

**THE HISTORICAL PROGRESSION OF SECTION 49 OF THE
CRIMINAL PROCEDURE ACT 51 OF 1977: AN OVERVIEW OF THE
PAST TO PRESENT IN LINE WITH THE CONSTITUTION OF SOUTH
AFRICA**

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ABSTRACT

Police officers are the people that need to utilise the law, especially with regard to effecting an arrest. They would need to know how to apply force in various situations and what limitations are there. It is therefore important for them to understand the purpose of section 49 of the Criminal Procedure Act 51 of 1977, and how to effect a lawful arrest.

Crime is rife in South Africa and therefore section 49 had to undergo numerous amendments through the years to try and ensure that the police officials are using reasonable force when apprehending suspects, while also protecting the offender and his right to life.

This dissertation aims at examining the three main versions of section 49, which are the 1977 version, the 2003 version and the current version of 2012. The purpose of this examinations is ultimately to assess whether the current 2012 version of section 49, which came about as a result of the *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) and *Ex Parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC) complies with these two landmark cases, and is therefore constitutional.

DECLARATION BY SUPERVISOR

I, **KHULEKANI KHUMALO**, hereby declare that this mini-dissertation by **ADILLA ABDOOL JABAR** for the degree of Master of Laws (LLM) in **CRIMINAL JUSTICE** be accepted for examination.

Signed-----

Date-----

KHULEKANI KHUMALO

DECLARATION BY STUDENT

I, **ADILLA ABDOOL JABAR**, declare that this mini-dissertation submitted to the University of Kwa-Zulu Natal (Pietermaritzburg Campus) for the degree of Masters of Law (LLM) in Criminal Justice has not been previously submitted by me for a degree at this university or any other university, that it is my own work and in design and execution all material contain herein has been dully acknowledged.

Signed-----

Date-----

ADILLA ABDOOL JABAR

DEDICATION

I dedicate my dissertation work to my family. A special feeling of gratitude to my late parent, Mohamed Asham Abdool Jabar whose words of encouragement and push for furthering my studies I will be eternally grateful for as well as for the upbringing and the close-knit family ties you bestowed on me.

To my mother who has the biggest heart and has always been there to assist me in reaching my goals - without her this all would not be possible. For her constant assistance, encouragement, and solid morals and values that she instilled in me as a child I will forever be grateful. For all her help words cannot express the gratitude to have her in my life.

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Chapter 1

Introduction

1.1 Purpose of the study

The fundamental purpose of this dissertation is to critically examine the current section 49 of the Criminal Procedure Act (CPA)¹ in order to assess whether it complies with the two landmark cases stemming from the Constitutional Court and the Supreme Court of Appeal, these being the case of *Govender v Minister of Safety and Security* 2001(4) SA 273 (SCA)² (hereinafter referred to as the *Govender* case) and *Ex Parte Minister of Safety and Security: in re S v Walters* 2002(4) SA 613 (CC)³ (hereinafter referred to as the *Walters* case). Both these cases pointed out glitches with regard to the wording of section 49 of the CPA, which mainly had been infringing the various constitutional rights of the individuals facing arrest.

In light of the above, the question sought to be addressed is whether the 2012 version of section 49 of the CPA, as introduced by the Criminal Procedure Amendment Act (CPAA),⁴ which regulates the use of force during an arrest, eventually comes in line with the Constitution in that it no longer unjustifiably infringes certain constitutional rights, among which are the right to life,⁵ right to freedom and security,⁶ freedom against cruel, inhuman or degrading treatment or punishment,⁷ and the right to a fair trial which includes the right to be presumed innocent until proven guilty.⁸

However before the study analyses the current version, which is the 2012 version of section 49 of the CPA; it will be prefaced with a twofold background. At the outset, the study will discuss the history of section 49 and thereafter the position of the 1977 version of section 49 at the time that the *Govender* and *Walters* cases were decided. Following that will be the

¹ 51 of 1977, as introduced by the Criminal Procedure Amendment Act 9 of 2012.

² 2001(2) SA 273 (SCA).

³ 2002 (4) SA 613 (CC).

⁴ 9 of 2012.

⁵ S 11 of the Constitution of the Republic of South Africa, 1996(hereinafter referred to as the Constitution).

⁶ S 12 of the Constitution.

⁷ S 14 of the Constitution.

⁸ S 12 (1)(e) of the Constitution.

discussion on the position of the 2003 version of section 49,⁹ which came after the *Govender* and *Walters* case. Finally, it will analyse the 2012 version which is the current version of section 49 and test whether the 2012 version is in line with the constitutional as requirements laid down particularly in the *Walters* case.

The reasoning for this structure is in order to comprehend the historical progression of section 49. It is necessary to discuss these three notable amendments to section 49. These amendments created much controversy in the legal fraternity. Therefore, it makes for much interesting reading to deal with these landmark amendments in this study.

The study consists of four chapters. Chapter one lays out the purpose of the study and the background of the study, Chapter two which entails the discussion and analysis of the *Govender* and *Walters* case, and analysis of the 2003 version of section 49. Chapter Three considers the current position of section 49 of the CPA and whether this current section 49 of the CPA does comply with the constitutional requirements set out in the *Govender* and *Walters* cases. Chapter Four discuss the alignment to the *Walters* case. Finally, Chapter Five will consist of recommendations and conclusions.

1.2 Background of the study

The function of the Independent Police Investigative Directorate (IPID) is to conduct independent, impartial and quality investigations of criminal offences allegedly committed by members of the South African Police Services (SAPS) and Municipal Police Services and subsequently release an annual report.¹⁰ The 2014/2015 Annual Report found that a total of 396 deaths were as a result of police action.¹¹ Of these, 106 of these were suspects who died during the course of the crime, 18 were suspects who died during the course of an escape and 114 suspects died during the course of an arrest of which 106 were shot with a service firearm.¹²

⁹ Which was introduced by section 7 of the Judicial Matters Second Amendment Act 122 of 1998.

¹⁰ 2(d) of the Independent Police Investigative Directorate Act 1 of 2011.

¹¹ The Independent Police Investigative Directorate *Annual Report* (2014-2015) 42.

¹² *Ibid* 52.

The 2015/2016 Annual Report found that there were a total of 366 deaths as a result of police action.¹³ Of these, 101 were suspects who died during the course of a crime, 8 were suspects who died during the course of an escape and 127 suspects died during the course of an arrest, 115 of which were shot with a service firearm.¹⁴

The 2016/2017 Annual Report found that there were a total of 364 deaths as a result of police action¹⁵. Of these, 132 were suspects who died during the course of a crime, 10 were suspects who died during the course of an escape and 117 were suspects who died during the course of an arrest, 105 of which were shot with a service firearm.¹⁶

The above annual statistics exposes a pattern that the death of suspects during the course of an arrest makes up almost a third of the total number of people killed during the police operations. With that in mind, one has to be alarmed at the fact that a third of the deaths are caused during the course of an arrest, but in order for these arrests to be effected certain requirements must be complied with before an arrestor uses force to effect an arrest.¹⁷ Section 49 of the CPA sets out the requirements for the use of force in effecting an arrest and in terms of the Constitution, which is the supreme law of South Africa, the police have a constitutional responsibility 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.¹⁸

1.3 History of section 49

In South Africa, the use of force in effecting arrest is statutorily governed by section 49 of the CPA. This statutory provision and its predecessors have formed part of South African law for many years. Some of the section 49 predecessors date back to the Criminal Codes of the four pre-union colonies in South Africa. These Codes regulated the use of force in their respective jurisdictions, but were all repealed in 1917 and the Criminal Procedure and Evidence Act 31 of 1917 came into force.¹⁹ Section 44(1) of this Act regulated the use of deadly force in effecting an arrest. It made provision for the use of force in instances where no other means

¹³ The Independent Police Investigative Directorate *Annual Report* (2015-2016) 51.

¹⁴ Ibid 58.

¹⁵ The Independent Police Investigative Directorate *Annual Report* (2016-2017) 35.

¹⁶ Ibid 42.

¹⁷ JJ Joubert et al *Criminal Procedure Handbook* 11 ed (2014) 134.

¹⁸ 205(3) of the Constitution.

