from 2005-2006 onwards indicate that 82% of shooting deaths were the killings of people alleged to be involved in violence against police or otherwise related to police duties. However, the far more significant factor is that deaths as a result of shootings have increased dramatically in the last year with the 568 shooting deaths being the highest recorded by the Independent Complaints Directorate”.¹⁰

1.3 CONCLUSION

The former leader of Parliament of the Congress of the People (COPE), Dr. Mvume Dandala, strongly condemned the South African Police Service members' action that left a young woman dead and two others fatally wounded in Mabopane on Sunday the 10th of October 2009, heeding to the call by their principals to ‘shoot to kill’.¹¹

Commenting on this, the learned Doctor said: “These calls will only incite our under-trained and much under-capacitated police force members to use unnecessary lethal

⁹ Bruce, D. *An acceptable price to pay?: the use of lethal force by police in South Africa*, Pinelands: Criminal Justice Initiative of Open Society Foundation for South Africa [Online] Available WWW: http://www.csvr.org.za/index.php?option=com_content&task=view&id=1336

¹⁰ *Ibid.*

¹¹ M Dandala, *President Zuma’s shoot to kill calls leave much to be desired, 13 October 2009* [Online] Available at: www.defenceweb.co.za (accessed on 08 March 2010).

force while sniffing the lives of innocent South Africans”. As a progressive political party, we acknowledge that the levels of crime in the country are at unacceptable levels, with more police men and women in the line of fire daily working hard to protect us, the citizens, their lives are ever in danger and they need to protect themselves. Criminals do not deserve kids gloves treatment and the police’ response should be within the parameters of the law. The Congress of the People would like to remind President Zuma, and the minister and the commissioner of police that South Africa is a constitutional democracy and they if continue with their irresponsible calls for police to ‘shoot to kill’, these calls will only lead to unfortunate incidents such as Sunday night's. The police responsibility to protect and serve should never trample on the citizens’ basic human rights, and government’s response to crime should be more sensible”.

In direct contrast to the apparent collective amnesia ailing some of South Africa’s leaders, with regard to the sanctity of its constitutional democracy, the Parliaments Monitoring Group aptly observed: “The purpose of the Criminal Procedure Amendment Bill 2010 is to amend the Criminal Procedure Act 51 of 1977, so as to bring the provisions relating to the use of force when effecting an arrest into line with a judgment of the Constitutional Court.”¹²

The apparent lack of understanding of the application of the current section 49 of the Criminal Procedure Act¹³ has prompted the author to critically evaluate the rationale and necessity behind the 2010 Amendment Bill that was tabled in Parliament on the 4th of November 2010 that purports to clarify the rules under which the police are allowed to use their firearms. ¹⁴ This critical evaluation will consist of an historical overview in Chapter 2, the impact of the Constitution on section 49, in Chapter 3, a contrast of the current section 49 (2) against the common

¹² Justice seeking comment on S[ection] 49, DefenceWeb, Monday, 08 March 2010 [Online] Available http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=7014:justice-seeking-comment-on-s49&catid=3:Civil%20Security&Itemid=113

¹³ Criminal Procedure Act, no. 51 of 1977 (as amended).

¹⁴ M Dandala, President Zuma’s shoot to kill calls leave much to be desired, 13 October 2009 [Online] Available at: www.defenceweb.co.za (accessed on 08 March 2010).

law defence in Chapter 4, the international legal position on the use of lethal force by the police in Chapter 5 and the conclusion is addressed in Chapter 6.

CHAPTER 2

2. AN HISTORICAL OVERVIEW OF SECTION 49

This chapter encompasses the use of lethal force pre-and post Judicial Matters second Amendment Act 122 of 1998 and the current section 49.

2.1 THE USE OF LETHAL FORCE PRE – JUDICIAL MATTERS SECOND AMENDMENT ACT 122 OF 1998

2.1.1 BACKGROUND

Burchell observed that before its 1998 amendment, section 49¹⁵ distinguished between the use of deadly force in ss. (2) and lesser, non-deadly force in ss. (1). In ss. (1) the Legislature also distinguished between the situation of a person who resists an arrest and one who flees an arrest. In the case of non-deadly force used on a person who resisted or fled arrest, the use of such force by the arresting officer (or in some cases, the private citizen) had, in terms of the legislative wording, to be weighed against the seriousness of the offence committed by the arrested. The use of force had to be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.¹⁶

The common-law balancing of the force used against the threat posed by the fleeing suspect in the light of the reasonable alternatives open to the arrestor, was included in s 48(1) and so internal limits existed to keep any potential abuse of the arrestor's powers within justifiable bounds.

Section 49(2)¹⁷ provided for what used to be called "justifiable homicide", in other words the justifiable killing of a fleeing suspect. But the Legislature did not

¹⁵ *The Criminal Procedure Act of 1977.*

¹⁶ *See Burchell J. Principles of Criminal Law revised 3 ed Juta (2006) pp. 308.*

¹⁷ *The Criminal Procedure Act 51 of 1977.*

distinguish between the person who resisted and one who fled an arrest, nor did the provision include the common-law balance, which required the use of deadly force to be weighed against the seriousness of the threat posed by the suspect, or a requirement to consider any alternative means open to the arrestor.¹⁸

2.1.2 PRAGMATIC LIMITS TO THE SCOPE OF SECTION 49 (2)

Burchell observed that in response to the conferment of such open-ended powers on the arrestor to shoot and kill, for instance, a young child who had stolen, or was reasonably suspected of having stolen, an item of such relatively trivial value as an apple and who had fled an arrest, the courts over the years employed a number of devices to limit the potentially excessive scope of s 49(2). These limits imposed were as follows:¹⁹

(i) The imposition of objective limits on the conduct of the arrestor²⁰

Rumpff CJ in *Matlou v Makhubedu*²¹ emphasised that s 49(2) had to be read in the light of the following pragmatic limits : “If the circumstances permit, an oral warning should be given; then, if that does not help, a warning shot should be fired into the ground or in the air, depending o the circumstances, and after that the arrestor should try to shoot the subject in the legs.”

(ii) Reversing the onus of proof²²

In *R v Britz*²³ Schreiner JA, took account of the dangers of the subsection in the light of the wide powers accorded to private citizens as well as police officers to invoke its protection and of the fact that Schedule 1 of the Criminal Procedure Act did not distinguish between degrees of seriousness of criminal conduct and the imperative

¹⁸ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 308.*

¹⁹ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 309.*

²⁰ *Ibid.*

²¹ 1978 (1) SA 946 (A) at 958B.

²² See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 309.*

²³ 1949 (3) SA 293 (A).

to respect the sanctity of human life. He concluded that the Legislature must have intended to place the onus on the arrestor, of proving that he or she fell within the scope of the subsection. This onus could only be discharged by proof on a balance (or preponderance) of probabilities. Some 36 years later, in *S v Swanepoel*²⁴ Rabie CJ affirmed that the Schreiner JA approach in *Britz* was still valid, regarding onus of proof.

(iii) The imposition of objective limits on the arrestor's belief²⁵

Coetzee J in *S v Barnard (1)*²⁶ suggested a rather different method of limiting the scope of the defence available to an arrestor in terms of s 49. He recommended that, if the arrestor's defence was that he mistakenly thought that he was justified in using force, in terms of s 49, his genuinely held mistake would not alone serve to excuse his conduct if he had exceeded the scope of his authority. His mistaken belief would, according to Coetzee J, have to be reasonable as well.

None of these three devices appeared to satisfy genuine critics of the unbridled scope of s 49(2).²⁷ Even the Constitutional Court in *S v Makwanyane*,²⁸ in declaring the imposition of capital punishment unconstitutional, made passing reference to the need for s 49(2) to be brought into line with the Constitutional emphasis on the sanctity of human life.²⁹ As had been said: "If the State has no right to take life in punishment of a convicted criminal, how may it retain the right to kill a person who is only suspected of having committed an offence".³⁰

The Natal High Court in *Raloso v Wilson*³¹ had confirmed that the original s 49(2) was

²⁴ 1985 (1) SA 576 (A).

²⁵ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 310.*

²⁶ 1985 (4) SA 431 (W).

²⁷ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp 309; For critical appraisals of s 49(2), see J R L Milton op cit; N Haysom "Licence to Kill Parts I and II" African Law and Practice" Research Report 1-90, Institute of Criminology, University of Cape Town (1990).*

²⁸ 1995 (3) SA 391 (CC) (1995 (2) SACR 1).

²⁹ At 721 G-H.

³⁰ See *Murdoch Watney 30, citing Sherman in (1980) Vanderbilt LR 71.*

³¹ 1998 (2) SACR 298 (N) at 306-7.

far too widely framed and that there was a reasonable prospect that it would not survive Constitutional scrutiny, and Hefer JA in *Government of the Republic of South Africa v Baseo*³² had described the “awesome power” of the police. This heralded the 1998 amendment.

The South African Legislature intervened in the form of an amendment to the Criminal Procedure Act in terms of section 7³³ to redefine the extent of the use of force in effecting arrest but, as a result of opposition by the police, it took some five years for this amendment, which was passed in 1998, to come into effect on 18 July 2003. In the intervening years the Supreme Court of Appeal and the Constitutional Court considered the validity of the old s 49 both 49(1) and 49(2) in terms of Constitutional parameters.³⁴

2.2 THE USE OF LETHAL FORCE – POST JUDICIAL MATTERS SECOND AMENDMENT ACT 122 OF 1998

2.2.1 BACKGROUND

Burchell stated that during this five-year inter-regnum, the Supreme Court of Appeal and the Constitutional Court embarked on a creative and thorough re-evaluations of the old s 49, and in effect served to introduce the essence of the 1998 legislative version of s 49 into their decisions through judicial interpretation of the old s 49 in terms of the Constitution.³⁵

2.2.2 THE NEW FACE OF SECTION 49

Burchell held the view that in *Govender v Minister of Safety and Security*³⁶ the Supreme Court of Appeal read down the old s 49(1) in terms of the Constitution, to require not merely a proportionality between the nature and degree of the force

³² 1996 (1) SA 355 (A) at 368 D-E.

