

Killing and the Constitution – arrest and the use of lethal force

by

David Bruce



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[David Bruce](#) is a Senior Researcher in the [Criminal Justice Programme](#) at the Centre for the Study of Violence and Reconciliation.

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Abstract

The article sets out the major developments relating to Section 49 of the Criminal Procedure Act, the law relating to the use of lethal force for arrest, since 1994. It then looks at the relationship between the questions of principle raised by the Constitutional Court in the death penalty judgment, that of *S v Makwanyane and Another*, and the use of lethal force. Finally it looks at the legal framework which now exists in South Africa in terms of the 1998 Amendment to Section 49, brought into operation in July 2003, in relation to the leading judgments of the Supreme Court of Appeal and the Constitutional Court on the matter. It focuses on three key questions relevant to understanding provisions on the use of lethal force for arrest. Firstly the types of offences or situations in relation to which the use of lethal force for purpose of arrest may be justified. Secondly is it acceptable for the power to use lethal force for arrest to be available to the public or should it be restricted to the police? Thirdly, considering the risk of error, what is an appropriate standard of belief for the use of lethal force to be justified, considering its potentially irreversible fatal consequences. While supporting the principles embodied in the legislation the article argues that the 1998 amendment is inadequate as it lacks clarity and that, considering aspects of the South African context, this is inappropriate for lethal force legislation. In addition neither the legislation nor the leading court judgments focus on the potential for error.

I Introduction¹

When, if ever, is it justified to kill another human being? Most people seem to agree that acting in defence of oneself or another person is justified. But can it ever be justified to take the life of a person who is running away?

Where there is no other way of apprehending the person, should the law permit shooting at a suspected serial killer? What if they are a suspected rapist? What about a hijacker who has just stolen an expensive car at gunpoint from a well-to-do business owner? What about a suspected stock thief alleged to have taken the only cows from a poverty stricken family living in rural South Africa? What if the person is a cell-phone thief?

While some may wish to argue that the use of lethal force² for purposes of arrest can never be justified, most democratic countries do have legislative provisions authorising such use of force in some situations.

As might be expected the advent of a constitutional state under a Bill of Rights in South Africa in 1994 was perceived to have implications for the question of the use of lethal force for purposes of arrest. However as a result of disagreement and indecision about how to deal with the issue, the legal position remained unclear for an extended period.

While parliament amended the law in question, section 49 of the Criminal Procedure Act, 51 of 1977, in November 1998,³ the issue remained unresolved as government and the SAPS opposed and obstructed the implementation of the amendment.

However in June 2001 and May 2002 South Africa's two highest courts gave leading judgments on Section 49.⁴ Essentially the courts indicated that in terms of South Africa's Constitution⁵ the use of lethal force for arrest is justified for offences of serious violence but not for property offences not involving violence or the threat thereof.

Despite the judgments however the issue remained clouded in confusion throughout 2002. Finally on 18 July 2003, the 1998 amendment was brought into operation by government.⁶ Only in late 2003 was it therefore possible to say that there was clarity about the exact legal provisions which applied in relation to the use of lethal force for arrest.

The legal standard which has thereby been brought into effect is one which goes beyond the standard put forward by the courts. Rather than merely providing that the use of lethal force is justified for arrests for offences of serious violence, the 1998 Amendment incorporates a notion of 'future danger' into South African law on the matter.

While it is good that there is at last clarity about which legal provision applies, there are still grounds for misgivings primarily in relation to the vagueness of the idea of future danger. As a result questions remain as to whether this will bring finality to the matter.

This paper first sets out the major developments in the law relating to the use of lethal force in South Africa since 1994. It then looks at the relationship between the issues of principle raised by the Constitutional Court in the death penalty judgment, that of *S v Makwanyane and Another*,⁷ and the issue of the use of lethal force.