¹⁹ The Cape Ordinance 2 of 1837, the Natal Ordinance 18 of 1845, the Orange Free State Ordinance 12 of 1902, and the Transvaal Ordinance 1 of 1903.

were available to the arrestor.²⁰ In terms of this section, the suspect was to be suspected on reasonable grounds and this required an objective belief on the part of the arrestor when using deadly force to effect an arrest.²¹ The Criminal Procedure and Evidence Act was replaced by the Criminal Procedure Act 56 of 1955.²² Section 37 of this Act made provision for the use of deadly force in effecting an arrest.²³ The difference between the 1917 Act and the 1955 Act was that killing a person who is not suspected of having committed an offence contained in the First Schedule was not permitted under the provision of the 1955 Act.²⁴ Thereafter the Criminal Procedure Act 51 of 1977 came into operation where section 49 made provision for the use of force in effecting an arrest.

As mentioned, section 49 underwent many amendments in order to provide clarity to police officers and private people. For the purposes of this study, we shall endeavour to discuss briefly the position of the 1977 version of section 49 at the time when it had been constitutionally scrutinised by the two highest courts in South Africa in 2001 and 2002. The two milestone cases were the *Govender v Minister of Safety and Security*²⁵ and *Ex parte Minister of Safety and Security: in re S v Walters*.²⁶

²⁰ A le Roux- Kemp and A Horne 'An analysis of the wording, Interpretation and Development of the Provisions Dealing with the Use of Lethal Force in effecting an Arrest in South African Criminal Procedure' (2011) *SACJ* 268.

²¹ *Ibid.*

²² *Ibid* 269.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Govender v Minister of Safety and Security* (Note 2 above).

²⁶ *S v Walter and Another* (Note 3 above).

Chapter 2
The Govender and Walters cases

2.1 Introduction

The 1977 version of section 49 reads as follows:

49. 'Use of force in effecting arrest

(1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person –

(a) resists the attempt and cannot be arrested without the use of force; or

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

(2) Where the person concerned is to be arrested for an offence referred to in Schedule 1²⁷ or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide'.²⁸

²⁷ 'Schedule 1 includes the following crimes: Treason, sedition, public violence, murder, culpable homicide, rape, indecent assault (at present known as sexual assault in terms of 5 of the Sexual Offences Amendment Act 32 of 2007), bestiality, robbery, kidnapping, child stealing, assault when a dangerous wound is inflicted, arson, malicious injury to property, breaking or entering any premises, with intent to commit an offence, theft, receiving of stolen property knowing it to have been stolen, fraud, forgery and uttering. Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine. Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule'.

²⁸ S49 of the Criminal Procedure Act 51 of 1977.

The 1977 version of section 49(1) regulated all situations where force was used for purposes of arrest and section 49(2) expressed situations where deadly force can be used. This version did receive judicial scrutiny from the two landmark cases and the discussion on same will follow.

2.2 South African case law

The case law relating to the use of deadly force is discussed below.

2.2.1 *Govender v Minister of Safety and Security (D)*

The plaintiff's son, Justin (hereinafter referred to as J), and some friends had been seen by the police driving a stolen car. The police gave chase with their siren and blue lights switched on, but J, who was driving the car, failed to stop.²⁹ After a high-speed chase, J stopped the car and attempted to run away. One of the policemen pursued him on foot and shouted at him to stop. The policeman fired a warning shot into a grass bank and again instructed him to stop. The policeman was convinced that he would not be able to catch J and fired a shot at his legs³⁰ - the shot struck him in the spine, resulting in J becoming a paraplegic.³¹

The plaintiff claimed damages from the defendant, being the Minister of Safety and Security, as a result of serious injuries.³² The cause of action arose at Durban on 16 June 1995. At the time J was a matriculant, aged 17 years. The fact that the police officer, Cox, fired the shot that injured J was not in dispute. Nor that Cox at the time was acting within the course and scope of his employment. It was also not in issue that Cox fired the shot with the intention of wounding J.

The only element remaining to find a delictual cause of action against Cox, and consequently vicarious liability on the part of the defendant, is that of wrongfulness. The defendant's case is that the action taken by Cox, although *prima facie* wrongful as a violation of Justin's constitutional rights, was justified, and therefore not wrongful, Cox having acted within the scope and ambit of section 49(1) of the CPA.

²⁹ *Govender v Minister of Safety and Security* (Note 2 above at 964 B-C).

³⁰ *Ibid* at 964 A-C.

³¹ *Ibid* at 962 A-B.

³² *Ibid* at 962 J-B.

The trial court³³ found that the action taken by the police officer Cox was reasonably necessary to prevent J from escaping, and thus found that Cox had acted lawfully:

It seems to me that at common law and in terms of s 49(1) the Courts approach each case on its own facts and circumstances in the general context of our society and, of course, also the Constitution in deciding in each particular case whether the degree and type of force applied was the minimum force possible, reasonable, necessary and proportionate, such as to justify a reliance upon s 49(1). It cannot, in my view, be contested that in terms of criminal offences, two of the most prevalent and present dangers to South African society are the theft of motor vehicles and the closely related offence of the hijacking of motor vehicles. Many lives are lost in seeking to prevent the escape of motor vehicle thieves and their apprehension. In this case the stolen vehicle had to be followed at high speed, and in the end the police had to avoid colliding with the vehicle which had been turned in such a way that it bore down upon the police vehicle. In my view, the force used was reasonable and necessary and proportionate to the offence of motor vehicle theft. The public interest involved in the use of deadly force as a last resort to arrest a fleeing car thief relates primarily to the serious nature of this crime, its increasing prevalence throughout this country and the public's interest in the apprehension, prosecution and punishment of car thieves. In the result, in my view, the shooting was justified by s 49(1).³⁴

Furthermore, the court found that the force used in the present case was reasonable, necessary and proportionate to the offence of car theft and the policeman's conduct had been justified by section 49 (1).³⁵ The court held, that in terms of section 35(2) of the Interim Constitution³⁶ no law which limited any of the rights protected in the Interim Constitution would be unconstitutional solely because its wording *prima facie* exceeded the limits imposed in it, provided that the law was reasonably capable of a more restricted interpretation.³⁷ In such case the law had to be 'read down' so that the more restricted interpretation should be applied.³⁸ The court held further that in terms of sections 33(1) and (2) of the Interim Constitution, the rights entrenched in it could only be limited by a law of general application, and only to the extent that such law was reasonable and justifiable in an open and democratic

³³ *Govender v Minister of Safety and Security* 2000 (1) SA 959 (D).

³⁴ *Ibid* at 968 B-D.

³⁵ *Ibid*.

³⁶ Interim Constitution of the Republic of South Africa 200 of 1993.

³⁷ *Ibid* at 968G-I.

³⁸ *Ibid*.

society based on freedom and equality, was necessary and did not deny the crucial content of the right in question.³⁹ The amount and method of force used had to be in proportional balance to the aim that was to be achieved and had to be the minimum force that would be reasonably effective in the circumstances.⁴⁰ Such reasonableness also included the weighing up of the nature and seriousness of the crime in question, as committed against the amount and method of force used. The court concluded that section 49 (1) met the criteria of section 33 of the Interim Constitution and was constitutional valid⁴¹.

2.2.2 *Govender v Minister of Safety and Security (SCA)*

On appeal⁴² the Supreme Court of Appeal held that to apply section 49(1) of the CPA to this instance, consideration must be given to the ‘nature and degree of the force used and the threat posed by the suspect to the safety of the police officers, other individuals and society as a whole’.⁴³ With this in mind, the court must also consider the facts which was that the ‘suspect was young, unarmed, of slight build, and he could have been arrested in another way’.⁴⁴

The court considered the threat posed by the suspect and the degree and nature of the force used was applied, that the scale was tipped in favour of the suspect. He was unarmed and the policeman did not see a weapon in his possession. He was 17 years old and it must have been obvious to the policeman when he tried arresting the suspects that they were youths.⁴⁵

The interesting aspect is that there had been no allegation of hijacking, assaults or other acts of physical violence having been committed by the suspect or his friends in the car nor had there been any threat or danger to the police or the public.⁴⁶ It is submitted that the policeman acted incorrectly as J clearly wasn’t a suspect he had no weapon in his possession yet just because he ran the policemen fired. The aspect of interest of society was not present simply because J had no intention and wasn’t actually committing any crime and there was no reason for the policeman to violate the suspect’s physical integrity, nor could it be said that the protection of property was more important than life or physical integrity.⁴⁷ The policeman’s

³⁹ Ibid at 969 G-H.