³³ *The Judicial Matters Second Amendment Act 122 of 1998*.

³⁴ See See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 310*.

³⁵ See See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 310*.

³⁶ 2001 (4) SA 273 (SCA) (2001 (2) SACR 197).

used but also the seriousness of the offence committed or reasonably suspected of having been committed. The Supreme Court of Appeal, applying the reasonableness standard, highlighted that the nature and degree of force used must be proportional to the threat posed by the fugitive to the safety and security of police officers and others.³⁷

Burchell further said that shortly after the Govender matter, section 49 (2) came to be considered by the Constitutional Court in *Ex parte Minister of Safety and Security : In re S v Walters*.³⁸ In *Walters* the Constitutional Court held s 49(2) to be inconsistent with the Constitution, as it infringed the rights to dignity, life and security of a person and could not be saved by the limitations clause. The Constitutional Court held that the approach taken by Olivier JA in *Govender* to s 49(1) applied equally to s 49(2). In other words, the narrow test of proportionality between the seriousness of the relevant offence and the force used should be expanded to include a consideration of the proportionality between the nature and degree of the force used and the threat posed by the fugitive to the safety and security of police officers, other individuals and society.³⁹

Furthermore, according to Olivier JA in *Govender*, the arrestor must have reasonable grounds for believing that the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or that the suspect has committed a crime involving the infliction of serious bodily harm. Kriegler JA in *Walters* held that the same limits would apply to the use of force leading to the death of a fleeing suspect.⁴⁰

The Constitutional Court in *Walters* emphasised that the purpose of arrest is to bring before a trial court persons suspected of having committed offences. An arrest is not a form of punishment. In deciding what degree of force is necessary to prevent a fleeing suspect from escaping, the threat of violence the suspect poses must be

³⁷ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 310.*

³⁸ 2002 (4) SA 613 (CC) (2002 (2) SACR 105.

³⁹ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 311.*

⁴⁰ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 311.*

balanced with the nature and circumstances of the offence. Ordinarily the suspect must pose a threat of violence to the arrestor or others. These limitations do not detract from the rights of the arrestor to defend himself or herself in terms of the law of self-defence. These limitations would, however, preclude the killing of an unarmed youth who had stolen property.⁴¹

Kriegler J, in Walters conveniently tabulated the requirements for arresters:⁴²

- “(a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.
- (b) Arrest is not the only means of achieving this purpose, nor always the best.
- (c) Arrest may never be used to punish a suspect.
- (d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.
- (e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.
- (f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.
- (g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.
- (h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable ground of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other means of carrying out the arrest, whether at that time or later.
- (i) These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other

⁴¹ See See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 311.*

⁴² 2002 (4) SA 613 (CC) (2002 (2) SACR 105.

person.”⁴³

2.3 THE CURRENT SECTION 49

2.3.1 BACKGROUND

In Snyman’s *Geregverdigde Doodslag by Inhegtenisneming* he summarized the application of section 49 as follows:⁴⁴

“In this article the wording of the new section is investigated. It is argued that there is no substantial difference as far as meaning is concerned between paragraphs (a), (b) and (c) of subsection (2) of the section. It is furthermore argued that the proviso in subsection (2) is not limited to cases of private defence or putative private defence. As a result of the insertion of the words “or future” in paragraphs (a) and (b) of subsection (2), the proviso also applies to situations where an arrestor kills or seriously injures an arrestee whose conduct at the time of the arrest does not pose an imminent threat to the safety or security of the arrestor or anybody else. The arrestor must, however, believe on reasonable grounds that the arrestee will pose some threat to the life or physical integrity of another some time in the future.

*Furthermore, the defence created in this section is only a ground of justification, that is a defence which excludes the unlawfulness of the act. The section does not deal with the element of culpability (mens rea). In order to decide whether an arrestor whose reliance on this defence fails, is guilty of murder, culpable homicide or perhaps not guilty of any crime, a court simply applies the ordinary principles relating to intention and negligence”.*⁴⁵

2.3.2 REASONABLE/PROPORTIONAL TEST

Burchell contends that the new version does specifically stipulate that the force used

⁴³ See See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 311.*

⁴⁴ See Snyman, C.R. *Geregverdigde Doodslag by Inhegtenisneming: die bepalings van die nuwe artikel 49 van die Strafproseswet STELL LR 2004 3 pp. 549.*

⁴⁵ See Snyman, C.R. *Geregverdigde Doodslag by Inhegtenisneming: die bepalings van die nuwe artikel 49 van die Strafproseswet STELL LR 2004 3 pp. 549.*

in either overcoming the resistance of the arrested or preventing his or her escape must be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing. This general limiting factor applies to all use of force, including the use of deadly force. The obvious value of a proportional/reasonable criterion is that a court has to weigh in the degree of force used by the arrestor, the requirement that the suspect has been made aware of the fact that he or she is to be arrested, the need for oral warnings or warning shots (see *Matlou v Makhubedu*),⁴⁶ the ability of the suspect to escape (for instance, his or her agility on foot or climbing) and specifically in the case of an arrestor using a firearm, whether such use of the firearm involves a risk of harm to innocent bystanders and/or whether the arrestor is threatened.⁴⁷ The reasonableness criterion also incorporates an emphasis on the reality that the discretion to use or not to use force (including deadly force) must be assessed in the circumstances, not in the comfort of a judicial armchair.⁴⁸

2.3.4 ADDITIONAL LIMITS

Burchell contends that if someone seeks to justify the use of deadly force, further limits are required by the new s 49. These three additional limits relate to aspects of the belief of the arrestor, which must exist on reasonable grounds. Incidentally, these limits were not contained in the original Judicial Matters Bill⁴⁹ that merely sought to balance the force used against the seriousness of the offence reasonably suspected of having been committed.⁵⁰

- (l) The first limit on the belief of the arrestor is that he or she must believe on reasonable grounds that deadly force is immediately necessary to protect himself or herself, or any person who might be assisting them, from imminent

⁴⁶ 1978 (1) SA 946 (A); 1978 2 All SA 77 (A).

⁴⁷ See the American Institute's Model Penal Code (1985), para 3.07(2) (b) (iii).

⁴⁸ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 313.*

⁴⁹ B95-97.

⁵⁰ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 314; See also Etienne du Toit et al Commentary on the Criminal Procedure Act 5-30A.*

or future death or grievous bodily harm. This first limit appears to contain a restating of the scope of the common-law defence of private defence and putative private defence, with two central differences : In all cases where an arrestor kills a fleeing suspect he or she must believe, on reasonable grounds, that it is immediately necessary to protect himself or another from imminent death or grievous bodily harm (compare the approach suggested by Coetzee J in Barnard) and a belief, on reasonable grounds, regarding both an imminent death or grievous bodily harm is sufficient. By requiring objective reasonable grounds for the belief of the arrestor in all cases, even where the charge against him or her is based on a crime requiring subjective intention, the scope of this legislative version of putative private defence places the arrestor in a more restrictive position than a person killing another under putative private defence, under the common law where the indictment is one of murder. Where the indictment is one of culpable homicide the reasonableness of the arrestor's belief is, as a matter of principle, automatically in issue.⁵¹

However, by extending the objectively-assessed putative defence available to the arrestor, to a threat that is not merely "imminent" (as required as a minimum by common law) but also to a threat of "future" death or grievous bodily harm, the legislator has provided a justification for the use of deadly force which is potentially broader than the equivalent defence under the common law. The Legislature, by referring to "future" death or grievous bodily harm has introduced a potentially vague criterion that is difficult to define. Does "future" mean that the harm may occur in a few minutes, hours, days or even months?⁵²

- (ii) The second limit requires that the arrestor believes, on reasonable grounds, that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed. The American Law Institute's Model Penal Code contains a similar proviso that the "actor believes

⁵¹ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 314.*

⁵² See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 314.*

that there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed”.⁵³ However, it will be immediately evident that the Model Penal Code does not require objective limits of reasonable grounds or probable cause to the arrestor’s or actor’s belief. The arrestor’s bona fide (subjective) belief would appear to be sufficient to excuse him or her.⁵⁴

Burchell states that in order to give this second limit in the new section 49 a meaning and scope distinct from the first limit (above), it would appear to be necessary to interpret the second limit as covering the risk of serious bodily harm or death by the suspect to any other person apart from the arrestor or person assisting him, whose life or bodily integrity are protected by the first limit (above). Apart from this difference the same comments that were directed at the first limit applies to the second limit as well.⁵⁵

The general effect of the combination of the first and second limits reflects the approach of the United States Supreme Court in *Tennessee v Garner*⁵⁶ where the court held that a Tennessee statute was incompatible with the Fourth Amendment on reasonable seizures on the basis that it did not adequately limit the use of force by distinguishing between felonies of different magnitudes. In rejecting the validity of the police officer’s use of deadly force against an apparently unarmed, relatively young suspected housebreaker, Justice White, delivering the opinion of the court, held that officers cannot resort to deadly force unless they “have probable cause... to believe that the suspect [has committed a felony and] poses a threat to the safety of the officers or a danger to the community if left at large”.⁵⁷ Unlike the Model Penal Code formulation,⁵⁸ the Supreme Court in *Garner* did impose objective (“probable cause”) limits on the officer’s belief. Of course, the South African formulation has the merit of not having to draw slippery distinctions between

⁵³ Para 3.07(2)(b)); See See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 315.*

⁵⁴ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 315.*

⁵⁵ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 315*

⁵⁶ 471 US 1, 85 L Ed 2d 1.

⁵⁷ At 471 US 6, 85 L Ed 2d 6.

