THE USE OF FORCE IN EFFECTING ARREST IN SOUTH AFRICA AND THE 2010 BILL: A STEP IN THE RIGHT DIRECTION?

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1 Introduction

In South Africa the use of force in effecting arrest is statutorily governed by section 49[1] of the *Criminal Procedure Act*.[2] Section 49 is applicable not only to police officers but also allows private persons authorised by the Criminal Procedure Act[3] to use force in effecting arrest.[4] This statutory provision and its predecessors have formed part of South African law for more than 170 years.[5]

However, the inception of the Constitution[6] brought about a dramatic change in the law. Section 49 was constitutionally scrutinised by the two highest courts in South Africa in 2001[7] and again in 2002.[8] In *Govender v Minister of Safety and Security* 2001 2 SACR 197 (SCA) (hereafter Govender)[9] the Supreme Court of Appeal did not declare section 49(1) unconstitutional but found it had to be interpreted restrictively ('read down') to survive constitutional scrutiny. The Constitutional Court on the other hand confirmed the unconstitutionality of section 49(2) in *S v Walters* 2002 2 SACR

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1 Hereinafter referred to as s 49.

2 Criminal Procedure Act 51 of 1977, hereinafter referred to as Criminal Procedure Act.

3 The Criminal Procedure Act in s 49 provides that any person authorised under the Act may use force when effecting arrest. In practice it is the police force that undertakes most arrests. The South African position in this regard differs from the situation in countries in North America and Europe for example, where only police officers are authorised to use force when effecting arrest. See s 39 of the Criminal Procedure Act and Bruce 2003 SAJHR 430.

4 This paper does not discuss the use of force when effecting arrest by other people authorised under the Criminal Procedure Act but focuses on the use of force when effecting arrest by the South African Police Service (SAPS).

5 See inter alia s 1 of Cape of Good Hope Ordinance 2 of 1837; s 41 of the Transvaal Criminal Procedure Ordinance 1 of 1903; s 44 of the Criminal Procedure Act 31 of 1917 and s 37 of the Criminal Procedure Act 56 of 1955.

6 Constitution of the Republic of South Africa, 1996, hereinafter referred to as the Constitution.

7 S 49(1) by the Supreme Court of Appeal in Govender v Minister of Safety and Security 2001 2 SACR 197 (SCA).

8 S 49(2) by the Constitutional Court in S v Walters 2002 2 SACR 105 (CC).

9 at [23]-[24].

105 (CC) (hereafter Walters)[10] and the provision was declared invalid albeit not with retrospective effect.

By the time when the courts have decided on the constitutional aspects of the then section 49 of the Criminal Procedure Act in Govender[11] and Walters,[12] the legislature had already promulgated an amendment[13] to section 49 but the amendment was not yet operational.

This paper briefly discusses the 1998 amendment[14] and related provisions in the Bill[15] and then continues to investigate the application of the Bill and some of the pitfalls in its practical implementation.

2 The 1998 amendment

Although promulgated in 1998 the amendment came into operation only in 2003 after the Govender[16] and Walters[17] cases had been decided. The reason for this was the fact that the amendment was originally opposed by some of the parties involved. It was however approved by Parliament in October 1998, signed by the President on 20 November 1998, published in the Government Gazette on 11 December 1998,[18] and was suppose to come into operation on a date determined by the President.[19] The commencement date was twice proclaimed and withdrawn, mainly because of opposition by the then Minister of Safety and Security, his successor and the SAPS in general.

10 at [77].
11 Govender v Minister of Safety and Security 2001 2 SACR 197 (SCA).
12 S v Walters 2002 2 SACR 105 (CC).
13 S 7 of the Judicial Matters Second Amendment Act 122 of 1998, hereinafter referred to as the 1998 Amendment.
14 Judicial Matters Second Amendment Act 122 of 1998.
15 Criminal Procedure Amendment Bill B39-2010, hereinafter referred to as the Bill. The Bill was approved by Cabinet and tabled in the National Assembly on 4 November 2010.
16 Govender v Minister of Safety and Security 2001 2 SACR 197 (SCA).
17 S v Walters 2002 2 SACR 105 (CC).
18 GN 1636 in GG 19590 of 11 December 1998.
19 S 16 of the Judicial Matters Second Amendment Act 122 of 1998. In terms of s 81 of the Constitution the commencement date of an Act of Parliament may be determined in such a manner.

The late Mr Steve Tswete[20] was of the view that the 1998 amendment allowed the police to shoot at criminals only in self-defence and place[d] the police at risk of massive assault from criminals. According to the late Minister in terms of the 1998 amendment police officials would have to wait until they were shot at before they were allowed to use their fire-arms in effecting arrest.[21]

The 1998 amendment to section 49 eventually came into operation on 18 July 2003,[22] a year after the Walters case was decided, two years after the Govender decision, and almost five years after the 1998 amendment had been approved by Parliament.[23] In the seven years since the 1998 amendment came into operation no case has been reported challenging the constitutionality of the 1998 amendment.[24]

Section 49 currently states (with the 1998 amendment incorporated):

> *Use of force in effecting arrest*
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> 49(1) For the purposes of this section-
> (a) "arrestor" means any person authorised under this Act to arrest or to assist in arresting a suspect; and
> (b) "suspect" means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

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20 The Minister of Safety and Security at the time.