Finally it looks at the legal framework which now exists in South Africa in relation to three key questions relevant to understanding provisions on the use of lethal force for arrest namely:

- The purpose of the use of lethal force – the question of the types of offences or situations in relation to which the use of lethal force for purpose of arrest may be justified.
- Who should have the power to use lethal force for purposes of arrest? Should the police only have this power, or should other people have access to this power as well? And
- The question of the standard of belief – considering the risk of error, how sure must the person using lethal force be about the facts of the situation in order to justify the use of lethal force?

In examining these issues the paper raises questions about whether the current legal standard is appropriate to the South African context.

II Legal and regulatory framework for the use of lethal force

The legal position relating to the use of lethal force is defined by the common law provisions regarding self (or private) defence as well as by Section 49 of the Criminal Procedure Act, the provision which regulates the use of force in effecting arrest.⁸

(a) Private defence

The core provisions of law which justify the use of force are common law provisions. Common law defines the circumstances in which the use of force in 'private defence' may be justified.

A person acts in private defence if he defends himself or somebody else against an unlawful attack upon life, limb, property or dignity In daily parlance this ground of justification is often referred to as 'self defence'. But this description is too narrow, since it is not only persons who defend themselves but also those who defend others who can rely upon this ground of justification.⁹

The right to use force in private defence is of general application and therefore applies to everyone in South Africa including members of the police service.

In 1995 in the case of *S v Makwanyane*, the Constitutional Court confirmed that the right to private defence is upheld by the Constitution. The court stated that the approach taken in law is to balance 'the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty.'¹⁰ This was reconfirmed and re-emphasised by the court in *S v Walters*.¹¹

The position at common law relating to the use of lethal force to defend oneself or another person against threats of serious violence is untouched by changes to the law regarding the use of lethal force for arrest.¹² The concerns and anxieties which have been expressed by members of the public and police that changes to the law have the consequence of denying people the right to defend themselves are therefore unfounded. As a consequence of this, concerns that changes to the law, on the use of lethal force in arrest, will negatively impact on police safety, are also largely unfounded.¹³

(b) Arrest

The question of the use of force for purposes of arrest is essentially separate from the question of private defence.¹⁴ In South African the legal position relating to the use of lethal force for arrest has for some time been regulated by the provisions of the Criminal Procedure Act. Since the Act was amended in 1977 the key provision in question has been Section 49 of the Act, and the key developments relating to the use of lethal force for purposes of arrest have been parliamentary amendments to and courts judgments regarding Section 49.

(i) The 'old' section 49 of the Criminal Procedure Act, 51 of 1977

While parliament had passed an amendment to section 49 in 1998 – the new section 49 - government prevented it from coming into force by failing to declare when the amendment was to come into operation.

Though widely regarded as unconstitutional¹⁵ the 'old' Section 49 introduced by the 1977 Criminal Procedure Act therefore remained on the statute books untouched, until in June 2001 and May 2002, judgements by South Africa's highest courts brought about decisive changes to its contents.

The old Section 49 was composed of two subsections. Section 49(1) provided that:

(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.

Section 49(1) regulated all situations where force was used for purposes of arrest, except where a person was killed. This included situations where a person was injured or disabled as a result of the use of a firearm or other lethal force.¹⁶

Because Section 49(2) expressly referred to situations where people were killed these were by implication excluded from the ambit of section 49(1). Section 49 (2) of the Criminal Procedure Act, 51 of 1977, provided that where a person was trying to arrest someone

for an offence referred to in Schedule 1 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.

Schedule 1 lists a range of offences which include serious violent offences as well as breaking or entering with intent to commit an offence, theft, receiving stolen property knowing it to have been stolen, fraud, forgery, offences relating to the coinage, and any offence the punishment for which may be a period of imprisonment exceeding six months without the option of a fine.

(ii) The 1997 SAPS Special Service Order

Early in 1997 the SAPS issued a Special Service Order which modified the fairly permissive provisions of Section 49 particularly by restricting the categories of offences in relation to which lethal force was authorised. The introduction to the Special Service Order stated that it was anticipated that Section 49 would be amended in the light of the Constitution and that

until such time as Parliament has had the opportunity to pronounce itself on an amendment to Section 49, all members are required to strictly adhere to the instructions set out [in the Special Service Order].