⁴⁰ Ibid at 969 C-D.

⁴¹ Ibid at 972 F-H.

⁴² *Govender v Minister of Safety and Security* (Note 2 above).

⁴³ Ibid at para 21.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

conduct clearly fell out of the bounds of section 49(1) of the CPA. It is submitted that the policeman failed to consider all the aspects highlighted, the judgment call he eventually made was far from being reasonable considering the circumstances at the time of the incident. The court was of the view that the force used to prevent the suspect from fleeing was not in line with the constitutional values and therefore the conduct of the police official was unlawful.⁴⁸

2.2.3 Comparison between *Govender (D)* and *Govender (SCA)*

In *Govender (SCA)*, the court considered the age of the suspect and furthermore that the police man must have known that the suspects were very young,⁴⁹ and that there had been no allegation of other acts of violence committed by the suspect nor had there been any threat or danger to the police or the public. The court in *Govender (D)* did not take these factors into account in deciding whether the arrestor's conduct was reasonable and proportional. It is possible that if the High Court had taken these factors into account, it would have reached a different decision. This shows that a court must consider all the circumstances of each case.

The differences between the requirements of reasonableness and proportionality that were applied in these two cases were that in *Govender (D)*, the court held that with regard to proportionality, the amount and method of force used had to be in proportional balance to the aim that was to be achieved and had to be the minimum force that would be reasonably effective in the circumstances.⁵⁰ According to the court, reasonableness also includes the weighing up of the nature and seriousness of the crime in question, as committed against the amount and method of force used. However, in *Govender (SCA)*, it was held that the test of proportionality between the seriousness of the relevant offence and the force used should include considering the proportionality between the nature and degree of the force used and the threat posed by the suspect to the safety and security of the police officers, other individuals and society.

2.2.4 *S v Walters (Tk)*

In this case the incident arose from a shooting incident in Lady Frere one night in February 1999 when the two accused, accused one the father, and accused two, the son, shot at and wounded a burglar fleeing from their bakery. One or more of the burglar's wounds proved

⁴⁸ Ibid at para 22.

⁴⁹ Ibid at para 22.

⁵⁰ Ibid 969 C-D.

fatal, resulting in a murder charge to which the defence raised the exculpatory provisions of section 49(2).⁵¹

The constitutionality of section 49(1)(b) and (2) thus again arose in *Walters* (Tk). The accused raised a defence based on section 49(2) of the CPA during the trial on a charge of murder. The court ruled that the provision was invalid and adjourned the trial for the declaration of invalidity to be confirmed by the Constitutional Court. In deciding to declare the subsection invalid, the court held that the court in *Govender* (SCA) had ‘overstepped its constitutional mandate’ and that it was not bound thereby.⁵²

The court observed that in *Govender* (SCA), the scope covered by section 49(1) was too wide, and the provision imposed limitations on constitutionally entrenched rights such as the right to life, the right to physical integrity, the right to dignity, the right to be presumed innocent, and the right to equality before the law and equal protection of the law. The suspect’s constitutional rights were to be weighed against the limitation imposed by the provisions.

The court then assessed the constitutionality of section 49(2) and stated that the rights to life and dignity were placed above the other rights in the Bill of Rights. They were the most important of all human rights and were the source of all other personal rights.⁵³ The process of balancing rights in section 36 of the Constitution involved the weighing up of different and competing interests.⁵⁴ Section 36(1) of the Constitution expressly required courts to take into account the nature of the right affected by the limitation, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether there were less restrictive means to achieve the purpose.⁵⁵ Taking into account these factors, the conclusion had to be reached that section 49(2) was not justifiable.⁵⁶ The killing of fleeing suspects constituted a total denial of their constitutional rights.⁵⁷ The Constitution permitted limitations but not denial of rights. A limitation had to be restricted to the extent that it remained reasonable and justifiable. The limitation had to have been adopted in order to achieve a particular desired purpose. The killing of suspects did not

⁵¹ *S v Walters and Another* (Note 3 above, at para 24).

⁵² *Ibid* at para 13.

⁵³ *Ibid* at para 24.

⁵⁴ *Ibid* at para 25.

⁵⁵ *Ibid* at para 26.

⁵⁶ *Ibid* at para 29 and 30.

⁵⁷ *Ibid* at para 29.

achieve such a purpose. It did not serve to preserve the criminal justice system.⁵⁸ The risk of innocent people being killed under the purview of section 49(2) was unacceptably high.⁵⁹ There was no rational connection between such killing and the purpose that force was used for fleeing suspects.⁶⁰

Thereafter the constitutionality of section 49(1)(b) was assessed and the court found that the provision also brought about a limitation of rights such as the right to life, the right to physical integrity, the right to dignity, the right to be presumed innocent, and the right to equality because it permitted the ‘use of such force as may in the circumstances be reasonably necessary’ to capture the fleeing suspect. The only restriction on the force used was that it should be ‘reasonably necessary for stopping the suspect’s escape’.⁶¹ The subsection applied to offences ranging from the most trivial to the extremely serious and it was couched in extremely and dangerously wide terms. The court found that section 49(1) was too broad, rendering it unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom.⁶² The court made an order declaring the provisions of section 49(1)(b) to be inconsistent with the Constitution and therefore invalid and referred the order to the Constitutional Court for confirmation proceedings.⁶³

2.2.5 *S v Walters* (CC)

In *Walters* (CC), the court referred to the interpretation of section 49(1)(b) by the court in *Govender* (SCA), which was that the words ‘*use such force as may in the circumstances be reasonably necessary . . . to prevent the person concerned from fleeing*’ must be interpreted to exclude the use of a firearm or a similar weapon unless the arrestor or person assisting the arrestor in arresting a fleeing suspect has reasonable grounds for believing:

- ‘(i) that the suspect poses an immediate threat of serious bodily harm to him, or a threat of harm to members of the public; or
- (ii) that the suspect has committed a crime involving the infliction or threatened

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid at para 31.

⁶² Ibid at para 34.

⁶³ Ibid at para 38.

infliction of serious bodily harm'.⁶⁴

The court set out the law relating to the arrest of a suspect by way of a list of given factors to be considered by police officials when performing arrests.⁶⁵

- (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 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 the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person'.⁶⁶

⁶⁴ *Ex Parte Minister of Safety and Security* (Note 3 above at para 38 and 39).

⁶⁵ *Ibid* at para 54.

(ii)

These factors were provided to assist police officials in properly understanding how to effect and arrest. A point to note was that the court held that the test in *Govender*⁶⁷ is accepted as establishing the requirements to any use of a firearm to shoot a suspect.⁶⁸ If the SCA's 'general warning against the use of a firearm to prevent a suspect from fleeing in the absence of a threat of serious bodily harm is accepted, deadly force and its justification under section 49(2) cannot be used if there is no threat'.⁶⁹ Weighty consideration is necessary before the lives of suspects can be risked by using a firearm or some other form of potentially deadly force merely to prevent escape.⁷⁰ The mechanism used in section 49(2) to maintain reasonable proportionality with the use of deadly force was to draw a distinguishing line between lesser and more serious offences and to permit the use of deadly force for the arrest of suspects suspected of having committed crimes in the more serious category only⁷¹.

This was done by introducing 'Schedule 1 to the Act and the Schedule listed widely divergent offences, ranging from really serious crimes with an element of violence, such as treason, public violence, murder, rape and robbery at one end of the spectrum to, at the other end, relatively petty offences, such as pickpocketing or grabbing a mealie from a fruit-stall'.⁷² The Schedule included offences that do not constitute any kind of physical threat⁷³. If due recognition is to be given to the rights limited by the section and the extent of their limitation, the resort to Schedule 1 in section 49(2) in order to draw the line between serious cases warranting the potential use of deadly force and those that do not comprehensively fails the test of reasonableness and justifiability in section 36(1) of the Constitution⁷⁴.

These nine principles laid down provided clarity to section 49 so police officials would understand what is expected of them in situations which require the use of force. The measure of force used would be able to effectively assist these police officials in their duties.