21 Maepa 2002 SA Crime Quarterly No 1 at 13.

22 Proclamation 54 in Government Gazette 25206 of 11 July 2003 determined the date as 18 July 2003.

23 This delay in the implementation of s 49 caused a "new third standard" to be created by the courts in Govender and Walters. See Leggett 2003 SA Crime Quarterly 4 in this regard.

24 After the 1998 amendment restricting the use of force when effecting arrest came into operation, there was a substantial increase (23 percent) in deaths resulting from police shootings during the 2003/2004 year, according to statistics of the Independent Complaints Directorate (ICD) published at http://www.icd.gov.za/documents/report_released/ annual_reports/2006-2004/icd03report.pdf. This differs from the situation in the United States of America where it was predicted that reforms of the law restricting the use of force when effecting arrest could be associated with overall declines in the number of shootings, including fatal shootings, by the police. The ICD is the civilian oversight body which investigates complaints against the police as well as deaths caused by the police and deaths in custody. See in this regard Bruce 2005 South African Review of Sociology 141-159. Bruce indicates (at 156) that the year in which the number of deaths resulting from police shootings were the highest according to ICD statistics was also the year in which South Africa experienced its highest murder rates and the highest number of police killings, thereby implying that a likely reason for the high number of deaths as a result of police action is the high level of violent crime in South Africa and is not an outcome of the implementation of the law providing for the use of deadly force.

> (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this Section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds—
> (a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
> (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
> (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

It is noteworthy that the wording of the 1998 amendment includes reference to the "future danger principle", a phrase to be found in section 25 of the Canadian Criminal Code.[25] Section 25 of the Canadian Criminal Code in subsections (4) and (5) provides for the use of force in effecting arrest. Subsection (4) provides that a peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if:

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
(c) the person to be arrested takes flight to avoid arrest;
(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace

[25] Criminal Code of Canada (R.S.C., 1985, c. C-46). Despite this informative reference to Canadian law, this paper discusses only the developments in South African law with regard to the use of force when effecting arrest over the last years. It does not venture into any comparative analysis since a future publication will follow this methodology.

officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and

(e) the flight cannot be prevented by reasonable means in a less violent manner.[26]

Bruce[27] is of the opinion that the "future danger" provision could have implications for persons, particularly members of police services, who may be faced with a need to perform their legal responsibilities under an ill-defined legal framework which requires them to make a judgment as to whether or not the fleeing person is likely to cause death or serious bodily harm in the future, without providing any guidance as to how such a future danger is to be evaluated, thus exposing themselves to an enhanced risk of criminal prosecution. Bruce[28] also argues that the "future danger" provision is complex to enforce by the bodies (in South Africa this is the ICD) responsible for ensuring accountability in relation to shootings under section 49, as it compels them to evaluate the shooting in terms of a speculative abstraction. In countries like Canada, where the future danger principle is part of the law, there is less use of force by the police (and lower violent crime rates). These countries are also better able to maintain administrative mechanisms which can impose accountability in relation to such a standard.[29]

As explained above, the 1998 amendment was opposed by the then Minister of Safety and Security, and almost five years after it came into operation it was still widely criticised, by others as well. It has been criticised as being complex and confusing and lacking in legal clarity. Some are of the view that the new provision hampers the police in combating crime and that it creates a "higher standard" to be met when an accused relies on the protection afforded by section 49. The test applied by the courts is an objective *ex post facto* test and it is irrelevant whether the

[26] In terms of subsection (5) of the Criminal Code of Canada a peace officer is justified in using force that is intended or is likely to cause death or grievous bodily harm against an inmate who is escaping from a penitentiary within the meaning of subsection 2(1) of the Corrections and Conditional Release Act, S.C. 1992, c. 20 if (a) the peace officer believes on reasonable grounds that any of the inmates of the penitentiary poses a threat of death or grievous bodily harm to the peace officer or any other person; and (b) the escape cannot be prevented by reasonable means in a less violent manner.

[27] Bruce 2005 South African Review of Sociology 141-159.

[28] Bruce 2005 South African Review of Sociology 141-159.

[29] Bruce 2005 South African Review of Sociology 141-159.

arrestor subjectively believed that the suspect posed a "future danger". The interpretation and application of the text of the 1998 amendment also raised concern in so far as the appropriate training of police officers is concerned specifically. Some are even of the opinion that it creates a "right to flee" and that it protect the rights of perpetrators to the detriment of law-abiding citizens.[30]

These objections, coupled with the hindsight of the Constitutional Court's approach in the Walters case,[31] are probably the main reasons why the Department of Justice and Constitutional Development decided to revisit the provisions of section 49 of the Criminal Procedure Act. The result was the drafting of the Criminal Procedure Amendment Bill[32] during early 2010, which proposes to amend the provisions regarding the use of force, including deadly force, in effecting arrest in South Africa.