While the Special Service Order still contained a list of roughly 18 offences for which the use of lethal force would be authorised, the list excluded all property offences which had been included in Schedule 1 of the Criminal Procedure Act, except that it allowed for the use of lethal force for 'theft of a motor vehicle' and 'theft of livestock (excluding poultry)'.

The Special Service Order was an internal police regulation. While it was intended to give effect to the provisions of the Constitution, it lacked the force of law. Members of the SAPS who acted in violation of the Special Service Order, but still within the confines of the old Section 49 of the Criminal Procedure Act, would not have been in violation of the law as defined in the statute books. If called before the courts SAPS members could still base any defence on Section 49 of the CPA, rather than the Special Service Order.

It is not clear how seriously the Special Service Order was taken inside the SAPS. Steps were taken to inform SAPS members of the Special Service Order, but a study conducted in 1998¹⁷ indicated that subsequent to the regulation's having been issued by the SAPS National Commissioner, some SAPS members continued to shoot people in circumstances which were not authorised by the order. By late 1999 copies of the Special Service Order were not available from some legal offices of the SAPS, suggesting it had fallen into disuse. It is also not clear whether, in investigating fatal shootings by police, the ICD made reference to the Special Service Order or the Criminal Procedure Act or whether SAPS members were ever disciplined internally for breaches of the Special Service Order.

The Special Service Order would also have had no consequences whatsoever for other persons empowered to use lethal force in terms of Section 49, including private security guards and other civilians and 'peace officers' who were not members of the SAPS.

(iii) The new section 49 – the 1998 amendment

Finally in late 1998 an amendment to Section 49¹⁸ was passed by parliament. In relation to the use of lethal force for arrest, Section (2) of the amendment stated 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.

While the amendment suffers from a lack of clarity in the way in which it has been formulated in essence it appears to provide that lethal force may be used, firstly to defend people against direct threats to life and threats of serious bodily harm (i.e. for private defence), and secondly in situations where there is a significant risk that the fleeing suspect will cause such harm to other people if he or she gets away.

Although the amendment was passed by parliament in November 1998, the amendment was not brought into operation partly because of controversy relating to the implications of the new Act. This appears to have been because the Minister of Safety and Security and the SAPS opposed the implementation of the amendment. Press reports appear to have indicated that the key reason which the Minister and National Commissioner provided for opposing the amendment was that it would jeopardise the safety of police officers. One report said the amendment was 'not implemented after the police asked for clarity on provisions that were obviously confusing Police legal expert Tertius Geldenhuys said that, as a result of the uncertainties, the police had approached [Minister of Safety and Security] Tshwete and [Minister of Justice and Constitutional Development] Maduna - as well as their predecessors - for clarity. "We train the police and so we must have certainty - it's a matter of life and death. If a police officer is uncertain of whether he can use his firearm, he could be killed"¹⁹.

These concerns were sufficient to delay the implementation of the amendment for more than four years.

(iv) The Govender judgment

As a result of the non-implementation of the new Section 49, the old Section 49 remained in force and the legal position in South Africa therefore remained unchanged.²⁰ However this changed dramatically in 2001 and 2002 with two major court judgements.

The first judgement issued by the Supreme Court of Appeal on 1 June 2001 concerned the shooting on 16 June 1995 of Justin Govender, at that time a 17-year-old matric student. On the night in question Inspector Cox and Sergeant Hillcoat were on patrol duty in a police vehicle in the Durban area. After noticing a BMW being driven extremely recklessly, they radioed the control room and were informed the vehicle had been stolen earlier that evening. A high-speed chase ensued following which the driver of the vehicle, and another

person, got out of the car and started running away. After shouting a warning, and a short pursuit on foot, Cox realised he would not be able to catch the one suspect and fired at his legs, hitting Govender in the spine. Govender survived the shooting but is now a paraplegic as a result of the injuries sustained in the shooting.²¹

Govender's father took the case to the SCA after the initial judgement in the Durban High Court rejected his claim for damages on behalf of his son. The SCA reversed the initial judgement with the instruction that the matter be referred back to the Durban court for quantification of damages.