⁵⁸ See s 3.07(2)(b)(iii) and (iv).

felonies and misdemeanors and between different types of felonies. It is far better to confine the operation of the statutory justification of public authority to cases of reasonably perceived serious physical violence and death as the South African legislature has done.⁵⁹

(iii) The third limit covers the situation where the arrestor reasonably believes that the offence for which the arrest is sought is in progress and involves the use of life threatening violence or a strong likelihood of grievous bodily harm. In other words, this limit focuses on the arrestor's reasonable belief about the nature of the offence that the suspect is in the process of committing.⁶⁰

All of the above three limits in the new South African legislation involve instances of actual or reasonably perceived physical violence of a serious degree to the arrestor (or person assisting him to arrest) (limit(a)), to another person (limit (b)) and where the suspect is confronted in flagrante delicto while committing a crime involving a risk of serious bodily harm or death (limit(c)). Therefore, all three limits would rule out an automatic justification.⁶¹

2.4 CONCLUSION

At the end of the day, the justifiability of the new s49 will have to be examined not only in the light of the reasonableness of its wording and scope but also in the light of the need for the development of more scientific and effective techniques of crime detection and apprehension.⁶²

Section 49, as revised in 1998 and now in force, marks an improvement on the old s 49(2) - an improvement that if interpreted in the light of the above submissions

⁵⁹ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 315*

⁶⁰ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 315*

⁶¹ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 315.*

⁶² See Watney, M. *To shoot ... or not to shoot: the changing face of section 49 of the Criminal Procedure Act 51 of 1977. De Rebus 30, 1999.*

(especially the suggested return to the hallowed principle of onus of proof resting on the State) could immunise the amended section against any Constitutional attack.

The following constitutes an important difference between the old and the new wording of section 49; in terms of the old wording, X could, in order to prevent Y from fleeing, shoot or grievously harm Y merely on the grounds that Y had in the past committed a serious crime, such as murder. X was justified to do this even though:⁶³

- (iv) Y's actions at the time that X came across her did not constitute and immediate threat to X's or anyone else's safety; and
- (v) even though there was no danger that Y would in future kill or grievously harm any person.

In terms of the new wording, however, the killing of Y or the causing of grievous bodily harm to Y by X under the circumstances mentioned under (a) and (b) is no longer possible. Even though X is convinced that Y is the person the police is looking for in connection with a murder that she (Y) has committed in the past, and even though objectively it is certain that Y is indeed the murderer, X may not, in terms of the new wording, use any deadly force or even inflict grievous bodily harm against Y if, under circumstances where Y's conduct does not constitute any immediate threat against X or any other person, and there is also no reasonable presumption that Y will use deadly or grievous force against any person in future, X comes across Y, wants to arrest her, and Y then flees.⁶⁴

⁶³ See *Snyman, C.R. Criminal Law 5 ed Lexis Nexis pp. 134 (2008)* the wording of s 3.07 (2)(b)(iv) of the Model Penal Code. This provision amounts to the following: X may not use lethal force in the course of effecting an arrest unless (apart from certain other provisions not applicable here) there is compliance with one of the following two alternative requirements : (A) that Y had in the past committed a crime which involved the use of lethal force (eg murder), or (B) that there is a substantial risk that Y may use lethal force or inflict serious injury in respect of another person if the arrest is postponed. The wording of the new s 49 corresponds only to the (B)-part of s 3.07 (2)(b)(iv) of the Model Penal Code. The (A)-part, which forms an alternative to (B), is not covered in the new s 49.

⁶⁴ See *Snyman, C.R. Criminal Law 5 ed Lexis Nexis pp. 134 (2008)*

CHAPTER 3

3. THE CONSTITUTIONALITY OF SECTION 49

3.1 INTRODUCTION

In the Preamble of the Constitution⁶⁵ all, the people of South Africa, adopt the Constitution as the supreme law of the Republic ‘so as to-establish a society based on democratic values, social justice and fundamental human rights.’

The Constitution in section 7(1)⁶⁶ commanded the State and all its organs to respect, protect, promote and fulfil all of the rights protected by the Bill of Rights as contained in Chapter 2⁶⁷.

In this Chapter the impact of the Constitution on section 49⁶⁸ and the constitutional principles set out in *S v Walters*⁶⁹ will be addressed.

3.2 THE IMPACT OF THE CONSTITUTION ON SECTION 49

Section 49(2) of the Criminal Procedure Act⁷⁰ allows for the blameless killing in effecting the arrest of persons reasonably suspected of having committed certain offences.⁷¹ In the past, this provision has served to justify killing in various circumstances.⁷² *Prima facie*, section 49(2) violates the right to life,⁷³ of freedom and

⁶⁵ *Constitution of the Republic of South Africa, 1996.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Criminal Procedure Act, no. 51 of 1977.*

⁶⁹ 2002(2) SACR 105 (CC).

⁷⁰ *Criminal Procedure Act, no. 51 of 1977.*

⁷¹ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 308; See also Snyman, C.R. Criminal Law 5 ed Lexis Nexis pp. 137 (2008); Constitution of the Republic of South Africa, 1996.*

⁷² 1999 5 BCLR 580 (D).

⁷³ See *Macu v Du Toit* 1983 4 SA 629 (A); See also *S v Swanepoel* 1985 1 SA 576 (A).

security,⁷⁴ against cruel, inhuman or degrading treatment or punishment,⁷⁵ and to a fair trial, which includes the right to be presumed innocent.⁷⁶

In all instances the Constitution⁷⁷ must be used to determine the validity of a particular legal principle, or to measure whether the *law applicable violates constitutional values and individual*.⁷⁸

In *Makwanyane*⁷⁹ there were a number of other considerations in issue and the individual concurring judgments each emphasised one or more particular features, but a thread that ran through all was the great store our Constitution puts on the two interrelated rights to life and to dignity. This, for instance, is what O'Regan J said: "The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence – it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity."⁸⁰

Commenting on the divergent approaches of members of the Court, Leibowitz and Spitz suggest that: "In view of the fundamental violation of human dignity associated

⁷⁴ *Constitution of the Republic of South Africa, 1996.*

⁷⁵ *Constitution of the South Africa, 1996, sec. 14.*

⁷⁶ *Constitution of the South Africa, 1996, Section 12(1)(e).*

⁷⁷ *Constitution of the Republic of South Africa, 1996.*

⁷⁸ See *Snyman, C.R. Criminal Law 5 ed Lexis Nexis pp. 134 (2008)*; see also *Snyman, C.R. 2004 Stell LR 536*; See also *Neethling 2000 THRHR 111*; *Burchell, J. 2000 SACJ.*

⁷⁹ *1995 6 BCLR 665 (CC).*

⁸⁰ See *Kruger, A. Use of force in effecting arrest in Hiemstra's Criminal Procedure, 2008.*

with imposing the death penalty for murder, the approach of the four members of the court referred to above is to be welcomed. Nevertheless, we submit that the interpretative approach of Chaskalson P is particularly effective where the conduct complained of raises issues both under section 10 and under another, more specific, fundamental right. Where a more specific right speaks with greater direction to the issue raised, it is submitted that section 10 will add interpretative flesh to the bones of the more specific right, assisting in the definition of the latter's scope. This approach accords due importance to the protection of human dignity as a founding constitutional value, and utilizes its entrenchment as a tool for affording a purposive interpretation to the content of the right more directly implicated by the conduct at issue. Nevertheless, this approach avoids the potential pitfalls of the most expansive available interpretation of the scope of section 10."⁸¹

The right to life is, of course, of central importance in any Bill of Rights and in practice, since without life none of the other civil rights can be exercised. But, even the right to life is qualified by the judicial recognition of the right to kill in legitimate defence of oneself or others. The question remains, however, whether it is permissible to kill a suspect fleeing arrest who has committed, or is reasonably suspected of having committed, a serious offence and who cannot be apprehended using lesser force.⁸²

Greater weight is given to the sanctity of human life of the fleeing suspect in the new (1998) section 49. But, those intimately involved in law enforcement might question whether enough weight is given to the interests of law enforcement.⁸³

The functions of the police and others in the administration of justice would be crippled if no physical force could lawfully be used by the arresting officer in

⁸¹ See Leibowitz, D. and Spitz, D. *The Right to Human Dignity in Constitutional Law of South Africa*, Chaskalson (ed), 1996.

⁸² See Hiemstra's *Criminal Procedure "Use of force in effecting arrest"*, Snyman, C.R. 2004 Stell LR 536; See also Snyman, C.R. *Criminal Law 5 ed Lexis Nexis pp. 134 (2008)*

⁸³ See Neethling, 2000 THRHR 111; Burchell, J. *Deadly force...*, pp. 202.

securing an arrest. But, is the use of *deadly force*, as opposed to lesser force, justified in terms of the law in effecting the arrest of a criminal suspect.⁸⁴

3.3 THE CONSTITUTIONAL PRINCIPLES AS SET OUT IN *S V WALTERS*

The present wording of section 49 (2) was introduced into the CPA by the Judicial Matters Second Amendment Act in 1998 since it was anticipated, at the time, that the provisions of the "old" section 49 would not pass Constitutional muster. However, the new text only came into force in 2003 that is five years after the passing of the 1998 amendment. In the mean while, the "old" section 49(2) was declared unconstitutional and invalid by the Constitutional Court in 2002, in the case of *Ex parte: The Minister of Safety and Security and Others: In re the State v Walters and Another*.⁸⁵ In a unanimous judgment (per Kriegler J, concurred in by Chaskalson CJ, Langa DCJ, Ackermann, Madala, Mokgoro, O'Regan, Sachs and Yacoob JJ, and Du Plessis and Skweyiya AJJ) the Constitutional Court set aside the High Court's order and substituted it with an order declaring section 49 (2) of the Criminal Procedure Act⁸⁶ to be inconsistent with the Constitution and invalid.⁸⁷

In *Ex Parte Minister of Safety & Security & others: In Re: S v Walters & another*⁸⁸ the Court made the following remark: "Such a provision authorising the use of force against persons – and more particularly justifying homicide – inevitably raises constitutional misgivings about its relationship with three elemental rights contained in the Bill of Rights.⁸⁹ They are the right to life, to human dignity and to bodily

⁸⁴ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp 310.*

⁸⁵ 2002(2) SACR 105 (CC) The court found that the previous formulation was too wide to be constitutional. In terms of the previous wording, X's killing of Y could be justified even if there was no proportionality between the seriousness of the crime for which Y had been arrested and the seriousness of the force applied by X. The old formulation could be interpreted in such a way that it was lawful for X to shoot and kill Y, who had stolen only one apple from a fruit vendor at a market stall and then run away with it, in circumstances in which it was unlikely that he would ever be traced again (128–130).