⁶⁶ Ibid.

⁶⁷ *Govender v Minister of Safety and Security* (Note 2 above).

⁶⁸ Ibid at para 40.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid at para 41.

⁷² Ibid.

⁷³ Ibid at para 45.

⁷⁴ Ibid.

The court found that section 49(2) inherently inclined unreasonably and disproportionately towards the arrestor and, accordingly, section 49(2) was inconsistent with the Constitution and therefore invalid.⁷⁵

The court held further that the trial court had been bound by the interpretation put on section 49 by the court in *Govender (SCA)*.⁷⁶ The judge was obliged to approach the case before him on the basis that such interpretation was correct.

2.2.6 Comparison between *Walters (Tk)* and *Walters (CC)*

In *Walters (Tk)*,⁷⁷ the court was keen to note that in *Govender (SCA)*⁷⁸ the court had found the scope covered by section 49(1) to be too wide. However, the Constitutional Court held that the judge had been obliged to approach the case before him on the basis that such interpretation was correct. In *Walters (CC)* the court focused on the issue of proportionality with the use of deadly force by drawing a distinguishing line between lesser and more serious offences and the use of deadly force for the arrest of suspects suspected of having committed crimes in the more serious category only.⁷⁹ In *Walters (Tk)* the court considered the offences listed under Schedule 1 but did not draw the line between serious cases warranting the potential use of deadly force and those that do not but this was not the focus of the decision.⁸⁰

The *Walters (CC)*, the court clearly set out the requirements of the law relating to arresting a suspect in reaching its decision⁸¹ whereas in *Walters (Tk)*⁸² the court dealt with the constitutional validity of section 49 but failed to analyse the section appropriately. In considering the constitutional validity of section 49, the court considered that the suspect's constitutional rights, and that it should be weighed against the limitation imposed by the provisions. This must result in a desired purpose, and if it did not gain that purpose then it does not preserve the criminal justice system. The trial court was correct with regard to the connection between then killing of the suspect and the purpose. However, this approach was not used in *Walters (CC)*, and it therefore shows that these two courts used different methods to make their decisions.

⁷⁵ Ibid at paras 40, 41, 45 and 46.

⁷⁶ Ibid at para 61.

⁷⁷ *S v Walters* (Note 3 above).

⁷⁸ *Govender v Minister of Safety and Security* (Note 2 above).

⁷⁹ Note 79 above at para 41.

⁸⁰ Ibid at para 4.

⁸¹ Ibid at para 54.

⁸² *S v Walters* 2001 (10) BCLR 1088 (Tk).

With the law set out in the *Walters* case, the Department of Justice and Constitutional Development was encouraged to revisit the provisions of the section 49 of the CPA. The result was the amendment of 2003 version of section 49 by section 7 of the Judicial Matters Second Amendment Act 122 of 1998, which proposed to amend the provisions regarding the use of force in effecting an arrest.

- **The 2003 version of section 49**

This version of section 49 was approved by Parliament in October 1998 and was duly signed by the President on 20th November 1998 and published in the Government Gazette.⁸³ It however did not become operational in law due to the fact that the amendment was mainly opposed by SAPS and it was this opposition that delayed the commencement date. The main aspect that had been opposed by SAPS was that the 2003 version of section 49 limited the police officials especially with regard to the timing of when to use their fire-arms to effect the arrest.⁸⁴ However this argument was ultimately resolved and this version came into operation on the 18th July 2003.⁸⁵

The 2003 version of section 49 as amended⁸⁶ read as follows:-

(1) 'For the purposes of this section -

(a) "arrestor" means any person authorised under this Act to arrestor or to assist in arresting a suspect; and

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

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

⁸³ Proclamation 54 in Government Gazette 25206.

⁸⁴ T Maepa 'How much might is right? Application of Section 49 of the Criminal Procedure Act' 2002(1) SA *Crime Quarterly* 11-13.

⁸⁵ Note 86 above.

⁸⁶ S 7 of the Judicial Matters Second Amendment Act 122 of 1998.

effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome 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 purpose 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'.⁸⁷

It is submitted that the first noticeable change is that section 49(1) defines the terms 'arrestor' and 'suspect'.⁸⁸ Secondly, section 49(2) describes the circumstances in which force, as well as deadly force, may be employed. While the first part of section 49(2) addresses the use of force only, the concluding part sets the boundaries for the use of deadly force.⁸⁹ The second aspect to the section 49 is of extreme importance as it simplifies the layout of the exact type of force to be used by police officers. By inserting the words "proportional" and "reasonable necessary", the type of force used by police officials is limited.

Keebine-Sibanda and Sibanda⁹⁰ are of the view that, in addition to the 'reasonably necessary' and 'proportionality' requirements, the wording of the section 49(2) also creates harsher conditions for the use of force. Further, the use of force should no longer only be 'reasonably necessary', but also 'proportional'. This test is now known as the proportionality test.⁹¹ This is agreeable, has section 49 needed clarity especially with regard to the conditions to use such

⁸⁷ Ibid.

⁸⁸ R Botha & J Visser 'Forceful Arrests : An Overview of Section 49 of the Criminal Procedure Act 51 of 1977 and its Recent Amendments' (2012) 15 (2) *PELJ* 346.

⁸⁹ Ibid 357.

⁹⁰ MJ Keebine-Sibanda and OS Sibanda 'Use of deadly force by the South African Police Services re-visited' 2003 5 (1) *Crime Research in South Africa* 1-6

⁹¹ Ibid.

force and these conditions have become firmer which will eliminate problems for police officers in future.

2.7 *S v Kruger*

In the case of *S v Kruger*,⁹² the 2003 version of section 49 was applied, as the incident had occurred on 22 January 2006. The appellant, who was a police officer, shot and injured a suspect in the back. The appellant was charged with attempted murder and an alternative charge of causing injury by negligently discharging a firearm in contravention of section 120(3) (a) of the Firearms Control Act 60 of 2000.⁹³

The appellant was on duty in a patrol vehicle and he received a radio call from his senior to say that a police van was chasing a car linked to the possible drug dealing in the area.⁹⁴ The driver of the car who was the suspect arrested in this case; was refusing to pull over.⁹⁵ The appellant's senior requested him to assist in apprehending the vehicle, so the appellant followed the car and made hand signals but the suspect refused to stop.⁹⁶ The appellant decided that his only option was to shoot at the rear tyres of the car.⁹⁷ He fired 12 shots in total.⁹⁸ In the court a quo the appellant was found guilty of attempted murder. He was sentenced to five years imprisonment suspended for five years.⁹⁹

2.2.8 Analysis of *S v Kruger*

The trial court found that death or serious bodily harm was more than a remote possibility since the appellant fired 12 shots at the car over a period of eight minutes.¹⁰⁰ The appellant was aware that any bullet could have ricocheted and caused harm to the suspect.¹⁰¹ The court reasoned that even if the appellant did not foresee the possibility that a shot might hit the suspect, he must have foreseen the possibility that, if he succeeded in hitting the tyres, the

⁹² 2015 JDR 0005 (WCC).

⁹³ Ibid at para 4.

⁹⁴ Ibid.

⁹⁵ Ibid at para 4.

⁹⁶ Ibid.

⁹⁷ Ibid at para 7.

⁹⁸ Ibid.

⁹⁹ Ibid at para 2.

¹⁰⁰ Ibid at para 46.