In finding in favour of the Govenders, the court defined two types of situations in which lethal force may lawfully be used, stating that

section 49(1) of the Act must generally speaking be interpreted so as to exclude the use of a firearm or similar weapon unless the person authorized to arrest, or assist in arresting, a fleeing suspect has reasonable grounds for believing (1) that the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or (2) that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm.²²

The effect of the judgment was to narrow down Section 49(1) in relation to the use of lethal force. The court was only concerned with Section 49(1) as Govender had not been killed and therefore the SCA did not address itself to questions relating to the interpretation or constitutionality of Section 49(2).

(v) The Walters judgment

The Walters case, which was referred to the Constitutional Court by the Transkei High Court,²³ concerned a bakery owner and his son charged with murder after they had shot at and killed a person who had broken into their bakery and was fleeing from the scene.

In a unanimous judgement on 21 May 2002 the Constitutional Court finally struck down Section 49(2) but the court declined to declare Section 49(1) unconstitutional.

In leaving section 49(1) untouched the Constitutional Court endorsed the framework for the use of lethal force for arrest which had been defined by the Govender judgment. As a result of the striking down of section 49(2) the use of lethal force for arrest was therefore in its entirety subject to Section 49(1) as interpreted by Govender including both situations where a person was killed or injured.

(vi) The final demise of the old Section 49 - implementation of the 1998 Amendment

Following the *Walters* judgment the SAPS issued a circular to inform SAPS members of the Constitutional Courts decision. But while the *Govender* and *Walters* judgments had major implications for the issue of the use of lethal force for arrest there was no formal public response from government or the SAPS to the judgments for several months.²⁴ In May 2003 the issue became the subject of further controversy, with the Minister of Justice

strongly criticising the police for their opposition to the 1998 Amendment.²⁵ After further consideration by government of the issue, the 1998 Amendment was brought into operation on 18 July 2003.

As a result of the Govender and Walters judgments the old Section 49 had been entirely redefined and brought within the limits of the Constitution. But with the implementation of the 1998 Amendment the old framework, at least in its statutory form, was rendered obsolete, notwithstanding this redefinition.

South Africa has therefore entered a new era in the legislative control of the use of lethal force. In so far as the 1998 Amendment provides clarity, the issue of the legislative framework on the use of lethal force for arrest can now, at last, be said to have been resolved.

III Killing and the Constitution - the Makwanyane judgment

In understanding the relevance of the Constitution to the question of the use of lethal force in effecting arrest, one useful point of reference is the judgment of the Constitutional Court in the case of *S v Makwanyane*, the case in which the court declared the death penalty to be unconstitutional.

In the judgment the court systematically examined questions of principle raised by the Constitution in relation to the taking of human life by the state. In Table 1 (see following page) this paper sets out the key reasons provided in the judgment of Chief Justice Chaskalson in *Makwanyane* as to why the death penalty is contrary to the South African Constitution.²⁶ The table also suggests how each of the reasons provided may be seen to apply to the question of the constitutionality of the use of lethal force for purposes of arrest.

When lethal force is used there is not as much certainty that the person will be killed as is the case with the death penalty. Frequently gun shots fail to hit their target, and even where they do, the person may not die but may be injured, or even permanently disabled. But, notwithstanding the fact that death is not as certain, the use of lethal force has the same potential as the death penalty to finally and irrevocably end life, thereby resulting in the denial of all other human rights.

In so far as it amounts to a denial of the right to life the use of lethal force amounts to a denial of the most fundamental of rights. In the *Walters* judgment the Constitutional Court illustrated this with the following quotes from the judgments of justices O'Regan and Langa in the *Makwanyane* case.