⁸⁶ Criminal Procedure Act, no. 51 of 1977.

⁸⁷ Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp 311.*

⁸⁸ [2002] JOL 9743 (CC).

⁸⁹ See Chapter 2 of the Constitution of the Republic of South Africa, 1996, which is introduced as follows in s 7(1): "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

integrity.⁹⁰ The Constitution commands the State and all its organs to respect, protect, promote and fulfil all of the rights protected by the Bill of Rights.⁹¹ These particular rights are, insofar here relevant, expressed in the following terms by sections 10, 11 and 12 of the Constitution:"

*In Ex Parte Minister of Safety & Security & others: In Re: S v Walters & another*⁹² the Court set down the right regarding the use of force in effecting an arrest as follows:

"[54] In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:

- (a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.
- (b) Arrest is not the only means of achieving this purpose, nor always the best.
- (c) Arrest may never be used to punish a suspect.
- (d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.
- (e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.
- (f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.⁹³
- (g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.

⁹⁰ See Burchell, *J. Principles of Criminal Law revised 3 ed Juta (2006) pp 311.*

⁹¹ See Section 7(2) of the Constitution of the Republic of South Africa, 1996 read with s 8(1), which provide as follows: "7(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights." "8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

⁹² [2002] JOL 9743 (CC).

⁹³ See Burchell, *J. Principles of Criminal Law revised 3 ed Juta (2006) pp 312.*

- (h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.
- (i) These limitations in no way detract from the rights of an arrester attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.⁹⁴

3.4 CONCLUSION

It has been argued that Section 49(2) is not a reasonable limitation, and should be declared unconstitutional.⁹⁵ This answer is premised on the given that the death sentence has been declared unconstitutional.⁹⁶ If a court cannot impose the death sentence, allowing an arbitrary extra-curial discretion to kill seems perverse. A mere suspicion of crime, without any proof, cannot justify an infringement of a person's most basic right. Experience has shown that killing under such circumstances may be mistaken, but obviously remain irreversible.⁹⁷

However, in *S v Makwanyane*⁹⁸ Chaskalson P left room for a distinction between “shooting a fleeing criminal in the heat of the moment” and “the execution of a

⁹⁴ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp 312.*

⁹⁵ See *R v Douglas Lines (Ontario Court of Justice (General Division), per Hawkins J, unreported judgment of 26 April 1993) s 25(4) of the Canadian Criminal Code was declared unconstitutional. See also the obiter remarks in S v William 1992 NR 268 (HC), in which Hannah J recommended that the Law Reform Commission consider whether s 49(2) (which also applies in Namibia) should be repealed or amended in the light of its apparent conflict with the right to life (art 6 of the Namibian Constitution). See also obiter remark in Govender v Minister of Safety and Security 1999 5 BCLR 580 (D).*

⁹⁶ Discussion in par 5B48 *infra*. See also *R v Douglas Lines supra*, which found the justification of the “fleeing felon” rule (s 25(4) of the Canadian Criminal Code) in the fact that felonies had been punishable by death. This rationale no longer exists “in civilized societies where few or no crimes are punishable by death” (15 of typed judgment).

⁹⁷ *S v Barnard 1986 1 SA 1 (A) and Government of the Republic of South Africa v Basdeo 1996 1 SA 355 (A).*

⁹⁸ *S v Makwanyane 1995 3 SA 391 (CC).*

captured criminal”.⁹⁹ International and foreign law also provide examples which show that law enforcers are permitted to use lethal force under at least some circumstances in open and democratic societies.¹⁰⁰

The purpose of the killing should be considered. At present, lethal force is allowed to effect arrest or *to prevent escape*. In the United States, such force is only justified if “the suspect poses a threat of serious physical harm”.¹⁰¹ Restricted to such an extent, section 49(2) would correlate with the common law defence of necessity under South African law, which is in any event available to everyone.¹⁰² The existence of section 49(2) should only be required to allow for lethal force *to effect a lawful arrest*, as is the case under the European Convention.¹⁰³

Section 49(2) authorises killing if arrest cannot be procured and escape cannot be prevented by “other means”. This leaves too much scope for abuse, and should be restricted to a formulation such as “any other means reasonably necessary in the circumstances”.¹⁰⁴

A wide range of offences trigger section 49(2). The range includes major offences, such as murder, but extends to potentially minor offences, such as theft and fraud. Prevention of crime as an aim is clearly disproportionate to the violation constituted by killing someone stealing a *Lunch Bar*.¹⁰⁵ In most other jurisdictions, offences which may trigger the use of lethal force are limited.¹⁰⁶

⁹⁹ *Ibid.* Par. 140

¹⁰⁰ European Convention, art 2(2). On the German law, see F.J. De Jager, *Geweld by inhegtenisneming in die Duitse reg*, 1989 TSAR 24.

¹⁰¹ *Tennessee v Garner* (1985) 85 L Ed 2d 1 See also s 25(4) (d) of the Canadian Criminal Code.

¹⁰² See Snyman, C.R. *Geregverdigde doodslag by inhegtenisneming: die bepalings van die nuwe artikel 49 van die Strafproseswet*, Stell LR, 15(3), August 2004, pp. 536-549.

¹⁰³ Criminal Law Act of 1967, Sec. 2(2) and s. 3

¹⁰⁴ See s. 25(4) (d) and (e) of the Canadian Criminal Code; See also s. 42(2) of the Zimbabwean Criminal Procedure and Evidence Act; see also *S v Chipere* 1992 2 ZLR 276 (S); s. 3 of the English Criminal Law Act of 1967 and *Tennessee v Garner* (1985) 85 L Ed 2d 1

¹⁰⁵ See Hiemstra's *Criminal Procedure* “Use of force in effecting arrest”, Snyman, C.R. 2004 Stell LR 536; See also Neethling, 2000 THRHR 111; Burchell, J. 2000 SACJ; *Constitution of the Republic of South Africa*, 1996, sec. 36(1)(d)

¹⁰⁶ See also *Sapat v Director: Directorate for Organised Crime and Public Safety* 2000 2 BCLR 200 (C), in which a constitutional challenge against ss 37 and 225 failed. In the United States, only felony suspects, in Canada, it had to be an offence for which a person may be arrested without warrant

Section 49(2) may be retained as it is, because it will be “read down” and will therefore be re-interpreted in light of the Constitution.¹⁰⁷ Its open-ended aspects must be interpreted in the spirit of the requirements provided by the limitation clause. For example, “other means” should be interpreted to mean “no other means”, the force used should be weighed against the seriousness of the offence, and the least intrusive means reasonably possible to achieve arrest should be required. Police practice has already evolved into this direction, and supports this conclusion.¹⁰⁸

According to section 36¹⁰⁹, any limitation of the right must be in terms of a law of general application and it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In doing so, a court engages in a balancing act, taking into account the factors listed in that section, 36¹¹⁰ as well as other relevant ones,¹¹¹ and arrives at a global judgment on proportionality.¹¹² The issue is ultimately one of degree, taking into consideration the case’s legal and social setting, values to be protected and the means available to do so.¹¹³

Where a defence, irrespective of whether it is founded in common law or in statute, is not supported by a constitutional fundamental right – the defence of consent, for

(s 25(4)(b)); see also s 495 (a reasonable suspicion is sufficient in respect of an indictable offence, for other offences the person must be found committing it). In Nigeria blameless killing is justified in respect of offences punishable with death or imprisonment of 7 years or more (s 271 of Criminal Code Act 1958 of Nigeria, Cap 42, Laws of Federal Republic of Nigeria

¹⁰⁷ Constitution of South Africa, 1996, section 39(2) and as done in *Tennessee v Garner*

¹⁰⁸ See *South African Police Service Act 68 of 1995 s 13(3) (b)* which provides only for minimum force reasonable in the circumstances is authorize; See also internal SAPS instructions, *Standing Order (G) 341 Arrest and the treatment of an arrested person until such person is handed over to the community service centre commander: Legal Services: Management Services V1.00 Issued on 1999-07-08 by Consolidation Notice 15/1999; Selebe J, National Commissioner, South African Police Service National Instruction - Special service order relating to the use of force in effecting an arrest: Reference: 18/5/1/1 - 1/4/1(5), 18 July 2003.*

¹⁰⁹ Constitution of the Republic of South Africa, 1996.

¹¹⁰ Constitution of the Republic of South Africa, 1996; *The list in section 36 is not exhaustive.*

¹¹¹ *The nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and the less restrictive means to achieve that purpose.*

¹¹² *The list in s. 36 is not exhaustive: S v Manamela (Director-General of Justice Intervening) 2000 5 BCLR 491 (CC); 2000 3 SA 1 (CC); 2000 1 SACR 414 (CC).*

¹¹³ *S v Makwanyane 1995 6 BCLR 665 (CC) par 104; 1995 3 SA 391 (CC); See also National Coalition for Gay & Lesbian Equality v Minister of Justice 1998 12 BCLR 1517 (CC) pars 33–35; 1999 1 SA 6 (CC); 1998 2 SACR 556 (CC); S v Manamela Director-General of Justice Intervening supra par 32.*

example – the party claiming the restriction on the fundamental right¹¹⁴ can still show that it is justified in terms of section 36.¹¹⁵ What is required is that the rule or ground for justification must not clash with constitutional values and that the *existence* of the rule or defence is justified in terms of section 36.¹¹⁶

¹¹⁴ See *S v Manamela (Director-General of Justice Intervening)* 2000 5 BCLR 491 (CC) 2000 3 SA 1 (CC); 2000 1 SACR 414 (CC).

¹¹⁵ *Constitution of the Republic of South Africa Act, 1996.*

¹¹⁶ *Constitution of the Republic of South Africa, 1996; See Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 433 (SE) 453; *Nortje v Attorney-General, Cape* 1995 2 BCLR 236 (C); 1995 2 SA 460 (C) 472; 1995 1 SACR 446 (C); *R v Oakes* (1986) 26 DLR (4th) 200 (SCC).