3 The Bill

The Department of Justice and Constitutional Development issued a working draft of the 2010 Bill[33] and circulated it for comments. A second revised version[34] of the working draft was circulated after public commentary on the first version had been received. In a memorandum attached to the Bill the Department of Justice and Constitutional Development explains that the police could be confused about their rights under section 49 of the Criminal Procedure Act. The 2010 Bill aims to bring the provisions relating to the use of force in effecting an arrest into line with a judgement of the Constitutional Court[35] and to ensure greater legal certainty regarding the circumstances in which force, especially deadly force, may be used in order to effect an arrest.[36]

30 See inter alia Snyman Criminal Law 136, Bruce 2003 SAJHR 431 and Van der Walt 2007 TSAR 106-108.
31 S v Walters 2002 2 SACR 105 (CC).
32 Criminal Procedure Amendment Bill B39-2010.
33 The first working draft of the Bill dated 1/02/10.
34 The revised version of the Bill dated 1/04/10.
35 S v Walters 2002 2 SACR 105 (CC).
36 Minister of Justice and Constitutional Development 2010 www.pmg.org.za.

The wording of the Bill regarding the use of non-lethal force does not differ from the wording of the existing section 49.[37] Section 49 provides that when a suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing. But the proposed changes are aimed at the use of **deadly force** in effecting arrest. The Bill inserts section 49(1)(c) which defines "deadly force" as force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a person with a firearm. Section 49(2) is significantly amended by the Bill to provide:

> If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor may use deadly force only if:
> (a) the suspect offers a threat of serious violence to the arrestor or another person; or
> (b) the arrestor suspects on reasonable grounds that the suspect has 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.

The "future danger principle" which formed part of section 49 after the 1998 amendment has not been expressly included in the Bill. The "threat of danger" requirement which was set by the court in Walters[38] has, however, been included in the Bill. The Bill closely aligns the wording of section 49(2) with the criteria laid down by the Constitutional Court in Walters[39] where Kriegler J tabulated the main points to "make perfectly clear" what the legal position is.

Kriegler J stated[40] that the effect of the two judgements (Govender[41] and Walters[42]) was that a suspect may be shot at only if:

(a) the person attempting the arrest believes; and

37 After the 1998 amendment.
38 S v Walters 2002 2 SACR 105 (CC) at [40] and [52].
39 S v Walters 2002 2 SACR 105 (CC) at [54] (h).
40 S v Walters 2002 2 SACR 105 (CC) at [52].
41 Govender v Minister of Safety and Security 2001 2 SACR 197 (SCA).
42 S v Walters 2002 2 SACR 105 (CC).

(b) has reasonable grounds for believing that the suspect either

(i) poses an immediate threat of serious bodily harm to the person attempting the arrest or members of the public; or

(ii) has committed a crime involving the infliction or threatened infliction of serious bodily harm.

The judgement in Walters[43] allowed for potentially deadly force to be used in order to arrest a fleeing suspect when the suspect committed a crime involving the infliction or threatened infliction of serious bodily harm irrespective of whether or not the suspect posed an immediate threat of serious bodily harm to others at the stage of arrest.[44] Cognisance was clearly given to the right of the State to ensure that dangerous criminals are brought to trial.[45]

The Bill similarly provides for the use of force, including deadly force, in arrests where the fugitive offers a "threat of danger" either to the arrestor or to another person, or where the suspect is reasonably suspected of having committed a crime involving the infliction or threatened infliction of serious bodily harm irrespective of whether the suspect poses an immediate threat of serious violence to the arrestor or another person at the stage of arrest. The Bill provides that the threat of violence posed by the suspect must be reasonably perceived by the arrestor to be of a very serious nature ("serious violence").[46]

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43 S v Walters 2002 2 SACR 105 (CC).

44 The word "or" used in S v Walters 2002 2 SACR 105 (CC) at [54] (h) is indicative of this intention.

45 Various politicians in South Africa, including the National Police Commissioner, have made several "shoot to kill" statements lately when discussing the crime situation. The Minister of Police, Nathi Mthetwa, promised in 2009 to amend the Criminal Procedure Act to allow the police to "shoot to kill" after even the President of South Africa urged the Police to return fire when attacked. The Bill is referred to by the press as the "shoot to kill" Bill. See, for example, Boyle 2010 www.timeslive.co.za. Some scholars furthermore suggest a link between these "shoot to kill" statements and the rise in killings by the police. The Annual Report 2008/09 of the ICD (http://www.icd.gov.za/ documents/ report_released /annual_reports/2008-2009/AnnualReport2008-09.pdf) tabled in Parliament in October 2009 shows a marked increase in deaths due to police action. 556 people were shot dead by the SAPS, which is reported to be the highest number in 12 years. However, the ICD in its Media Release on 25 March 2010 (http://www.icd.gov.za/media_statements/25032010.asp) stated clearly that such a link is not supported by facts and that the increase in deaths due to police action is more attributable to the increase of violent crimes itself. The ICD explains it as follows: "Some of the shootings by the police take place during confrontations with heavily armed suspects who will not hesitate to shoot at the police. Such shootings are in fact justified in law".