This, for instance, is what O'Regan J said:

The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share

in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.

The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence – it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.²⁷

This is what Justice Langa said:

The history of the past decades has been such that the value of life and human dignity have been demeaned. Political, social and other factors created a climate of violence, resulting in a culture of retaliation and vengeance. In the process, respect for life and for the inherent dignity of every person became the main casualties.²⁸

Justice Langa continued

A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead. In acting out this role, the State not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by example, society's own regard for human life and dignity by refusing to destroy that of the criminal. Those who are inclined to kill need to be told why it is wrong. The reason surely must be the principle that the value of human life is inestimable, and it is a value which the State must uphold by example as well.²⁹

Not only may lethal force result in the denial of life but it can also be said to constitute treatment which is cruel, inhuman and degrading and therefore to be a violation of Section 12(1)(e) of the Constitution. Far more so than in the case of the death penalty there is a high risk of error and abuse, while the 'procedural safeguards' consist of retrospective investigation into the circumstances in which lethal force was used. Poverty, race and chance are also factors which are likely to affect its use.

Section 7(3) of the Constitution states that the rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36, or elsewhere in the Bill. While there may be a limitation of some rights these must pass the test prescribed in Section 36(1).³⁰

But, due to the fact that the rights to life and dignity are at the centre of the Constitution, limitations on these rights must be subject to a specially stringent test. The Constitutional Court in *Walters* emphasised this point, stating that

[T]he right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory. It therefore follows that any significant limitation of any of these rights, would for its justification demand a very compelling countervailing public interest.³¹

Table 1. Judgment of Chief Justice Chaskalson in S v Makwanyane – key reasons provided for unconstitutionality of death penalty and their relevance to question of lethal force for purposes of arrest

Reason given in S v Makwanyane	Applicability to question of constitutionality of Section 49 of the Criminal Procedure Act
Death is final and irrevocable. ³²	Applies equally.
The possibility of error. ³³	Far greater risk of error - furthermore procedural safeguards which may prevent misuse of lethal force are of more limited effect in use of force situations and mostly only come into play after the fact.
Death penalty infringes rights to life and dignity and amounts to cruel, inhuman or degrading treatment or punishment. ³⁴	Cruelty and violation of dignity is of a slightly different nature but comparable in degree.
Poverty, race and chance are clearly factors. ³⁵	Slightly different in nature but comparable in degree.
Question of constitutionality of death penalty does not interfere with right to self defence. ³⁶	Applies equally.
Death penalty is a violation of rights contained in Bill of Rights. ³⁷	Equally valid – use of lethal force clearly violates the rights contained in the Bill of Rights.
Not justified in terms of limitations clause as not 'necessary' – there are equally effective alternatives in the form of long sentences of imprisonment which may equally serve the purpose of deterrence and prevention. Despite perceptions that this is the case there is no conclusive evidence that the death penalty is more effective than imprisonment in achieving these objectives. ³⁸	Potentially justified in terms of limitations clause – in terms of laws lethal force for purposes of arrest is only ever justified where there are no reasonable alternatives. There is a reasonable argument that lethal force is necessary in that in certain circumstances there are no other ways of achieving the purpose which it is intended to achieve. The courts have presented this purpose as being essentially the prevention of future danger (See further the relevant sections of this chapter).
The state as a role model in the creation of a rights culture. ³⁹	Should apply equally (though also potential for civilians to exercise powers in terms of section 49).
Therefore death penalty is not constitutional for the crime of murder. ⁴⁰	Lethal force for arrest is constitutional where the suspect is reasonably believed to have committed a crime involving the infliction or threatened infliction of serious bodily harm.