CHAPTER 4

4. CONTRASTING THE CURRENT (1998) SECTION 49 (2) AGAINST THE COMMON LAW DEFENCE OF PRIVATE DEFENCE

4.1 INTRODUCTION

This Chapter contrasts the defence provided by section 49 against the defence of private defence with specific reference to self defence, as a ground of justification. The legislature by requiring that the arrestor, who has killed a fleeing suspect and is charged with murder, must have believed *on reasonable grounds* that his life (or those of others) was threatened, whereas a private individual invoking the analogous principles of putative private defence to the killing of another only has to adduce evidence of a *bona fide and genuine* (not necessarily a reasonable belief that he was justified in killing), unfairly discriminates against law enforcement officers. The new section 49 introduces a statutory form of 'normative' as opposed to 'psychological' fault at a time when the general approach of the criminal law is one of psychological fault. Is this unequal treatment of law enforcement officers (and others effecting arrests), so far as the assessment of fault is concerned, reasonable and justifiable?¹¹⁷

It is submitted that it would have been better if the legislator had not introduced such a 'normative' concept of fault in s 49 but rather left the common law principles of *mens rea*, as set out in *S v De Blom*¹¹⁸, to govern criminal liability of the arrestor for committing a specific crime while effecting an arrest¹¹⁹. Where killing of a fleeing suspect is involved, the inquiry on a murder charge would be a purely subjective one, whereas on an investigation into the competent verdict of culpable homicide, the reasonableness of the accused's belief would always be in issue as a matter of legal principle. However, the unequal treatment of arresting officers under section

¹¹⁷ See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 317; see also Snyman, C.R. Criminal Law. 5 ed, Durban: Lexis Nexis, 2008. pp. 137.*

¹¹⁸ 1977 (3) SA 513 (A)

¹¹⁹ E Du Toit [et al] (eds), *Commentary on the Criminal Procedure Act*, p. 5—30A

49, as amended by the 1998 Judicial Matters Second Amendment Act, by placing them under greater constraints in the use of deadly force than an ordinary person in a private defence or putative private defence situation, might be regarded as reasonable and justifiable in the light¹²⁰ of research that demonstrates that, in the past at least, the record of the police in issuing oral warnings, firing warning shots and using viable lesser force has not been that impressive¹²¹. Furthermore, if as is suggested below, the *raison d'etre* for the shifting of the onus onto the arresting officer to prove on a balance of probabilities that he or she falls within the framework of section 49 has been substantially removed by the new section 49, there could perhaps be some further justification in imposing 'normative fault' limits in all cases of possible liability of arrestors for the use of deadly force under the new section 49.¹²²

4.2 THE CONCEPT OF REVERSE ONUS

Reverse onuses are sometimes found in criminal statutes but most of the reverse onuses that have recently been questioned in terms of Constitutional parameters have rightfully not survived scrutiny.¹²³ The most recent pronouncement on this matter is that of the Constitutional Court in *S v Manamela*,¹²⁴ where the majority of the court maintained their jaundiced attitude to the reverse onus of proof (as opposed to the accused's burden of adducing evidence) as constituting an unjustifiable infringement of the presumption of innocence. But O'Regan J and Cameron AJ expressed a significant dissent.¹²⁵

The reasons for shifting the onus onto the arrestor to prove on a balance (or preponderance) of probabilities (that he or she falls within the framework of the old

¹²⁰ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 317.*

¹²¹ See Hansson, D. *Firearms used with deadly effect: a study of South African law and practice. Cape Town: University of Cape Town. Institute of Criminology. 1990. (Research Report; 1–90).*

¹²² See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 317.*

¹²³ See A Paizes 'A closer look at the presumption of innocence in our constitution: what is the accused presumed innocent of' (1998) 11 SACJ 409.

¹²⁴ 2000 (1) SACR 414 (CC).

¹²⁵ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 317; see also Snyman, C.R. Criminal Law. 5 ed, Durban: Lexis Nexis, 2008. pp. 137.*

s 49) enunciated in *Britz and Swanepoel*¹²⁶ are based, as we have seen, on the overly wide scope of the protection afforded the arrestor by the old s 49(2), the potential for abuse of state powers in terms of the section and the failure of the wording of the provision to accommodate either an investigation of the nature of the offence suspected or the balancing of the offence suspected against the degree of force used by the arrestor. Apart from one of the factors affecting the open-endedness of the original section 49(2) (ie that it applied not only to the lawful use of force in effecting an arrest by *police officers* but also by *private individuals*), the new section 49 effectively addresses these objections raised against the old section 49(2). It would be a happy day for criminal justice if the courts could now reject the foundation for the reasoning in *Britz and Swanepoel* (supra) on onus and revert to the fundamental presumption of innocence, requiring the prosecution to negative, beyond a reasonable doubt, the defence incorporated in the new section 49 for which an arrestor has adduced evidence.¹²⁷

Of course, this conclusion does not detract from the policy that the arrestor alleging that his or her conduct falls within the scope of section 49 will at least have to adduce sufficient evidence to lay a foundation for the defence. However, he or she should not have to prove the existence of a section 49 defence on a balance (or preponderance) of probabilities.¹²⁸

Furthermore, such a conclusion on onus would also help to insulate the new section 49 from Constitutional attack based upon an infringement of the presumption of innocence or the right to silence.¹²⁹

Apart from the unfortunate (though not necessarily fatal) introduction of a concept of 'normative' fault into the new section 49 and the use of an inherently vague reference to 'future' death or grievous bodily harm in the amended version, it is

¹²⁶ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp 318.*

¹²⁷ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp 318.*

¹²⁸ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp 319.*

¹²⁹ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp 319.*

suggested that the amendment of section 49 in section 7¹³⁰ might just be strong enough to withstand a constitutional challenge — provided the courts adopt the above submission on onus in criminal cases. In fact, the tougher normative, rather than subjective, psychological fault theory, introduced in the new section 49 might be required as a type of 'trade-off' for removing any burden of proof from the shoulders of the arrestor.¹³¹

It is submitted¹³² that the fundamental presumption of innocence (and the right to remain silent) serves to differentiate the issues of policy affecting the allocation of the onus in criminal, as opposed to civil, cases. The general approach to onus of proof in civil cases is that the onus of proving a defence excluding unlawfulness raised by the defendant falls on the defendant to establish facts supporting the defence on a balance (or preponderance) of probabilities,¹³³ but contrast the recent controversial decision of the Supreme Court of Appeal in *Molefe v Mahaeng*¹³⁴ which is critically assessed by the present author in (1999) 116 *SALJ* 729). In terms of the established principle in *Mabaso* and *Minister of Law and Order v Hurley*¹³⁵ the arrestor, who is a defendant in a civil case, should bear the burden of proving on a balance of probabilities that he or she falls within the framework of section 49¹³⁶.

The only recognized exception to this rule is where the arrestor has proved that he is authorized to use force in terms of section 49 and the plaintiff alleges that he has used excessive force.¹³⁷ Although the revised section 49 incorporates the limits of a defence excluding *unlawfulness* which is available to an arrestor in certain circumstances, it is possible (as discussed above) that the section can also be seen as embodying, in addition, a special defence of absence of 'normative' *fault*, based upon the reasonableness of the arrestor's belief. If a defendant in a delict claim bears the burden of proving contributory negligence (also assessed objectively) on a

¹³⁰ *South Africa, Judicial Matters Amendment Act 68 of 1998, Cape Town: Government Printer, 1998.*

¹³¹ See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp 319.*

¹³² See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp 320.*

¹³³ *Mabaso v Felix 1981 (3) SA 865 (A).*

¹³⁴ *1999 (1) SA 562 (SCA).*

¹³⁵ *1986 (3) SA 568 (A).*

¹³⁶ *Criminal Procedure Act 51 of 1977.*

¹³⁷ *Hiltonian Society v Crofton 1952 (3) SA 130 (A).*

balance (or preponderance) of probabilities, then it would seem equitable that the defendant (arrestor) in a civil suit where he or she raises the defence of absence of 'normative' fault, under the revised s 49, should also bear the burden of proving the absence of 'normative' fault on a balance (or preponderance) of probabilities.¹³⁸

It is clear that the Constitution will have a strong influence where the defendant is a state party and, while it is undesirable to create a separate body of principles for state parties, the application of standard principles could well lead to results different from those cases in which ordinary persons are involved. So, in omission cases: “The protection that is afforded by the Bill of Rights to equality, and to personal freedom, and to privacy, might now bolster that inhibition against imposing legal duties on private citizens. However, those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others, and its duty to do so will differentiate it from others who similarly fail to act to avert harm.”¹³⁹

And where the harm results from violent conduct, the constitutional obligation on the state to refrain from perpetrating violence and to protect persons from violent conduct,¹⁴⁰ coupled with the state’s duty to “respect, protect, promote and fulfil the rights in the Bill of Rights”,¹⁴¹ “places a positive duty on the State to protect everyone from violent crime”.¹⁴² The obligation on the state and its organs to be publicly accountable will also create liability in some instances.¹⁴³

An application of these norms and obligations has led to state liability in instances where liability was unlikely to have arisen in a pre-Constitution era. In *Carmichele v*

¹³⁸ See Burchell, *J. Principles of Criminal Law revised 3 ed Juta (2006) pp 302; see also Burchell, J. Deadly force...*, p. 202

¹³⁹ Midgley 2002 SALJ 352 and par 72 post

¹⁴⁰ See *Minister of Safety & Security v Van Duivenboden* 2002 3 All SA 741 (SCA); 2002 6 SA 431 (SCA)

¹⁴¹ Constitution of the Republic of South Africa, 1996, Sec. 12(1)(c)

¹⁴² Constitution of the Republic of South Africa, 1996, Sec. 7(2); See also *Minister of Safety & Security v Van Duivenboden*