46 S 49(2) of the Bill.

The Bill,[47] as against the court in Walters,[48] does not include the requirement that the suspect must offer an "immediate" threat of serious bodily harm to the arrestor or members of the public in general. This implies that deadly force may be used when the arrestor reasonably believes the suspect offers a serious threat of danger to him or others at any time, and not only during the time of arrest. Therefore one can assume that the "future danger principle" is still provided for.

A major fear of the SAPS (and the main basis of its objections to the 1998 amendment) was that the 1998 amendment limits the police to being able to shoot a suspect only in self-defence. In Walters the court stated emphatically that the limitations placed on section 49[49] by the judgement had no bearing on the situation where the suspect threatened the life or safety of the prospective arrestor or of someone else. The right[50] and duty of police officers to protect their own lives and personal safety and also the lives and safety of others were endorsed and in no respect diminished. The only aspect decided in Walters was the right to use force, including deadly force, to stop a fleeing suspect from getting away.[51]

One can safely assume that the courts in future will interpret the provisions of the Bill in a similar fashion. Section 49 has nothing to do with the common law right to self-defence.[52] The purpose of the use of force provided for by section 49 is to arrest a (fleeing) suspect. It is widely understood that to rely on a defence of self-defence, several requirements regarding the attack and defence action must be met. In relation to an *attack* there must be evidence of an attack; the attack must be unlawful; the attack must be directed at an interest which legally deserves protection; and the attack must be imminent but not yet completed. In relation to a defence the defence action must be directed against the attacker; the defensive act must be necessary; there must be a reasonable relationship between the attack and

47 S 49(2)(a) of the Bill.
48 S v Walters 2002 2 SACR 105 (CC) at [52].
49 S 49 read prior to the 1998 amendment. The court in S v Walters 2002 2 SACR 105 (CC) at [73] refused to comment on the constitutionality of the provisions of the 1998 amendment as that was not the issue before the court.
50 The common-law right to self-defence.
51 S v Walters 2002 2 SACR 105 (CC) at [51] and [54].
52 Also referred to as private defence.

defensive act; and the attacked person must be aware of the fact that s/he is acting in self-defence.[53]

The Bill provides for the use of force (including deadly force) in order to arrest a suspect and not only as a defence mechanism. The only requirements to be met are that the suspect must offer a serious threat of danger to the arrestor or others, or must have committed a crime involving the infliction or threatened infliction of serious bodily harm and there is no other way (without using force) to arrest the suspect. The Bill clearly allows for deadly force even in circumstances where the arrestor's life or bodily integrity is not at stake. The provisions of the Bill therefore negate the police's main objection to and fear of the 1998 amendment.

The Bill also complies with the proportionality requirement set out by the Constitutional Court in Walters, as it requires in section 49(2) that the force used must be reasonably necessary and proportional in the circumstances. It goes without saying that when a court must consider if a killing was justified in terms of section 49(2), the court must take into consideration all of the guidelines set out in Walters.[54]

4 Application of the Bill in practice

The law regarding the use of force when effecting an arrest requires that police officers on the ground must often make several very difficult, split-second decisions and judgement calls in less than ideal and often dangerous circumstances. The requirements set by the Bill are less stringent than the requirements of the current section 49,[55] but the Bill still requires the arrestor to decide if the force to be used is reasonably necessary in the circumstances; and whether or not such force is proportional in the circumstances.

53 See inter alia Snyman Criminal Law 103-115 and Burchell Principles of Criminal Law 230-255.
54 S v Walters 2002 2 SACR 105 (CC) at [54] (a)-(i).
55 See also Van der Walt 2007 TSAR 106-108.

To make a decision in this regard the arrestor must take a number of factors into consideration e.g. the type of force to be used; the extent of the force to be used; whether such force is proportional to the seriousness of the crime the suspect allegedly committed; and whether such force is also proportional to the extent of the suspect's resistance against the arrest.

In addition, if the arrestor decides that the force "reasonably necessary and proportional" in the circumstances is "deadly force" the arrestor must then also consider whether the suspect offers a threat of serious violence to the arrestor or another person (at any stage because the Bill does not include the words "immediate threat" as does the current section 49, or as used by the court in Walters); or whether the arrestor suspects on reasonable grounds that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm; **and** whether there are no other reasonable means of carrying out the arrest at that time or at a later stage.

These complex decisions and value judgements hastily made by the arrestor on the scene under difficult circumstances are scrutinised objectively *ex post facto* by the courts. In the past[56] an accused person who wanted to rely on the protection of section 49 had to prove on a balance of probabilities that his actions fell within the provisions of the section. The cases of *S v Swanepoel*[57] and *Macu v Du Toit*[58] serve as examples in this regard. In the *Swanepoel*[59] case the court reaffirmed the authority of *R v Britz*[60] in which it was held that someone who relied upon the protection afforded by section 44 of the *Criminal Procedure Act* 31 of 1917 had to prove on a balance of probabilities that his actions fell within the terms of the section. This section was a predecessor of section 49(2).[61] In the case of *Macu v Du Toit*[62] it