¹⁰¹ Ibid.

suspect would lose control of the vehicle and suffer serious injury or even die.¹⁰² By continuing to shoot over eight minutes the appellant must have reconciled himself to these possible outcomes.¹⁰³

It was held that the appellant had to prove on a balance of probabilities that he had reasonable grounds for believing one or more of the requirements set out in section 49 but he did not succeed in doing so.¹⁰⁴ The suspect drove his vehicle in a manner which presented a risk of imminent grievous bodily harm to the appellant and his colleague.¹⁰⁵ The appellant could have refrained from trying to force the suspect to pull over and instead continue to follow him.¹⁰⁶ The appellant did not fire the shots to stop the suspect crashing into the police van but because he had been unable to force the suspect off the road with his van.¹⁰⁷

The appellant had no basis for believing that there was a substantial risk that the suspect would cause imminent future death or grievous bodily harm if his arrest was delayed.¹⁰⁸ The appellant only knew that the suspect and the vehicle were suspected of involvement of drug dealing. If one assumes that the suspect was continuing to commit some drug offence while driving the car and that such offence was 'in progress', the drug offence was not of a forcible and serious nature and did not involve the use of life-threatening violence or strong likelihood of grievous bodily harm.¹⁰⁹

The judge concluded that he would be surprised if police officers entrusted with firearms were not aware of the amendments to the law relating to the use of force in effecting an arrest and would be both surprised and disappointed if an unexperienced police officer in 2006 thought he was justified in firing 12 shots in the circumstance of the present case.¹¹⁰ The court found that the appellant discharged the onus of establishing that he genuinely thought he was acting lawfully.¹¹¹ The conviction of attempted murder was set aside.

¹⁰²Ibid at para 47.

¹⁰³Ibid.

¹⁰⁴Ibid at para 48.

¹⁰⁵Ibid.

¹⁰⁶Ibid.

¹⁰⁷Ibid.

¹⁰⁸Ibid at para 49.

¹⁰⁹Ibid at para 50.

¹¹⁰Ibid at para 63.

¹¹¹Ibid at para 66.

2.9 Conclusion

With the above in mind, the 2003 version of section 49 has been criticised as being complex and confusing and lacking in legal clarity¹¹². It is submitted that this new amendment to section 49 ‘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’.¹¹³ With the *Kruger* case, the courts interpreted the test correctly, however the 2003 version had been applied at the time, and therefore still has loopholes which clearly means the legislature still have not correctly drafted the provision.

Regrettably the decision that emanated from the *Walters* case was handed down after the introduction of the 2003 version of section 49, which ultimately meant that the legislature had no sight or guidance to properly draft the 2003 version in line with the constitutional courts judgment. The next chapter will consider the current section 49 of the CPA.

¹¹² T van De Walt ‘The Use of Force in Effecting and Arrest in South Africa and the 2010 Bill: A step in the Right Direction?’(2011) 14 (1) *PELJ* 142.

¹¹³ *Ibid.*

Chapter 3
Current Position of S 49 (2012 Version)

3.1 Introduction

The government in order to simplify section 49 especially with regard to the amount of force used in arresting suspects, decided to amend the 2003 version of section 49 of the CPA.¹¹⁴ The justification for this amendment was based on the fact that section 49 ‘exhibits ambiguities that detrimentally affect the police’s ability to perform their tasks effectively, and that a need exists to align the provisions of section 49 with the constitutional court judgment in the *Walters*-case’.¹¹⁵

This is confirmed in the preamble to the CPA,¹¹⁶ where it is stated that the objective is to substitute and align the provisions relating to the use of force in effecting arrests with the judgment of the Constitutional Court in the *Walters* case in which the 1977 version of section 49 was declared unconstitutional. When the 2003 version of ‘section 49 was formulated the legislature did not have the benefit of making use of the guidelines as set out in the *Walters* decision because it was too late’¹¹⁷ and it was unfortunately already publicized. Therefore, the ‘legislature decided to amend section 49 with effect from 25 September 2012 by section 1 of the Criminal Procedure Amendment Act’.¹¹⁸

3.2 Discussion on current section 49

Section 49(1) states:

‘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;

¹¹⁴ Botha and Visser (Note 90 above at 362).

¹¹⁵ Ibid.

¹¹⁶ Criminal Procedure Amendment Act 9 of 2012.

¹¹⁷ See P Burring and M Reddi; ‘Section 49, lethal force and lessons from the De Menezes shooting in the United Kingdom’ (2013) 46(4) *De Jure* 943.

¹¹⁸ 9 of 2012.

- (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;
- (c) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.'

Section 49(2) of the CPA states:

'(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; but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if –

- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
- (b) the suspect 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 effecting the arrest, whether at that time or later.'

With regard to the law on the use of force in effecting an arrest the police officers are often found to make 'spur of the moment decisions especially in dangerous situations'.¹¹⁹ Therefore with this version provision is still made for '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'.¹²⁰

In order to decide there are many factors to be considered 'like 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'.¹²¹ These aspects will be further discussed whereby changes to section 49(1) are elaborated on.

¹¹⁹ T van der Walt (Note 114 above at 147).

¹²⁰ Ibid.

¹²¹ Ibid 148.

With reference to section 49(1), the significant change was the addition of the definition of an ‘arrestor’, wherein the person who is arresting or attempting to arrest the suspect must have the power in terms of the CPA to arrest the suspect or to assist in his arrest.¹²² In the definition of ‘suspect’, the person being arrested must be in the process of committing an offence or already have committed the offence. If the arrestor is arresting the suspect on a suspicion that the suspect is committing or has committed an offence, the suspicion must be reasonable.¹²³ This is determined by enquiring whether a reasonable person would also have assumed that the suspect has committed an offence.¹²⁴

The term ‘deadly force’ means force that is reasonably capable of causing death or significant bodily harm.¹²⁵ Deadly force is possibly fatal but not in all situations.¹²⁶ However an interesting note to mention was prior to the finalisation of the Criminal Procedure Amendment Act, the Centre for the Study of Violence and Reconciliation (CSVR) made a submission to the Portfolio Committee on Justice and Constitutional Development as to why deadly force is of great concern.¹²⁷ This report was a response at the time of the Bill being passed in 2010.¹²⁸

In this report it was stated that deadly force is of concern for the following reasons:

- a) ‘Deadly force is force that can potentially cause death as it has the most extreme consequences which includes not only death but also grave injury and disability.’¹²⁹
- b) The effects of deadly force are not reversible. The consequences of the use of deadly force are serious as well as often irreversible because other decisions taken by police officers can be reviewed and reversed where they are found to be unjustified.¹³⁰

¹²² 49(1) of the Criminal Procedure Act.

¹²³ JJ Joubert et al (Note 17 above at 137).

¹²⁴ Ibid.

¹²⁵ W A Gellar and SS Scott *Deadly force; What we Know* (1992) 23.

¹²⁶ D Bruce ‘Killing and the Constitution-Arrest and the Use of Lethal Force’ 2003 *SAJHR* 454.

¹²⁷ Submission to the Portfolio Committee on Justice and Constitutional Development Re: Criminal Procedure Amendment Bill, 39 of 2010’ available at <http://www.csvr.org.za/docs/CSVRsubmissiononCriminalProcedureAmendmentBillB39-2010.pdf> accessed on 5th August 2018.

¹²⁸ Ibid.

¹²⁹ Ibid 12.

¹³⁰ Ibid 13.

- c) There is a high potential for error as decisions relating to the use of deadly force often have to be made quickly so there is a high potential for them to be taken in error.¹³¹
- d) Deadly force affects bystanders. The risks in killing innocent people do not only affect those who are mistakenly identified as suspects but also bystanders.¹³²
- e) Deadly force has repercussions for the public's attitude to the police. The image and public reputation of the SAPS may be severely formed by a single incident where deadly force or other force is used'.¹³³

It must be noted that, the submissions made by CSVR are significant as it is clearly evident that the terms 'deadly force' will have a huge impact because it is affecting an individual's right to life which is the most significant right. However, these submissions were side-lined as the legislature did insert the term 'deadly force'.

With reference to section 49(2), it is submitted that an arrestor can use force but only in circumstances where it is necessary to override the suspect. Any force that could be used by the arrestor will entirely depend on the circumstances that he/she faces at the time. All the circumstances, such as seriousness of the offence, whether the suspect is armed, poses a threat to the arrestor or another person, is known and can easily be apprehended at a later stage should be considered in determining whether the use of a specific degree of force was justified in the circumstances.¹³⁴ It is further submitted that the arrestor cannot use force without first making an attempt to arrest the suspect. The suspect must attempt fleeing the arrest or offer resistance to it.¹³⁵ The suspect must be aware that an attempt is being made to arrest him.

Snyman¹³⁶ suggest that if a person relies on section 49 as a defence, three basic requirements must be complied with:

1. 'Necessity
2. Proportionality

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid 139.

¹³⁵ Ibid 137.

¹³⁶ CR Snyman *Criminal Law 6ed* (2014) 129.