¹⁴³ *Van Eeden (formerly Nadel) v Minister of Safety & Security*

*Minister of Safety and Security*¹⁴⁴ the police and prosecution were held to have had a duty to protect a woman who was viciously assaulted by a man who was out on bail. The authorities had failed to place evidence before the court which would have caused the magistrate to refuse bail. In *Minister of Safety and Security v Van Duivenboden*¹⁴⁵ the police were held liable in damages where they had failed to have a person declared unfit to possess a firearm in circumstances in which they ought to have done so, and that person shot and injured the plaintiff. In *Van Eeden (formerly Nadel) v Minister of Safety and Security*¹⁴⁶ the police were held to have a duty towards a woman who had been assaulted, raped and robbed by a dangerous criminal and serial rapist who had escaped from the police cells. These principles have also been extended to public bodies. In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*¹⁴⁷ two public companies, Transnet and the South African Rail Commuter Corporation, were held to have had a duty to “minimize the extent of violent crime and lack of safety on the commuter rail service”.¹⁴⁸ The Constitutional Court confirmed that such a duty exists¹⁴⁹ and ordered Metrorail to take steps to ensure commuter safety.¹⁵⁰

4.3 SELF DEFENCE – A GROUND OF JUSTIFICATION

In *Govender v Minister of Safety & Security*,¹⁵¹ the plaintiff's former husband was shot and killed by the police when he took a third party hostage. The defendant had pleaded that the actions of the police officers in shooting and killing the deceased were reasonably necessary to protect the hostage, the public and themselves from

¹⁴⁴ *Minister of Safety & Security v Van Duivenboden; Van Eeden (formerly Nadel) v Minister of Safety & Security; Minister of Safety & Security v Carmichele* 2003 4 All SA 565 (SCA); 2004 2 BCLR 133 (SCA); 2004 3 SA 305 (SCA)

¹⁴⁵ The Supreme Court of Appeal, applying the usual principles, had previously held that there was no liability. See *Carmichele v Minister of Safety & Security* 2000 4 All SA 537 (SCA); 2001 1 SA 489 (SCA)

¹⁴⁶ *Minister of Safety & Security v Van Duivenboden* 2002 3 All SA 741 (SCA) par 19; 2002 6 SA 431 (SCA)

¹⁴⁷ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail; Rail Commuters Action Group v Minister of Safety & Security* 2005 2 SA 359 (CC)

¹⁴⁸ 2003 3 BCLR 288 (C); 2003 5 SA 518

¹⁴⁹ 2003 3 BCLR 288 (C) at 334–335; 2003 5 SA 518 at 573

¹⁵⁰ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail; Rail Commuters Action Group v Minister of Safety & Security* 2005 2 SA 359 (CC); 2005 4 BCLR 301 (CC) pars 79–86

¹⁵¹ 1999 5 BCLR 580 (D); see also Burchell, J. *Principles of Criminal Law revised* 3 ed Juta (2006) pp 310.

immediate threat or danger of serious physical harm emanating from the deceased's unlawful conduct. In other words the defendant pleaded a ground of justification which excludes unlawfulness in the conduct of his employees.¹⁵² This ground is commonly referred to as "self-defence".¹⁵³ The constitutional basis for this ground of justification was once articulated by Chaskalson P as follows:

"Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with section 33(1). To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true, where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger."¹⁵⁴

The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty.¹⁵⁵ But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to.¹⁵⁶ In any event, there are material respects in which killing in self-defence or necessity differ from the execution of a criminal by the State. Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less severe alternative is readily

¹⁵² *Snyman, C.R. Criminal Law. 5 ed, Durban: Lexis Nexis, 2008. pp. 107.*

¹⁵³ *See Govender v Minister of Safety & Security 999 5 BCLR 580 (D); The term which generally finds favour with modern authors is "private defence", the argument being that the term "self-defence" is too narrow since it is not only persons who defend themselves but also those who defend others who can rely on this ground of justification. See CR Snyman, Criminal Law, 4th ed., p. 102.*

¹⁵⁴ *S v Makwanyane & another 1995 (3) SA 391 (CC) at 448H–449A, [also reported at [1995] (6) BCLR 665 (CC) – Ed]*

¹⁵⁵ *Self-defence is treated in our law as a species of private defence. It is not necessary for the purposes of this judgment to examine the limits of private defence. Until now, our law has allowed killing in defence of life, but also has allowed killing in defence of property, or other legitimate interest, in circumstances where it is reasonable and necessary to do so. See S v Van Wyk 1967 (1) SA 488 (A). Whether this is consistent with the values of our new legal order is not a matter which arises for consideration in the present case. What is material is that the law applies a proportionality test, weighing the interest protected against the interest of the wrongdoer. These interests must now be weighed in the light of the Constitution.*

¹⁵⁶ *1995 (6) BCLR 665 (CC) at 721.*

available to the potential victim. Killing by the State takes place long after the crime was committed, at a time when there is no emergency and under circumstances which permit the careful consideration of alternative punishment.

A number of strict conditions must be satisfied before a person can be said to have acted in self-defence.¹⁵⁷

However, as Chaskalson P would say, you may strike only if you are "in real danger".¹⁵⁸ Dealing with this requirement Nugent J (as he then was) once made the following remarks: "In the Court *a quo* Goldblatt J was of the view that the risk of death or serious injury must be 'real and imminent' in order to justify homicide, which in my view, aptly summarises the effect of the authorities and is in keeping with contemporary notions of the value to be attached to human life. The test is, of course, an objective one. What must be asked is whether a reasonable man in the position of the actor would have considered that there was a real risk that death or serious injury was imminent."¹⁵⁹

4.4 CONCLUSION

The right to life, like most of the rights enumerated in chapter 2 of the 1996 Constitution,¹⁶⁰ is not absolute; it is subject to the limitation provision, embodied in section 36 of the Constitution¹⁶¹. Therefore, all the judgments in *S v Makwanyane*,¹⁶² with the exception of one opinion, held that the right to life is indeed subject to limitation.¹⁶³ This is of significance for self-defence, the defence of lethal private defence in the protection of property, and the use of lethal force in effecting an arrest. The conduct involved will have to comply with the content and ethos of the

¹⁵⁷ See *Rex v Molife* 1940 AD 202; *Rex v Attwood* 1946 AD 331; *Ntanjana v Vorster & Minister of Justice* 1950 (4) SA 398 (C), [also reported at [1950] 4 All SA 248 (C) – Ed].

¹⁵⁸ *S v Makwanyane* 1995 (6) BCLR 665 (CC).

¹⁵⁹ *Minister of Law & Order v Milne* 1998 (1) SA 289 (W) at 294B–C.

¹⁶⁰ *Constitution of the Republic of South Africa*, 1996.

¹⁶¹ *Constitution of the Republic of South Africa*, 1996.

¹⁶² 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC); 1995 2 SACR 1 (CC).

¹⁶³ This was the limitation provision found in s 33 of the Interim Constitution of the Republic of SA 200 of 1993. See also *J Fedler, Life*, in *Constitutional law of South Africa*, editors M. Chaskalson et al. Kenwyn: Juta, 1996.

limitation provision. Therefore, it will have to be “reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom”.¹⁶⁴

Chaskalson P observed in the *Makwanyane*¹⁶⁵ judgment that “[g]reater restriction on the use of lethal force may be one of the consequences of the establishment of a constitutional state which respects every person’s right to life”.¹⁶⁶ This view induced the executive to amend section 49(2) of the Criminal Procedure Act¹⁶⁷ to circumscribe and limit the use of lethal force by the police.¹⁶⁸

¹⁶⁴ *S v Makwanyane* 1995 (6) BCLR 665 (CC).

¹⁶⁵ 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC); 1995 2 SACR 1 (CC).

¹⁶⁶ *S v Makwanyane supra pars* 138–140.

¹⁶⁷ Criminal Procedure Act, no. 51 of 1977.

¹⁶⁸ *The amendments encountered manifest resistance, but came into effect on 18 July 2003: Government Gazette 7720 R54, 11 July 2003.*

CHAPTER 5

5. THE CURRENT INTERNATIONAL LEGAL POSITION ON THE USE OF LETHAL FORCE BY THE POLICE IN EFFECTING AN ARREST.

5.1 INTRODUCTION

It is trite that when interpreting the Bill of Rights as contemplated in Chapter 2,¹⁶⁹ section 39 (1)¹⁷⁰ is decisive that international law must be considered. This Chapter will explore the current international legal position on the use of lethal force by police in effecting arrest.

Section 52 (1) of the Constitution of Canada¹⁷¹ is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The use of force by a person, usually a police officer, in effecting an arrest or preventing an escape of a fleeing suspect is regarded as legitimate in most systems of law.¹⁷² For instance, every American jurisdiction recognizes some form of law enforcement authority justification¹⁷³ and so does the United Kingdom¹⁷⁴ who refers to section 3 of the Criminal Law Act of 1967, which sets the bounds of the use of force in effecting arrests in the United Kingdom. The use of force in the furtherance of the administration of criminal justice is also regarded in some international instruments¹⁷⁵ as a justifiable limit on the protection of physical integrity and life. However, it is not the validity of the use of force in such circumstances that is the subject of dispute, it is the degree of force permitted which is controversial.

¹⁶⁹ *Constitution of the Republic of South Africa, 1996.*

¹⁷⁰ *Ibid.*

¹⁷¹ *The Constitution Act of 1982.*

¹⁷² See Burchell, J. *Principles of Criminal Law revised 3 ed Juta (2006) pp.*

¹⁷³ See Robinson, P.H. *Criminal Law Defenses vol 2 para 142 (1984).*

¹⁷⁴ See Watney, M. *To shoot ... or not to shoot: the changing face of section 49 of the Criminal Procedure Act 51 of 1977, De Rebus, 30, 1999.*

¹⁷⁵ *European Convention on Human Rights, article 2(2) (b).*

5.2 THE USE OF FORCE IN CANADA

The provisions of section 25(1) of the Canadian Criminal Code, provides that:

25. (1) “Every one who is required or authorized by law to do anything in the administration or enforcement of the law... as a peace officer or public officer,... is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose”.¹⁷⁶

Subsection (4) of the Canadian Criminal Code states that:

“A peace officer who is proceeding lawfully to arrest, with or without a warrant, any person for an offence for which that person may be arrested without a warrant, 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”.¹⁷⁷

In terms of Section 25(4) (d) of the Canadian Criminal Code¹⁷⁸ lethal force will be justified if the “suspect is reasonably suspected of having committed a crime involving serious physical harm”.