In evaluating the arguments in favour of the death penalty the court in *Makwanyane* focused on the three factors of deterrence, prevention and retribution. In examining each of

these factors, as applied in evaluating the Constitutionality of the death penalty, the court said that:

- Deterrence is primarily achieved through apprehension, conviction and punishment of offenders.⁴¹
- Prevention is a legitimate concern but imprisonment is adequate for this purpose.⁴²
- Society has a right to retribution, but imprisonment also serves this purpose.⁴³ Retribution is not a primary value of the Constitution. It cannot be equated with the rights to life and dignity which are the core values which underpin the Constitution.⁴⁴

As a result of the fact that the objectives of deterrence, prevention and retribution could be met by imprisonment, and that a respect for human life and dignity are the core values of the South African constitution, the court therefore said that the violation of rights entailed in the death penalty could not be justified.⁴⁵ Essentially the death penalty involves a violation of fundamental rights but there is no evidence that it is necessary. The objectives which it is intended to contribute to can be achieved by other means which are equally effective.⁴⁶

In examining the question of the use of lethal force the Walters judgment also emphasises the rights to life and dignity as well as the right to physical integrity as paramount values of the South African Constitution. As the judgment states

Our Constitution demands respect for the life, dignity and physical integrity of every individual. Ordinarily this respect outweighs the disadvantage to the administration of justice in allowing a criminal to escape.⁴⁷

The death penalty, when used, was only implemented after what may have been lengthy deliberation by the judges of the Supreme Court, with their decisions subject to being overturned on appeal. But while the death penalty is not constitutional, lethal force may be used in specified circumstances, even though this may be by untrained civilians acting on the spur of the moment.

There must therefore be significant differences between the death penalty and the use of lethal force for arrest. Some of these differences are explored in what follows.⁴⁸

IV The purpose of lethal force - bringing the suspect before court?

Both the death penalty and the use of lethal force for purposes of arrest are extreme violations of the rights contained in the Bill of Rights. When it is clear that something is a violation of the rights contained in the Bill of Rights, what the Constitutional Court (and other courts) then has to do is to look at whether such a violation may be justified 'in an open and democratic society based on human dignity, equality and freedom' taking into account the factors listed in the limitations clause.⁴⁹ One of these refers to 'less restrictive means to achieve the purpose'. Crucial to the question of the constitutionality of the death penalty was the fact that such 'less restrictive means to achieve the purpose' in the form of long sentences of imprisonment, clearly existed.⁵⁰

But there is one crucial difference in regard to the question of the use of lethal force for purposes of arrest which begins to explain why and how the use of lethal force for arrest can be justified in a society where the death penalty is outlawed. As legislation dealing with this issue always emphasises, lethal force against a fleeing person can only be justified where there are no other means of preventing the suspect's flight. Thus, in the words of the court in Makwanyane, killing in the form of capital punishment 'takes place long after the crime was committed, at a time when there is no emergency'.⁵¹ Clearly where a person uses force for purposes of self-defence this is an emergency situation. But are there situations where the fact that a person is running away can be seen as an 'emergency' which is of such a nature that it justifies using lethal force, and thus the risk that they will be killed?

In this regard the courts and legislature in South Africa have adopted a number of different approaches which have generally followed the approaches adopted in other countries. These different standards, from those which most restrict the use of lethal force, to those which are least restrictive, are illustrated in Table 2.

Table 2. The use of force for purposes of arrest - various standards relating to the type of offence in relation to which the use of force is justified

Level of restrictiveness	Standard	Comments
Most restrictive.	Private defence against threats to life and threats of serious bodily harm.	Not an arrest issue – but usually part of legal standards relating to the use of force for purposes of arrest covering situations of actual or threatened violent resistance to arrest rather than flight from arrest.
	Future danger (+ private defence).	Used in Canadian Criminal Code and in 1998 Amendment to Section 49 of the Criminal Procedure Act. ⁵²
	Person has committed a crime involving the infliction or threatened infliction of serious bodily harm (+ private defence).	<i>Govender v Minister of Safety and Security</i> ⁵³ and <i>S v Walters</i> . ⁵⁴ Originally <i>Tennessee v Garner</i> (US Supreme Court, 1985). ⁵⁵
	Serious violent offences and selected property offences (vehicle theft, livestock theft excluding poultry) (+ private defence).	Approach favoured by SAPS in Special Service Order issued in 1997.
Least restrictive.	Violent and property offences other than some of the least serious (+ private defence).	US 'fleeing felon rule" which was nullified by Supreme Court in <i>Tennessee v Garner</i> . ⁵⁶ Approach reflected in 'old' Section 49 of the Criminal Procedure Act