56 Before the 1998 amendment of s 49 and the Walters and Govender decisions.
57 S v Swanepoel 1985 1 SA 576 (A) 588A-F.
58 Macu v Du Toit 1983 4)SA 629 (A) at 632H and 637D.
59 S v Swanepoel 1985 1 SA 576 (A).
60 R v Britz 1949 3 SA 293 (A) 303-4.
61 S 49 of the Criminal Procedure Act before the 1998 Amendment. See also s 1 of Cape of Good Hope Ordinance 2 of 1837; s 41 of the Transvaal Criminal Procedure Ordinance 1 of 1903; s 44 of the Criminal Procedure Act 31 of 1917 and s 37 of the Criminal Procedure Act 56 of 1955.
62 Macu v Du Toit 1983 4 SA 629 (A).

was confirmed that the burden of proof regarding the protection of section 49(1)[63] also rests on the accused to show on a balance of probabilities that his actions fall within the provisions of the section. The expectation created in *Matlou v Makhubedu*[64] that the Appeal Court may shift the onus to the State to prove that the accused had not complied with the requirements of section 37 of the *Criminal Procedure Act* 56 of 1955[65] did not materialise.[66]

Neither the Govender[67] nor Walters[68] case dealt specifically with the question of onus. The present legal position is thus that the accused will have to prove, on a balance of probabilities, in order to successfully rely on the protection of the provisions of the Bill, that:

(a) he believed; and
(b) had reasonable grounds for believing that the suspect; either
 (i) posed a threat of serious bodily harm to himself (the arrestor) or to members of the public in general;
 (ii) had committed a crime involving the infliction or threatened infliction of serious bodily harm; and
 (iii) that there were no other reasonable means of carrying out the arrest at that time or at a later stage.

Since the test applied by the court is an objective one[69] the accused will not be able to discharge the onus lightly. The accused will have to convince the court on a balance of probabilities that his or her conduct was what is expected of a reasonable person (or a reasonable police officer) in the same circumstances. Even if the person who carries out the arrest has reasonable grounds for believing that the suspect either poses an immediate threat of serious bodily harm to himself or members of the public; has committed a crime involving the infliction or threatened

63 S 49(1) of the Criminal Procedure Act prior to the 1998 amendment.
64 Matlou v Makhubedu 1978 1 SA 946 at 956A.
65 S 37 of the Criminal Procedure Act 56 of 1955 was one of the predecessors of s 49. For a number of other preceding provisions see fn 5 above.
66 R v Labuschagne 1960 1 SA 632 (A) at 635E-F.
67 Govender v Minister of Safety and Security 2001 2 SACR 197 (SCA).
68 S v Walters 2002 2 SACR 105 (CC).
69 The words "reasonable grounds" suggest that the test is objective.

infliction of serious bodily harm, potentially deadly force may not be used if other effective means of bringing the suspect before a court for trial purposes are available.[70] Such means would be available, for instance, where the suspect's address is known and the arrest can be carried out later. The purpose of section 49 is the arrest of a suspect in order to bring the suspect to justice before a court of law, and a dead suspect can hardly be brought to court.

It is trite law that a suspect has various fundamental rights afforded to him by the Constitution[71] and any provision of law providing for the use of force (however reasonable that force may be) will always infringe on these rights. The question to be determined by the court is whether or not such an infringement constitutes an unjustifiable limitation[72] on the rights of the individual. A balance must always be struck between the conflicting rights of the suspect, the arrestor and society as a whole. All the rights and duties of the individual, the State and society at large must be weighed against one another while taking into account all the circumstances of the specific case, and the constitutional values.[73] With regard to the use of force when effecting an arrest it must also be kept in mind that in terms of section 205(3) of the Constitution, it is the duty of the police *inter alia* to protect the safety and security of the citizens of South Africa and to maintain law and order.

The Supreme Court of Appeal confirmed in Govender[74] that it is the duty of the State (through the police) to protect the effectiveness of the criminal justice system. The court made it clear that a failure in this regard will not only cause liability on the part of the State but it will end in lawlessness and even a loss of the legitimacy of the State itself.[75] The police may not unjustifiably infringe on the fundamental rights of a suspect without incurring liability. At the same time police officers cannot afford to let a dangerous criminal go free because they are afraid to use reasonable, proportional

70 S v Walters 2002 2 SACR 105 (CC) at [54] as well as s 49(2)(b) of the Bill.
71 The rights to life, dignity and bodily integrity, for example.
72 The rights entrenched in the Bill of Rights of the Constitution may be limited in terms of s 36 of the Constitution only. Such limitation must according to s 36 be justifiable in an open and democratic society and comply with a number of constitutionally entrenched requirements.
73 See inter alia Currie and De Waal Bill of Rights Handbook 163-188; S v Manamela 2000 3 SA 1 (CC) at [32]; S v Bhulwana 1996 1 SA 388 (CC) at [18]; S v Singo 2002 4 SA 858 (CC) at [33].
74 Govender v Minister of Safety and Security 2001 2 SACR 197 (SCA) at [12].
75 Govender v Minister of Safety and Security 2001 2 SACR 197 (SCA) at [12].

and necessary force to arrest such a criminal, or to feel uncertain as to whether they should do so or not. If the police fail to arrest suspects when they are supposed to, they will be held accountable for their inaction too, and worse, they may lose credibility and even legitimacy in the eyes of the society they serve and must strive to protect.[76] It should be borne in mind that the right to life[77] is one of the two most important human rights inscribed in the Constitution. According to the Constitutional Court:[78]

> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these to rights above all others.