In *Her Majesty the Queen v. Magiskan*¹⁷⁹ the court considered the use of excessive force and the lawful execution of duty. “Section 25 of the *Criminal Code*¹⁸⁰ provides that every police officer is justified in doing what he or she is authorized to do, using as much force *as is necessary* for that purpose, providing he or she acts *on reasonable grounds*. The initial prerequisites are necessity and reasonable grounds.¹⁸¹

¹⁷⁶ *The Consolidation Canadian Criminal Code. R.S., c. C-34, s. 1. Chapter C-46.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ 2003 CanLII 859 (ON S.C.) Par [21].

¹⁸⁰ *The Consolidation Canadian Criminal Code. R.S., c. C-34, s. 1. Chapter C-46.*

¹⁸¹ *Her Majesty the Queen v. Magiskan* 2003 CanLII 859 (ON S.C.) Par [22].

The words “grievous bodily harm” “do not mean any ‘hurt or pain’ ... but a *serious* ‘hurt or pain’” [emphasis added]¹⁸² Under section 25(4) of the *Criminal Code of Canada*¹⁸³, a peace officer is justified in using force likely to cause death or grievous bodily harm if the officer is either lawfully arresting a person with or without a warrant or “the offence for which the person is to be arrested is one for which he or she may be arrested without warrant”.¹⁸⁴

However, section 26 of the *Criminal Code*¹⁸⁵ provides that when peace officers are “authorized by law to use force” (as in the arrest situations referred to) they are “criminally responsible for any excess of the force used according to the nature and quality of the act that constitutes the excess”

As a result, although force likely to cause death or grievous bodily harm is permissible in the process of arrest described in section 25(4),¹⁸⁶ that force must be reasonable and proportionate. A police officer who resorts to force which is excessive having regard to “the nature and quality of the act that constitutes the excess” is acting unlawfully.

The nature and quality of the act that must be considered begins with the decision to use force of any kind in the first instance.¹⁸⁷ Justification for that decision, once made, is limited by all of the circumstances that affect the “nature and quality of the act that constitutes the excess”. Some such circumstances would include:

- the nature and seriousness of the offence for which the arrest is being made (one does not engage a bulldozer when a flyswatter is sufficient).
- the certitude of the fact of the offence which is the basis of the arrest having taken place (Persons are presumed to be innocent until proven guilty. The more that is known about the circumstances that establish guilt, the more

¹⁸² See *R v Bottrell* 60 CCC (2d) 211 (BCCA) at par 218.

¹⁸³ *The Consolidation Canadian Criminal Code. R.S., c. C-34, s. 1. Chapter C-46.*

¹⁸⁴ 2003 CanLII 859 (ON S.C.) Par [21].

¹⁸⁵ *The Consolidation Canadian Criminal Code. R.S., c. C-34, s. 1. Chapter C-46.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

thorough the inquiry, the more complete the objective evidence and the more reasonable the grounds upon which the arrest is made are important considerations which govern necessity and reasonableness).

- the need for detention as an aspect of intervention;
- the protection of the officers and other persons from violence;
- the prospect of flight/escape;
- the likelihood of continuation/resumption of offending conduct;
- the apparent physical condition of the person being arrested and/or alleged victims;
- police modules and training affecting the use of force;
- the prospect of escalation and retaliation;
- knowledge of the identity and access to the person to be arrested; (A person who is to be arrested does not, of necessity, have to be arrested at that time and place if use of force is contemplated when it is reasonable that this can be accomplished on another occasion without violence or with less violence.);
- the nature and extent of the force reasonably contemplated as likely to be necessary; and
- other exigent circumstances”.¹⁸⁸

In *Stewart v. Canada Attorney General*¹⁸⁹ Justice Sharlow stated that the appropriate test to be used by the trier of fact is as follows:

“In assessing the evidence in this regard, I must bear in mind that the degree of force must be viewed from the subjective view of the police officers as well as the objective circumstances. I must also make due allowance for a police officer in the exigencies of the moment misjudging the degree of force needed, and avoid holding a police officer to a standard of conduct that one sitting in the calmness of a courtroom later might determine was the best course.

¹⁸⁸ *Stewart v. Canada Attorney General* [199] F.J.C. 1996 (F.C.C. – T.D.)

¹⁸⁹ *Ibid.*

In *Levesque v. Sudbury Regional Police Force*¹⁹⁰ Justice Bernstein made the following observation: “It is both unreasonable and unrealistic to impose an obligation on the police to employ only the least amount of force that might successfully achieve their objective. To do so would result in unnecessary danger to themselves and others. They are justified and exempt from liability in these situations if they use no more force than is *necessary having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves* (my emphasis)”.

There is a special duty on the Police Officer to use care in shooting, which must be only a last resource.¹⁹¹ The right to use force is a limited one and must be exercised in a reasonable manner and if there has been negligence, blame rests on the Officer.¹⁹² In all the circumstances firing at a tire was using more force than necessary and was negligent, especially when continued pursuit might have resulted in the malefactor’s apprehension. A very high standard of care is required of a Police Officer.¹⁹³

The care to be exercised by persons using fire-arms has been declared in many Canadian cases. In *Potter v. Faulkner*¹⁹⁴, Erle C.J. stated: “The law of England in its care for human life, requires consummate caution in the person who deals with dangerous weapons”.

In *R. v. Smith*¹⁹⁵, at p. 330, Perdue J.A. stated in his charge to the jury: “Shooting is the very last resort. Only in the last extremity should a peace officer resort to such a dangerous weapon as a revolver in order to prevent the escape of an accused person who is attempting to escape by flight”.

¹⁹⁰ [1992] O.J. No. 512 (Ont. G.D.).

¹⁹¹ *Priestman v. Colangelo, Shynall and Smythson* 1957 CanLII 31 (ON C.A.).

¹⁹² *Robertson v. Joyce*, [1948] O.R. 696 at p. 701, 92 C.C.C. 382, [1948] 4 D.L.R. 436.

¹⁹³ *Cretzu v. Lines*, [1941] 1 W.W.R. 396, 75 C.C.C. 367, [1941] 2 D.L.R. 413; See also *R. v. Smith* (1907), 7 W.L.R. 92, 13 C.C.C. 326; *R. v. Sandford*, [1957] Ex. C.R. 210.

¹⁹⁴ *Potter v. Faulkner* (1861), 1 B. & S. 800 at p. 805, 121 E.R. 911.

¹⁹⁵ *R. v. Smith* (1907), 7 W.L.R. 92, 13 C.C.C. 326.

In *Robertson and Robertson v. Joyce*¹⁹⁶, the principle question in issue was whether the defendant, a police officer, was justified in shooting as he had under the particular circumstances. The action had been brought under the Fatal Accidents Act to recover damages sustained in consequence of the death of a young man who had been fatally shot by a police officer during an attempted flight. The governing principles in a case of this kind were stated clearly and succinctly by¹⁹⁷ Laidlaw J.A: “A peace officer is not empowered to employ whatever means in whatever manner he pleases to prevent the escape of an offender who takes to flight to avoid arrest. He is not free to use force of whatever kind or extent he may think fitting to the circumstances. A statutory defence against liability of a peace officer for what he has done is not available to him under section 41 if he has used an excess of force to prevent the escape by flight of a person to be arrested by him or if such escape could have been prevented by reasonable means in a less violent manner. The question whether he used an excess of force and the question whether the escape could have been prevented by reasonable means in a less violent manner are questions of fact for determination upon the evidence and in the circumstances of each particular case under review”.

5.3 CONCLUSION

Section 1¹⁹⁸ guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

A peace officer is authorized to use as much force as is necessary to prevent an accused escape by flight unless such flight can be prevented in a less violent manner.

Although Section 12¹⁹⁹ states that everyone has the right not to be subjected to any cruel and unusual treatment or punishment, the use of lethal force will be justified if

¹⁹⁶ *Robertson and Robertson v. Joyce* [1948] O.R. 696, 92 C.C.C. 382, [1948] 4 D.L.R. 436.

¹⁹⁷ *Laidlaw J.A* at page 701

¹⁹⁸ *Canadian Charter of Rights and Freedoms*.

the accused has committed a crime involving serious physical harm. This must be seen against the backdrop of the necessity and the reasonable grounds for the use of such lethal force.

In keeping with section 7²⁰⁰, which guarantees everyone the right to life, liberty and security and the right not to be deprived thereof except in accordance with the principles of fundamental justice, shooting must only be a last resort.

¹⁹⁹ *Canadian Charter of Rights and Freedoms.*

²⁰⁰ *Ibid.*

CHAPTER 6

6.1 CONCLUSION AND RECOMMENDATION

Having investigated the rationale and necessity behind the call for the amendments to section 49²⁰¹ and the ambit of the research question, the research revealed that the voiceferous calls from politicians and police leaders alike, for the police to be able to ‘shoot to kill’, is both unnecessary and irresponsible.

It is in direct contrast to a fundamental constitutional principle as set out in section 198 of the Constitution,²⁰² which provides for the governing principles on national security. These principles highlight the resolve to live in peace and harmony which precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

South Africa is still in its infancy in its democratic metamorphosis. It is undoubtedly such reckless and uninhibited statements, which, if allowed to fester, will threaten the new and vulnerable constitutional democracy.