3. (a) the suspect must pose a threat of serious violence or
(b) The arrestor must have a suspicion that the suspect committed a crime involving serious bodily harm in the past'¹³⁷

The requirement of necessity means that the 'arrestor's conduct should be the only way in which arrestor can effect the arrest of the suspect. This is demonstrated by the words 'the suspect cannot be arrested without the use of force' and the use of such force as is reasonably necessary' in section 49(2)'¹³⁸. If the arrestor decided to use other means to effect the arrest then the arrestor cannot rely on the protection of section 49. The arrestor may not shoot at or assault the suspect during the arrest if it is possible for the arrestor to arrest the suspect without the force referred to.

The requirements of proportionality are expressly incorporated into section 49. In essence the issue of the 'nature and degree of force' used by the arrestor should be proportional, not only to the seriousness of the crime which the suspect is suspected of having committed but also to the degree of danger that the suspect's conduct during the arrest poses for the safety of the arrestors and other members of society'¹³⁹. The question of whether such proportionality exists is a question of fact.

With regard to the third requirement, being 'deadly force', this may be used only in certain circumstances set out in section 49(2)(a) and (b). These subsections allow for the use of deadly force if the suspect's behaviour amounts to a serious threat of violence to the arrestor or another or the arrestor has a reasonable suspicion that the suspect had in the past committed a crime involving serious bodily harm and there are no other means of arresting the suspect'¹⁴⁰. It is submitted that Snyman's view is indeed fair as if any person wished to use section 49 as a defence then these requirements should be considered and will result in a fair and just outcome.

¹³⁷ Ibid 130.

¹³⁸ Ibid 131.

¹³⁹ Ibid.

¹⁴⁰ Ibid 132.

3.3 Conclusion

This 2012 version of section 49 aimed to be in line with the provisions relating to the use of force in effecting an arrest in line with the judgement in the *Walters*¹⁴¹ case and to ensure greater legal certainty regarding the circumstances in which force, especially deadly force, may be used in order to effect an arrest. However this version had varied reactions. Some academics were in favour of section 49 and some academics opposed section 49. This will be discussed in the next chapter.

¹⁴¹ *S v Walters and Another* (Note 3 above).

Chapter 4
The alignment to *S v Walters*

4.1 Introduction

The legislature sought to amend the version again to ultimately be in line with the principles laid out in *Walters* case. These principles¹⁴² were of such significant importance for the legislature as it was a clear guideline to ultimately drafting the most suitable version of section 49 for police officials to comply with. The crux of the dissertation lies in the question of whether this current version of section 49 ultimately in line with the very principles set out in *Walters* case. However before analysing the alignment, it is important to note some contentious arguments raised by academics that were in favour of this section 49 and those that were opposed to section 49.

4.2 Arguments in favour of section 49

Cowling¹⁴³ is of the view that the right on the part of the arrestor to use deadly force has ‘been strictly limited to the extent that the position governing the powers of arrest of the police have been seriously constrained, and that without the police using firearms the suspects will take the opportunity to flee and to escape the police rather than stopping’.¹⁴⁴ If those fleeing arrest do not fear being stopped by the application of deadly force, they could be tempted to flee on the basis that they have nothing to lose by doing so.¹⁴⁵ Bruce¹⁴⁶ asserts that entirely removing the provision for deadly force used to effect an arrest from our law would amount to deadly force only being allowed in circumstances of private defence and the implication of this would be that there would be an unrestricted ‘right to flee’, even by suspects who are suspected of being involved in the most violent crimes.¹⁴⁷

¹⁴² *S v Walters*(Note 3 above at Para 58).

¹⁴³ M Cowling ‘The licence to flee? Recent Restrictions on the Use of Deadly Force in Effecting an Arrest’ in SV Hctor and PJ Schwikkard (eds) *The Exemplary Scholar: Essays in Honour of John Milton* (2007) 116.

¹⁴⁴ *Ibid* 116.

¹⁴⁵ D Bruce ‘Beyond Section 49 – Control of the Use of Lethal Force’ (2011) 36 *SACQ* 3-12.

¹⁴⁶ *Ibid* 4.

¹⁴⁷ *Ibid*.

4.3 Arguments opposing section 49

Burring and Reddi¹⁴⁸ point out the flaws of the current section 49 by way of the De Menezes¹⁴⁹ incident to show the problems regarding the wording of this version. The incident occurred in the United Kingdom on 22 July 2005, shortly after the London public-transport bombings, Jean Charles de Menezes was shot and killed by anti-terrorist police, in the mistaken belief that he was a suicide bomber.¹⁵⁰ The police had been staking out a property in which a suspected terrorist (Hussain Osman) was residing at all times.¹⁵¹ When De Menezes, a Brazilian migrant who also lived in the same building, left to go to work, the police, in a confused interaction between the surveillance team and headquarters, thought that he was Osman and proceeded to follow him.¹⁵² De Menezes boarded a few buses, and jumped off at a station and decided to board another train and at the escalators he was dead from seven bullet wounds to the head.¹⁵³

Burring and Reddi¹⁵⁴, suggests that the De Menezes incident falls under the ambit of section 49(2)(a) of both the 2003 version of the CPA and the current version of the CPA.¹⁵⁵ An interesting point raised by Burring and Reddi was that the ‘De Menezes incident illustrate the dangers inherent in the removal of the phrase “he or she believes on reasonable grounds” from the 2003 version of section 49, and its replacement with the phrase “the suspect is suspected on reasonable grounds”’.¹⁵⁶ It is submitted that Burring and Reddi is correct in stating that 2003 version of section 49 problematic aspects of the wording contributed to the death of De Menezes. It fails to provide proper protection especially with regard to terrorist attacks against South Africa. The current still fails to properly provide clarity on the exact amount of force to be used and the insertion of the words “the suspect is suspected” is very wide and police officials can suspect most individuals and even at times not suspect but due to that insertion of that terms it opens the gate for the police officials to do as they see fit. This section has been problematic in South Africa and it continues to be as the legislature failed to draft wisely.

¹⁴⁸ P Burring and Reddi (Note 119 above at 937).

¹⁴⁹ Ibid 937.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid 940.

¹⁵⁵ Ibid 940.

¹⁵⁶ Ibid 940.

With regard to a more recent and local example of how the words ‘the suspect is suspected’ in section 49 may lead to death or severe injuries of an innocent person was the incident of the local musician Khuli Chana, who was shot and wounded by police officers after being mistaken for a criminal. His arm was injured after a bullet was lodged in his right finger.¹⁵⁷ One bullet also went through the back seat of his car and penetrated his back.¹⁵⁸ It was a case of mistaken identity, because he was thought to have been a kidnapper. The two police officers who shot him were charged with attempted murder but the charges was withdrawn.¹⁵⁹

This South African case was a clear mistaken identity, yet the police official used excessive force not reasonable to the situation at hand. It is furthermore evident that section 49 is still not in line with the *Walters* guidelines. This further emphasises that the police officials still do not understand the correct amount of force to be used in such circumstances and if the ground level officers are not familiar with this then we will keep having recurring cases like Khuli Chana whereby a mistaken identity and the incorrect amount of force will be used.

With regard to the arguments set out above, when a police official is effecting an arrest, section 205(3) of the Constitution must be adhered to which is the duty of the police to protect the safety and security of the citizens of South Africa and to maintain law and order. It is trite law that a suspect has various fundamental rights afforded to him by the Constitution and any provision of law providing for the use of force will always infringe on these rights.¹⁶⁰

The rights to life, dignity and freedom and security of the person are essential rights and substantial rights. They are importance to the Constitution’s objective to create an open and democratic society based on human dignity, freedom and equality so they will carry a great deal of weight in the exercise of balancing these rights against justifications for their

¹⁵⁷ ‘Local rapper Khuli Chana shot by police, mistaken for kidnapper’ available at <http://www.timeslive.co.za/entertainment/celebrity/2013/10/28/Local-rapper-Khuli-Chana-shot-by-police-mistaken-for-kidnapper>, accessed 02 August 2018.

¹⁵⁸ Ibid.

¹⁵⁹ #ChanaPower Khuli Chana reaches settlement with cops after wrongful shooting’ available at <http://www.timeslive.co.za/entertainment/2016/06/01Chanapower-Khuli-Chana-reaches-settlement-with-cops-after-wrongful-shooting>, accessed 02 August 2018.