The wording of the Bill has already passed constitutional muster in a sense, as it basically duplicates the words used by the Constitutional Court in Walters,[79] where the Court set out the circumstances under which force may be used in effecting arrest. The application of this law in practice is, however, neither simple nor straightforward. It requires the balancing of conflicting rights as well as the making of several value judgements regarding what will be reasonable, necessary and proportional in each individual case. There is no mathematical formula to be used as a solution. Due to this complexity it is imperative that principles and procedures are implemented on ground level to simplify matters as much as possible for those who must apply the law – the legal principles and procedures are supposed to give "teeth" to the law in practice.

5 Providing the Bill with "teeth"

The drafting of the Bill is a step in the right direction. As explained above, the provisions of the Bill are closely aligned with the criteria laid down by the

76 Van der Walt 2007 TSAR 96 and De la Harpe and Van der Walt 2002 Speculum Juris 304.
77 Entrenched in s 10 of the Constitution.
78 S v Makwanyane 1995 3 SA 391 (CC) at [326-7].
79 S v Walters 2002 2 SACR 105 (CC) at [54].

Constitutional Court in Walters[80] and therefore will not easily be challenged on a constitutional basis. The Bill succeeds in its purpose to provide legal certainty regarding the circumstances in which force, especially deadly force, may be used in effecting arrest.

However, the warning lights still flash in connection with the application of any law providing for the use of force in effecting arrest in a country where the police are not sufficiently trained and re-trained in the use of such force and where they do not make sufficient use of new technology to investigate the suitability of alternatives to the use of fire-arms. South African society is rife with violent crime,[81] and while it is necessary for the police to be empowered to effectively prevent and combat crime, to protect the safety and security of individuals and to maintain law and order,[82] the basic human rights and freedoms of individuals must be respected and protected at the same time. This can be done only through the drafting of proper legislation as well as the implementation of policies and procedures on ground level. It is necessary to provide "teeth" to the law.

Police officers, on ground level, are the ones who implement and apply the law in this regard. Therefore it is imperative that they must know exactly what their powers are. They should not be hesitant to use or uncertain about using reasonable and proportional force when necessary, as hesitation could cost them their lives[83] (and/or threaten the safety and security of the community at large). That being said - the impression that the police have a blanket licence to "shoot to kill" when apprehending suspects can never be tolerated. Not even in a country rife with crime, like South Africa.

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80 S v Walters 2002 2 SACR 105 (CC) at [54].

81 Approximately 2,1 million serious crime cases were registered in South Africa during the 2009/2010 policing year (1 April 2009–31 March 2010). Roughly a third of these cases were contact crimes. 34.1 people per 100 000 of the population were murdered and 347.3 people per 100 000 were robbed (robbery with aggravating circumstances as well as common robbery). 18 786 people per 100 000 of the population were robbed in their residential premises while 14 534 per 100 000 of the population were robbed in their places of business. Carjacking statistics indicate that 13 902 people per 100 000 of the population were carjacked. See the official crime statistics on SAPS 2009/2010 www.saps.gov.za.

82 As their constitutional obligations require. See s 205 of the Constitution.

83 110 police officers were killed on duty during the 2009/2010 year according to statistics on SAPS 2009/2010 www.saps.gov.za.

The regular police officer who has to apply the law in practice must be equipped with the necessary legal knowledge, expertise and sufficient training to effectively apply the provisions regarding the use of force in effecting an arrest. Until and unless the management of the police makes an attempt to issue simple guidelines in the form of a clear national "arrest-law" instruction,[84] South Africa will never keep abreast with international standards regarding the use of force during arrest. The continual training and re-training of police officers with regard to the use of force in effecting arrest is not negotiable. Appropriate and requisite training can empower police officials to make the correct decisions[85] immediately without hesitation. Training should include situational simulation so that responses by police officers are practised and habitual. There are various international policies with clear guidelines in this regard that South Africa can draw from.[86]

In 2001 the ICD conducted a research project[87] on the use of force in effecting arrest. The researchers proposed that, among others, certain procedures of the New York Police Department (NYPD) be adopted by the SAPS with regard to the use of force in effecting arrest.[88] The report also states: "...there is an obvious need for clear and concise explanations and definitions of the whole section 49". This report was released before the 1998 amendment came into operation and before section 49 underwent constitutional scrutiny in the Govender[89] and Walters[90] cases. Almost ten years later and these proposals of the "watchdog"[91] of the police have not yet been

84 The guidelines set out by Kriegler J in S v Walters 2002 2 SACR 105 (CC) at [54] must be included in this national instruction in a way that ensures police officials know and understand exactly what is required of them.