Initially, it was contended that section 49(2) is not a reasonable limitation and should be declared unconstitutional.²⁰³ This answer is premised on the given that the death sentence had been declared unconstitutional.²⁰⁴ If a court cannot impose

²⁰¹ *Criminal Procedure Act 51 of 1977.*

²⁰² *Constitution of the Republic of SA 108 of 1996.*

²⁰³ *In R v Douglas Lines (Ontario Court of Justice (General Division), per Hawkins J, unreported judgment of 26 April 1993) s 25(4) of the Canadian Criminal Code was declared unconstitutional. See also the obiter remarks in S v William 1992 NR 268 (HC), in which Hannah J recommended that the Law Reform Commission consider whether s 49(2) (which also applies in Namibia) should be repealed or amended in the light of its apparent conflict with the right to life (art 6 of the Namibian Constitution). See also obiter remark in Govender v Minister of Safety and Security 1999 5 BCLR 580 (D) 598B.*

²⁰⁴ *See discussion in par 5B48 infra. See also R v Douglas Lines supra, which found the justification of the “fleeing felon” rule (s 25(4) of the Canadian Criminal Code) in the fact that felonies had been*

the death sentence, allowing an arbitrary extra-curial discretion to kill seems perverse. A mere suspicion of crime, without any proof, cannot justify an infringement of a person's most basic right. Experience has shown that killing under such circumstances may be mistaken, but obviously remains irreversible.²⁰⁵

Prima facie, section 49(2) violates the right to life,²⁰⁶ of freedom and security,²⁰⁷ against cruel, inhuman or degrading treatment or punishment,²⁰⁸ and to a fair trial, which includes the right to be presumed innocent.²⁰⁹ In all instances the Constitution²¹⁰ must be used to determine the validity of a particular legal principle, or to measure whether the law applicable violates constitutional values and individual.²¹¹

In *Ex Parte Minister of Safety & Security & others: In Re: S v Walters & another*²¹² the Court was decisive that an arrest may never be used to punish a suspect. In *Makwanyane*²¹³ O'Regan J was emphatic that human life was a cardinal element of our constitutional values, stating that: "The right to life is more than existence – it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity."²¹⁴

Once more, in *Ex Parte Minister of Safety & Security & others: In Re: S v Walters & another*,²¹⁵ the use of force against persons inevitably raises constitutional

punishable by death. This rationale no longer exists "in civilized societies where few or no crimes are punishable by death" (15 of typed judgment).

²⁰⁵ See eg the facts of *S v Barnard* 1986 1 SA 1 (A) and *Government of RSA v Basdeo* 1996 1 SA 355 (A).

²⁰⁶ See *Macu v Du Toit* 1983 4 SA 629 (A); See also *S v Swanepoel* 1985 1 SA 576 (A).

²⁰⁷ Constitution of the Republic of South Africa Act 108 of 1996.

²⁰⁸ Section 14 of the Constitution of South Africa Act 108 of 1996.

²⁰⁹ Section 12(1)(e) of the Constitution of South Africa Act 108 of 1996.

²¹⁰ Constitution of the Republic of South Africa Act 108 of 1996.

²¹¹ See See Burchell J. *Principles of Criminal Law revised 3 ed Juta (2006) pp. 317*

²¹² [2002] JOL 9743 (CC).

²¹³ 1995 6 BCLR 665 (CC).

²¹⁴ See *Hiemstra's Criminal Procedure "Use of force in effecting arrest", Snyman 2004 Stell LR 536; See also See Burchell J. Principles of Criminal Law revised 3 ed Juta (2006)*

²¹⁵ [2002] JOL 9743 (CC).

misgivings about its relationship with three elemental rights contained in the Bill of Rights.²¹⁶ They are the right to life, to human dignity and to bodily integrity.

It is trite that section 49 has survived constitutional scrutiny. National legislation provides for the sanctioned use of force when effecting an arrest, provided that it is in line with the constitutional provisions where the sanctity of human life is respected and emphasized. It follows then that even if the country's leaders are weary of the rights that accused persons enjoy and which are entrenched in the Constitution and Human Rights Charters, they are nevertheless bound by it and no amendment to section 49 that choruses their 'shoot to kill' tune can alter that. By strongly wording their disdain of their perception of police not having sufficient powers, they serve only to sensationalize their course and work the less affluent masses, into a frenzy.

The solution is simple: the police do not need more powers to use deadly force because they already have all the powers that they need!

There are no ambiguities in the present section 49. The only ambiguity that this research has revealed is the lack of knowledge and understanding by the leaders on the application and interpretation of section 49.

Not only do the police have the recourse of section 49 as a ground for justification that excludes unlawfulness but they are also in the fortunate position in that they can also benefit from claiming one of the common law defences such as private defence, necessity and obedience to order.

Section 205 of the Constitution²¹⁷ makes provision for a single National Police Service, which dictates that National legislation must establish the powers and

²¹⁶ See Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996, which the Constitution introduces as follows in s 7(1): "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

²¹⁷ Constitution of the Republic of SA 108 of 1996.

functions of the police service and must enable the police service to discharge its responsibilities effectively. It must therefore be inferred then, that policies and procedures must be in place to 'enable' the police service. This would include proper and effective training of police in Criminal Procedure and Criminal Law. With specific reference to this research, the need has been identified for training in the interpretation and understanding of section 49, with proper guidelines to limit the potentially excessive scope of section 49.

The training should also include the mind set that 'shooting to kill', should not be taken lightly, should be limited and confined to what is reasonable and proportional in the circumstances and should only be exercised as a last resort. A fully capacitated and well resourced police force will also empower and enable police officials.

Police official should also take cognizance of section 205(3)²¹⁸ which is clear on the role of the police, which is 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.

It is common cause that there was a five year delay before the 1994 Amendment of section 49, was finally adopted. The delay arose out of the police's concern regarding the interpretation and application of the then new text. This was in respect of appropriate training of police officials. In 2010, the Draft Amendment Bill was tabled, even though the previous concerns of the police have not been addressed.

It is interesting how the country's leaders and politicians, use the media, instrumentally, to appease the public's insatiable appetite for a crime free South Africa. They release strongly worded media statements, promising that police will be entrusted with more powers to 'shoot to kill', yet, on the same breath, they issue a contrasting Special Service Order, wherein they caution police officials to exercise

²¹⁸ *Constitution of the Republic of SA 108 of 1996.*

care when reacting to a section 49 situation and to consider the type and degree of force necessary to effect an arrest.²¹⁹

Abraham Lincoln once said that “A statesman is he who thinks in the future generations and the politician is he who thinks in the upcoming elections”. It begs the question whether it is a mere co-incidence that politicians are so vocal about granting police more powers to ‘shoot to kill’, shortly before South Africa’s local government elections, early in 2011. It can be argued what better way is there to win over voters than to appeal to the country’s citizens call for better crime control.

Even former Constitutional Court Judge, Albie Sachs says the law allows police officers to shoot criminals when their lives, or those of members of the public, are in danger. Sachs says police must use force within the parameters of the law:²²⁰ “If the person escaping had committed a murder or rape, offences of that kind, and was armed and likely to injure the public then lethal force could be used,” says Sachs.²²¹

The Preamble to the South African Police Service Act 68 of 1998 makes it incumbent on police officials to uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3.²²² With respect this will not be achieved unless they are properly trained to understand and interpret legislation, like section 49.²²³ The

²¹⁹ See South Africa. South African Police Service. *Special service order relating to the use of force in effecting an arrest: Reference: 18/5/1/1 - 1/4/1(5)*, 18 July 2003; see also South Africa. South African Police Service. *Standing Order (G) 341, Arrest and the treatment of an arrested person until such person is handed over to the community service centre commander. V1.00 Issued on 1999-07-08 by Consolidation Notice 15/1999.*

²²⁰ See Nomsa Maseko “Sachs says law doesn’t need to change for shoot-to-kill” www.ewn.co.za/articleprog.aspx?id=23013 2009/10/02 See also *The Sunday Independent*; See also *Newsflash the Law Society of the Northern Provinces* www.gautenglaw.co.za/documents/document.cfm?docid=84 “Minister wants apartheid lethal force law reinstated” “Some clarity on what Police Minister Nathi Mthethwa hopes to achieve by tinkering with Section 49 of the Criminal Procedure Act has come to light in an interview in *The Sunday Independent*. He wants to reinstate what the paper notes is an apartheid-style law to give police more power to shoot and kill fleeing suspects. In an interview, Mthethwa intimated Section 49 – which stipulates that police can shoot only if their lives are threatened – must be changed to allow police to shoot fleeing suspects. The report points out that a controversial section of the 1977 Act, before it was amended by the democratic government, defined the killing of a fleeing suspect who had committed a serious crime as ‘justifiable homicide’.”

²²¹ See Nomsa Maseko “Sachs says law doesn’t need to change for shoot-to-kill” www.ewn.co.za/articleprog.aspx?id=23013 2009/10/02 *The Sunday Independent*

²²² *Constitution of the Republic of SA 108 of 1996*

²²³ *Criminal Procedure Act 51 of 1977*

Constitution, being the highest law of the land, places the highest premium on the protection of rights as expressed in Chapter 2.

National Police Commissioner Bheki Cele called for a change in legislation “that would allow police to open fire on suspects without having to worry about what happens after that.”²²⁴ This brings to mind Dr. Martin Luther King Junior’s words. “Cowardice asks the question — is it safe? Vanity asks the question — is it popular? . . . But Conscience asks the question — is it right? There comes a time when one must take a position that is neither safe, popular, nor political; but because it is right.” The constitutional provisions as illustrated and scrutinized in section 49, may to some, be neither safe, nor popular nor political but it is indeed right.

²²⁴ See www.guardian.co.uk Wednesday 16 September 2009

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7. LIST OF ABBREVIATIONS

All SA	All South African Law Reports
BCLR	Butterworths Constitutional Law Reports
CanLII	Canadian Legal Information Institute
CCC	Canadian Criminal Cases
DLR	Dominion Law Reports
ER	English Reports
Ex CR	Canadian Exchequer Court Reports
FJC	Fraser's Court of Session Cases, 5 th Series
JOL	Judgements Online
L Ed	United States Supreme Court Reports, Lawyers' Edition
Man R	Manitoba Reports
NR	Namibia Reports
OJ	Official Journal of the European Communities
OR	Oregon Reports
SA	South African Law Reports
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
WLR	Western Law Reporter
WWR	Western Weekly Reports