¹⁶⁰ Ibid.

infringement.¹⁶¹ The two most important rights which are the rights to life and dignity are infringed by section 49.

4.4 Limitation of Rights

Section 49 affects many constitutional rights by permitting the use of deadly force. This is not a minor but a serious infringement of rights. The infringements of these rights are more extensive than is necessary by the purpose that section 49 seeks to achieve. The question to be determined by the court is whether or not such an infringement constitutes an unjustifiable limitation on the rights of the individual.¹⁶² 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.¹⁶³ In considering the Limitation of Rights, this is governed by section 36 of the Constitution which deals and states as follows:

‘36 Limitation of rights

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights’.¹⁶⁴

¹⁶¹ I Currie and J De Waal *The Bill of Rights Handbook* 6 ed (2013) 164.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ S36 of the Constitution.

With regard to the limitation of rights, it may be infringed if there are compelling reasons.¹⁶⁵ If an infringement can be justified in accordance with the requirements in section 36, it will be constitutionally valid.¹⁶⁶ If it is found that a law of general application infringes a right protected by the Bill of Rights, the person relying on that law may argue that the infringement is a legitimate limitation of the right.¹⁶⁷ Section 49 can achieve the purpose of effecting an arrest by using non-lethal incapacitating weapons such as baton's, stun guns to arrest a suspect that would temporarily incapacitate a suspect to disarm him if he poses a threat to others and to arrest him. This is clearly a less restrictive method that would achieve the purpose of the limitation section 49 puts on the suspect's right to life, dignity and freedom and security of the person.

The limitation of rights plays an important role in the alignment to *Walters* case. With reference to the nine principles, the court took cognisance of the suspect's constitutional rights. It is submitted that the courts sought to consider whether section 49 has compelling reasons to justify the killing of a human being? That is ultimately the crux question does it fall within the ambit of the limitation clause governed by section 36 of the Constitution. According to *Walters*, it is submitted that it did not.

It is submitted that in light of the nine principles that had been laid out by the court, there had been no mention of using deadly force to effect an arrest only in specific and very limited cases. It is submitted that the court's interpretation was to effect arrest in the most reasonable manner possible. The legislature clearly interpreted the principles incorrectly and once again the section 49 was not in line with the Constitution.

Watney¹⁶⁸ argues that retaining section 49(2) is inconsistent with the abolition of the death sentence because if the state cannot take a life in punishment of a person convicted of an offence, how may it justify killing a person who is only suspected of having committed an offence?¹⁶⁹ She also argues that section 49 places a burden on the arrester to prove requirements on a balance of probabilities before his conduct may be considered

¹⁶⁵ Ibid.

¹⁶⁶ Currie and De Waal (Note 163 above at 117).

¹⁶⁷ Currie and De Waal (Note 163 above at 151).

¹⁶⁸ M Watney 'To shoot...Or Not To Shoot: The Changing Face of Section 49 of the Criminal Procedure Act 51 of 1977' 1999 *De Rebus* 28.

¹⁶⁹ Ibid.

justifiable.¹⁷⁰ This burden of proof is in conflict with the right to be presumed innocent as well as the right to remain silent.¹⁷¹ Additionally, not only may deadly force violate the suspect's right to life but it can also constitute treatment which is cruel, inhuman and degrading in terms of section 12(1)(e) of the Constitution.¹⁷² This was against the court's interpretation in *Walters*. The purpose was to use the most reasonable method of effecting an arrest.

Watney¹⁷³ comments that government should invest in creating a police service stepped in a more scientific investigation of crime.¹⁷⁴ This approach would probably lessen the need to execute arrests on the spot, and if this fails, the Constitution and its protection of rights may be perceived as contributing in the collapse of law and order in the country.¹⁷⁵ One suggestion put forward was the implementation of a national manual dealing with arrest in which detail regarding the use of force is explained in simple terms as well as how it should be used in practice.¹⁷⁶

Burchell¹⁷⁷ is of the view that section 49 must be examined with consideration to reasonableness and the need for development of more 'scientific and effective techniques of crime detention and apprehension and tracking in South Africa'.¹⁷⁸ A 'stun' or fast working 'dart gun' that could incapacitate, but not kill, a suspect, who is fleeing from justice, for at least ample time to disarm him and to effect the appropriate arrest.¹⁷⁹

From the above, it appears that a number of suggestions have been put forward on the use of deadly force in effecting arrests by other authors and this ultimately suggests that the legislature yet again were not successful in properly drafting section 49.

¹⁷⁰ Ibid 30.

¹⁷¹ Ibid.

¹⁷² Bruce (Note 128 above at 440).

¹⁷³ Watney (Note 170 above at 31).

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Van der Walt (Note 114 above at 158).

¹⁷⁷ J Burchell 'Deadly Force and Fugitive Justice in the Balance: The Old and the New Face of Section 49 of the Criminal Procedure Act' (2000) 13 (2) *SACJ* 212.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

4.4 Conclusion

It is submitted that the recommendations mentioned above, have highlighted that the use of deadly force in effecting an arrest will be a major flaw. By incorporating this particular term in section 49 legislature made a huge blunder as this clearly was not the way forward, and not in accordance to the nine guiding principles set out in *Walters* case. Therefore, this section 49 fundamentally goes against the right to life which is of utmost importance. One can conclude that the legislature would need to relook at the section 49 again in order to properly understand what the court's interpretation was regarding effecting an arrest.

Chapter Five
Recommendations and Conclusions

5.1 Introduction

In a country like South Africa, with its very high levels of crime, it is logical that more arrests are being executed through the use of force than in countries with lower crime rates.¹⁸⁰ It follows that the South African law in this regard must continually be developed and adapted to provide for these circumstances.¹⁸¹ 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.¹⁸² It is an unobjectionable fact that the use of force, even deadly force, in effecting arrests is unavoidable in certain situations.¹⁸³ The circumstances and degree to which it may be employed has, however, been under debate for centuries.¹⁸⁴ It is submitted that this chapter will endeavour to discuss recommendations that should assist in better understanding section 49.

5.2 The Basic Principle – Recommendation-1

The Basic Principles emanated from the United Nations Congress on the 7th September 1990. The aim for adopting these principles was that law enforcement officials are of extreme importance as any threat to the life and safety of law enforcement officials must be seen as a threat to the stability of the society as a whole. These law enforcement officials play a vital role in the protection of life, liberty and the security of people. It is submitted that South Africa is not a signatory to these principles. This is due to the fact that South Africa would need to religiously comply with every single wording pertaining to these principles and follow them to the end. The purpose of the Basic Principles is to ‘assist Member States in their task of ensuring and promoting the proper role of law enforcement officials’.¹⁸⁵ In terms of these principles, governments and police services should adopt and implement rules and

¹⁸⁰ Van der Walt (Note 114 above at 158).

¹⁸¹ Ibid.

¹⁸² Ibid .

¹⁸³ Botha R & Visser (Note 90 above).

¹⁸⁴ Ibid.

¹⁸⁵ Art 3 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Hereinafter referred to as Basic Principles)

regulations on the use of force and firearms against persons by police officials.¹⁸⁶ They should develop extensive means as possible and provide officials with various types of weapons and ammunition that would ‘allow for a differentiated use of force and firearms’.¹⁸⁷ This should include developing non-lethal incapacitating weapons for use in appropriate situations, to increasingly limit the application of means capable of causing death or injury to persons.¹⁸⁸ The development and use of these non-lethal incapacitating weapons should carefully be assessed in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.¹⁸⁹ According to the Basic Principles, police officials should also be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, to decrease the need to use weapons.¹⁹⁰ When performing their duties, police officials should, as far as possible, apply non-violent means before resorting to the use of force and firearms.¹⁹¹ They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.¹⁹²

Whenever the lawful use of force and firearms is unavoidable, law enforcement officials should:

- ‘Limit the use of force and act in proportion to the seriousness of the offence and the objective to be achieved’¹⁹³;
- ‘Minimize damage and injury, and preserve human life’¹⁹⁴;
- ‘Ensure that assistance and medical aid are given any injured or affected persons at the earliest possible moment; and ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment’¹⁹⁵
- ‘When injury or death is caused by using force and firearms by police officials, they should report the incident promptly to their superiors.’¹⁹⁶ The Basic Principles make provision for reporting and review procedures to be followed when this occurs’.¹⁹⁷

¹⁸⁶ Art 1 of the Basic Principles.