85 The police should know when to use force that is reasonable, necessary and proportional in particular circumstances and when to refrain from using force. They should also be made aware that the basic human rights and freedoms of individuals should not be unduly infringed in the exercise of their powers.

86 See inter alia the United Nations' Basic Principles on the Use of Force and Firearms by Law Enforcement Officials available at http://www.uncjin.org/Standards/Conduct/conduct.html and the International Association of Chiefs of Police's Model Policy on the Use of Force available at http://www.theiacp.org/PublicationsGuides/ModelPolicy/tabid/135/Default.aspx.

87 IHRCJS 2001 www.icd.gov.za.

88 The NYPD uses a "Use of Force Model Law" to train police officers extensively in the use of force during crime prevention and when effecting arrest. The ICD inter alia proposed in their report that the SAPS should for example be trained in the use of weapons other than fire-arms.

89 Govender v Minister of Safety and Security 2001 2 SACR 197 (SCA)

90 S v Walters 2002 2 SACR 105 (CC).

91 Refer on the ICD to fn 24 above.

implemented, despite the fact that there were radical developments and changes to section 49 during this time.

The International Association of Chiefs of Police (IACP) *Model Policy on the Use of Force* provides that an officer may use only the force that reasonably appears necessary to effectively bring an incident under control, while protecting the lives of the officer and others. It stresses that the use of force is not left to the unfettered discretion of the officer involved and is not a subjective determination. The policy makes it clear that the use of force must be objectively reasonable. The officer must use only that force which a reasonably prudent officer would use under the same or similar circumstances. Deadly force is defined as any force that is reasonably likely to cause death, and non-deadly force as any use of force other than that which is considered deadly force. Law enforcement officers are authorised to use deadly force to protect the officer or others from what is reasonably believed to be a threat of death or serious bodily harm, and/or to prevent the escape of a fleeing violent felon who the officer has probable cause to believe will pose a significant threat of death or serious physical injury to the officer or others. Where practicable prior to the discharge of a firearm, officers should identify themselves as law enforcement officers and state their intent to shoot.

Furthermore, in addition to the training required for firearms qualification, officers are required to receive agency-authorised training designed to simulate actual shooting situations and conditions and, as otherwise necessary, to enhance officers' discretion and judgement in using deadly and non-deadly force.

The United Nations (UN) *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*[92] (Basic Principles) requires that governments and law enforcement agencies develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for differentiated use of force and firearms. These should include the development

[92] Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind. It is furthermore required in the Basic Principles that whenever the lawful use of force and firearms is unavoidable, law enforcement officials should:

(a) exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
(b) minimise damage and injury, and respect and preserve human life;
(c) ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment; and
(d) ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

According to the Basic Principles, law enforcement officials should not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms should be made only when strictly unavoidable, in order to protect life. The Basic Principles further provide that a warning of the intent to use a fire-arm must be given, it lays down several rules and regulations regarding the use of fire-arms, it requires the training of law enforcement officials, and it describes the reporting and review procedures to be followed.

South Africa is a member of the International Association of Chiefs of Police and the UN and as such should aspire to implement both of the above international policy guidelines in practice. It is not sufficient to say that South African law complies with international standards in this regard – the guidelines and procedures must also be

implemented. Both international policy guidelines[93] require law enforcement agencies for example to provide training and re-training not only in the use of fire-arms but also in the use of alternative kinds of force in effecting arrest, whether such force includes the use of a fire-arm or an alternative weapon. In this regard South Africa does not yet fully comply with international standards – the applicable domestic law lacks "teeth" in that there are insufficient mechanisms and policies in place to ensure its effective application.

6 Conclusion

The level of violent crime in South Africa is unacceptably high. Contact crimes like armed robberies[94] are still increasing. In a country like South Africa the police should not be afraid[95] to use the necessary force (provided for by the law) to bring these dangerous criminals to boot. On the other hand every South African Police member must know that blanket "shoot to kill" statements by politicians will not help them in cases where they are used unnecessary, unreasonable or with excessive force. In Walters[96] the court emphasised that the State "... is called upon to set an example of a measured, rational, reasonable and proportionate response to anti-social conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors..."

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93 The IACP Model Policy on the Use of Force as well as the UN's Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

94 SAPS 2008/2009 www.saps.gov.za. More than two million (2,098,229) cases of serious crime had been reported in South Africa between 1 April 2008 and 31 March 2009 - an increase of 0.2 percent. Violent crime, or "contact crime" as it is officially labelled, accounts for 32.7 percent of all reported crime. Robbery with aggravated circumstance increased by 0.8 percent with business robberies showing an increase of 41.5 percent and a 27.3 percent increase in house robberies is reported. The small business sector was the most affected, having been the target in almost two thirds of business robberies. The hijacking of trucks increased by 15.4 percent and carjacking by 5 percent. The 2009/2010 National Crime Statistics released on 21 September 2010 show a slight decrease in some serious crimes like murder, but business and house robberies are still increasing – SAPS 2009/2010 www.saps.gov.za. South Africa has one of the highest murder (and crime) rates in the world. For example the murder rate in South Africa during the 2009/10 year is 34.1 per 100 000 people compared with Canada where it is 1.86 and with New Zealand where it is 1.14. It is also much higher than the global average of 9.61 per 100 000 people.