¹⁸⁷ Art 2 of the Basic Principles.

¹⁸⁸ Ibid.

¹⁸⁹ Art 3 of the Basic Principles.

¹⁹⁰ Art 2 of the Basic Principles.

¹⁹¹ Art 4 of the Basic Principles.

¹⁹² Ibid.

¹⁹³ Art 5 (a) of the Basic Principles.

¹⁹⁴ Art 5 (b) of the Basic Principles.

¹⁹⁵ Art 5 (c) of the Basic Principles.

In the abovementioned situations, police officials should identify themselves and give a clear warning of their intention to use a firearm, with sufficient time for the warning to be observed, unless doing so would unduly place the police officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or futile in the circumstances of the incident.¹⁹⁸ Governments must ensure that if force and firearms are abused or used arbitrarily by law enforcement officials, it is punished as a criminal offence under their law.¹⁹⁹

The Basic Principles also state that rules and regulations on the use of firearms by police officials should include guidelines that stipulate the circumstances under which police officials are authorized to use firearms and prescribe the kinds of firearms and ammunition permitted.²⁰⁰ These guidelines should ensure that the firearms are used only in appropriate circumstances and in a manner that can decrease the risk of unnecessary harm.²⁰¹ Furthermore, they should prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk.²⁰² The guidelines should also regulate the control, storage and issuing of firearms, including procedures for ensuring that police officials are accountable for the firearms and ammunition issued to them and provide for warnings to be given, if appropriate, when firearms are to be discharged.²⁰³ They should provide for a system of reporting whenever police officials use firearms in the performance of their duty.²⁰⁴

It is submitted that South Africa should use the Basic Principles as guidance on the use of force in effecting arrests because it has a structured method of what extent of force can be used in situations. The government should and SAPS should implement rules on the use of force against persons. These rules should provide proper clarity on when the firearm should be used, how they should use it and under what types of situations to use it. It is imperative that the government should use non-lethal weapons as Burchell stated a ‘fast working dart

¹⁹⁶ Art 5 (d) of the Basic Principles.

¹⁹⁷ Art 6 of the Basic Principles.

¹⁹⁸ Art 6 of the Basic Principles.

¹⁹⁹ Art 7 of the Basic Principles.

²⁰⁰ Art 11(a) of the Basic Principles.

²⁰¹ Art 11(b) of the Basic Principles.

²⁰² Art 11(c) of the Basic Principles.

²⁰³ Art 11(d);11(e) of the Basic Principles.

²⁰⁴ Art 11(f) of the Basic Principles.

gun or stun gun should be used when effecting an arrest that could incapacitate but not kill a suspect fleeing from arrest for sufficient time to disarm him'²⁰⁵. It is submitted that Burchell's view on then stun gun is a good method to be adopted by police official and this would avoid deathly results when effecting an arrest. This is much better rather than lethal weapons and this way the person's right to life is intact and this minimizes the injury or damage and ultimately preserves human life.

5.3 CSV R Proposed Amendment- Recommendation- 2

The CSV R proposed the following wording to section 49(2)(b) when the amendment in the 2010 Bill was passed:

'The arrestor may use deadly force only if s/he has reasonable grounds to believe that:

- i) The suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm; and
- ii) The suspect is likely to inflict serious bodily harm in the future if not apprehended; and
- iii) There are no other reasonable means of effecting the arrest, whether at that time or later; and
- iv) The use of deadly force will not endanger innocent bystanders.
- v) For the purpose of section 49(2)(b)(ii) persons may be regarded as likely to inflict serious bodily harm in the future if the suspect is reasonably believed to have committed.
 - a. Multiple acts of this kind; or
 - b. Aggravated robbery with a weapon capable of inflicting serious injury; or
 - c. Rape involving the infliction or threatened infliction of injury with a weapon capable of inflicting serious injury; or
 - d. On other reasonable grounds.'²⁰⁶

²⁰⁵ J Burchell 'Deadly Force and Fugitive Justice in the Balance: The Old and the New Face of Section 49 of the Criminal Procedure Act' (2000) 13 (2) *SACJ* 213.

²⁰⁶ Submission to the Portfolio Committee on Justice and Constitutional Development Re: Criminal Procedure Amendment Bill, 39 of 2010' available at <http://www.csvr.org.za/docs/CSVrsubmissiononCriminalProcedureAmendmentBillB39-2010.pdf> accessed on 5th August 2018.

The above wording contains three additions to section 49(2)(b). Firstly, the requirement in section 49(2)(b)(ii) makes the use of force conditional on how dangerous the suspect is and instils a protection of life principle within the provision.²⁰⁷ It is submitted however that not always a suspect can be regarded as dangerous, this is the view of the CSVR which is a bit pre-emptive thinking. At time the suspect may not have any weapons in his possession so that does not make him dangerous. The use of force should be standard and not just classify the suspect as dangerous. Secondly, section 49(2)(b)(iv) provides for the safety of bystanders which also emphasises the protection of life.²⁰⁸ Thirdly, section 49(2)(b)(v) is intended to address concerns that a dangerous principle on its own does not provide police with adequate clarity on when they may use deadly force for arrest.²⁰⁹

With regard to section 49(2) (b)(v) a fleeing suspect may be a person who the police knows.²¹⁰ If the suspect is known to the police it could be assumed that the police will be able to track down the suspect at a later stage and there is therefore no need to use deadly force to prevent him from fleeing unless there are reasonable grounds to believe that it will not be possible to track him down or that he will harm others prior to being traced.²¹¹ However, if the person is known to have been involved in repeated acts of serious violence, and if the police cannot reasonably expect to trace him then it may be reasonable to use deadly force to prevent him from fleeing.²¹² Subsection (2) and (3) are meant to cover the types of crimes which tend to be committed by suspects whose identity is not known to the victim and who tend to be associated with repeat offending.²¹³ Subsection 4 would allow for deadly force to be used in circumstances where reasonable grounds exist for believing the suspect poses a threat of serious harm to others.²¹⁴

5.4 Conclusion

In this Chapter it sought to consider the most suitable methods to ultimately understand section 49 of the CPA. Recommendation one considered the Basic Principles although South

²⁰⁷ Ibid 21.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid 22.

²¹⁴ Ibid.

Africa is not a signatory because of strict adherence to the wording of the basic principles which unfortunately it could not adhere to, it is submitted that it was highlighted as a recommendation on the basis that it provided a better way to arrest suspect. It is submitted that this method will assist police officers on ground level to understand what exactly is required of them when found in a situation of arresting a suspect. Ultimately this method will explain when the police officers should use the firer-arms, how they should use the firearms and the most important would be the different circumstances that it should be used in.

The crux of this research was to ultimately consider whether the current section 49 is in fact aligned to the principles set out in *Walters* case. It is submitted above, that unfortunately it does not align with the court's interpretation. This is a major flaw as police officials will continue to exhibit the wrong method of using deadly force to effect an arrest. Therefore recommendation one was duly recommended, as it will provide the alignment that needed, to properly understand what the exact interpretation was in *Walters*. It is also consistent with *Walters*²¹⁵ in that the court held that there were other means available to the arrestor to effect the arrest rather than shooting the suspect. Therefore recommendation one is submitted in that it would assist police officials to correctly apply *Walters*²¹⁶ interpretation.

With recommendation two, it is submitted that the CSVR proposal with regard to the Amendment Bill prior to being passed was good. It is submitted that it allowed for the term 'deadly force' to become broader. With this, it would have created different circumstances to use deadly force. By broadening this term it in a way reduced the violation of the constitutional right to life. Life should be preserved and it is submitted that this recommendation would definitely help the police officials and it also cater for bystanders which our current section 49 does not. This recommendation further will align properly to the *Walters*²¹⁷ principles.

As mentioned in *S v Makwanyane*,²¹⁸ '*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*'.

²¹⁵ *S v Walters and Another* (Note 3 above).

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *S v Makwanyane and another* 1995 (3) SA 391 (CC).

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