95 See IHRCJS 2001 www.icd.gov.za in this regard, where many subjects indicated that they would rather let a criminal go free than shoot at him in order to arrest him.

96 S v Walters 2002 2 SACR 105 (CC) at [47].

The use of force in effecting arrest must always be exercised within the parameters set by the law, which is why it is imperative that the law regarding the use of force in effecting arrest is clear, simple and certain. Arbitrary and wanton arrestors' discretion should never be tolerated. The establishment of objective standards to guide, regularise and make rationally reviewable the process for using force in effecting arrest, especially for using deadly force, is crucial.

Although the 201 Criminal Procedure Amendment Bill complies at face value with the requirements of the South African Constitution and international standards with regard to the use of force in effecting arrest, concerns can be raised over certain aspects.

Firstly it must be determined what exactly is meant by the words in section 49(2)(a): "the suspect offers a threat of serious violence to the arrestor or another person". What is the meaning of the word "offers" in this context? Should the word not be replaced with "poses"? Also what must be understood by the term "a threat"? Is it a "warning" or a "menace", or a "risk" or a "danger"? Must the threat be real – or is a threat of future violence also regarded as a threat? More importantly the caveat in section 49(2)(b) - that deadly force may be used only if there are no other reasonable means of carrying out the arrest - should also apply to section 49(2)(a).[97] Despite these few concerns the 2010 Bill remains a step in the direction of clarifying and simplifying the South African law with regard to the use of force in effecting arrest. Still, it is only the first of a number of necessary steps.

A further step in the right direction would have been taken if the SAPS were to develop and implement a national "arrest law"-manual that explains in detail the law regarding the use of force in practice in simple terms. Such a manual should subsequently be explained to all members and understood by them, and should lead to the provision of the necessary training and the use of new technology, as explained above.[98] The SAPS has much material to draw from if one considers the

97 That was one of the requirements set by the court in S v Walters 2002 2 SACR 105 (CC) at [54]. The court clearly stated that arrest is not always the only means specifically when deadly force is used.

98 IHRCJS 2001 www.icd.gov.za; Bruce 2005 South African Review of Sociology 141-159.

international policies and guidelines discussed above;[99] the recommendations of its oversight body in South Africa,[100] and the courts' judgements in Govender[101] and Walters.[102]

Lastly, more comparative research on the case law of foreign jurisdictions relevant to police shootings should be conducted in order to ensure that South African law regarding the use of force in effecting arrest is ultimately the best possible. This contribution has not yet ventured in a study of this nature.

In a country like South Africa, with its very high levels of crime,[103] it is logical that more arrests are being executed than in countries with lower crime rates. Due to the high incidence of violent crimes in South Africa many arrests are carried out through the use of force. It follows that the South African law in this regard must continually be developed and adapted to provide for these circumstances. The fight against crime is one of the five top priorities of the South African government, but the battle will be lost unless further progress is made with regard to the use of force by the SAPS in effecting arrest.

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List of abbreviations

IACP	International Association of Chiefs of Police
ICD	Independent Complaints Directorate
IHRCJS	Institute for Human Rights and Criminal Justice Studies
SAJHR	South African Journal of Human Rights
SAPS	South African Police Service
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

THE USE OF FORCE IN EFFECTING ARREST IN SOUTH AFRICA AND THE 2010 BILL: A STEP IN THE RIGHT DIRECTION?

Tharien van der Walt*

SUMMARY

In South Africa the use of force in effecting arrest is statutorily governed by section 49 of the *Criminal Procedure Act* 51 of 1977. The inception of the Constitution brought about a dramatic change in South African law in this regard. During 2001 and 2002 the two highest courts in the country had to decide on the constitutionality of sections 49(1) and 49(2) respectively. The Supreme Court of Appeal in *Govender v Minister of Safety and Security* 2001 2 SACR 197 (SCA) did not declare section 49(1) unconstitutional but found it had to be interpreted restrictively ("read down") to survive constitutional scrutiny. The Constitutional Court on the other hand confirmed the unconstitutionality of section 49(2) in *S v Walters* 2002 2 SACR 105 (CC) and the section was declared invalid. By then (as early as 1998) the legislature had already promulgated an amendment to section 49, but the amendment came into operation only in 2003 after section 49 had undergone intensive constitutional scrutiny. Legal scholars and others raised serious objections against the amendment – some were even of the opinion that it created a "right to flee" and that the rights of perpetrators were protected to the detriment of law-abiding citizens. The Department of Justice and Constitutional Development in 2010 drafted an Amendment Bill which was subsequently approved in Parliament. This paper discusses and concludes on: the developments over the last years in the South African law with regard to the use of force in effecting arrest by the South African Police Service (SAPS); international policies and guidelines of the police in this regard; and the application of the provisions of the Amendment Bill in practice and the possible pitfalls in the application of the latter.

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KEYWORDS

Use of force in effecting arrest; Section 49 of the Criminal Procedure Act; reasonable, proportional and necessary force; deadly force; national arrest law manual; application of the use of force in practice.