Both the Govender and Walters judgment emphasise that the purpose of the use of force and of lethal force is to secure the arrest of the fleeing person. The Govender judgment states that the objects and purport of section 49 are to protect the safety and security of all persons. The state has a duty to preserve the criminal justice system's effectiveness as a deterrent to crime.⁵⁸ The right to recourse to lethal force, it is implied, exists in order to uphold the state's 'systemic interest in insuring that suspects are brought to justice through a trial and possible punishments'.⁵⁹

Similarly the Walters judgment states 'the purpose of an arrest is to take the suspect into custody to be brought before court as soon as possible on a criminal charge'.⁶⁰ The primary purpose of arrest is 'not to punish the suspect' but 'to bring before court for trial persons suspected of having committed offences'.⁶¹ By implication where lethal force is used for arrest this is its essential purpose.

But if the purpose of arrest and of the use of lethal force for arrest is to bring the suspect before court to stand trial then this presumably implies that it is the nature of the offence which the suspect has committed which provides the motivation for the use of lethal force.

(a) The 'danger principle' - the risk that the suspect will kill or cause serious bodily harm in future

However in the Govender and Walters judgments the courts indicate that this is not in fact the case. It is not a question of the seriousness of the offence only which justifies the use of lethal force.⁶² Instead the judgments emphasise the issue of the danger which the individual poses to society quoting the following passages from the *Tennessee v Garner* judgment in this regard

Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so ...

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.⁶³

Thus the second part of the test put forward by *Garner*, to the effect that, the suspect 'has committed a crime involving the infliction or threatened infliction of serious physical harm' is essentially not a test of offence seriousness but is rather a test of the threat which the individual poses of 'serious physical harm to others'.

What the test says in effect is that an individual who has (is reasonably believed to have)

committed a crime involving the infliction or threatened infliction of serious physical harm, has thereby defined him/herself as posing a danger of such harm to other people. The test put forward in *Garner, Govender and Walters* is therefore a test of future danger, and the motivation for the use of lethal force, that of preventing future harm.

Thus the court in *Walters* restated the principle put forward in *Govender* (and initially in *Garner*) that

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.⁶⁴

The use of lethal force is therefore motivated for not on the basis of the previous actions of an individual and the need to bring him/her to trial for these actions but on the basis that these previous actions indicate the danger which he or she poses. Lethal force is therefore in effect motivated as being necessary to protect the public from the potential harmful consequences which may follow if the person is able to flee. The justification for the use of lethal force other than in self-defence is that, in certain circumstances, society's interest in defeating the person's bid for freedom is strong enough to justify taking the person's life. Where the person is killed the objective of arrest is defeated even if this would have been the preferred outcome.⁶⁵ Thus where lethal force is used in these circumstances *it is intended to prevent the person from being able to continue living as a free person on the grounds of the harm which they may do to others*. This is not about the offence which they have committed but about the danger which they pose to society.

There is a paradoxical element to this in relation to the principle that persons are presumed to be innocent until proved guilty. The justification for the use of lethal force is therefore that the person poses a risk of such great harm to others that it justifies the risk of killing them in the process of trying to arrest them. Where the person survives the shooting they can be brought to trial for offences which they have allegedly previously committed. If they are convicted considerations about their future dangerousness might also impact on the type of sentence which they receive. Ironically though if they survive the shooting the state will still subject itself to the risk of releasing them if they are acquitted in court and they may not even be brought to trial if there is insufficient evidence against them.

Despite this paradoxical element however the motivation is a compelling one. If the death penalty cannot be passed at trial it does not make sense that one should kill people to 'bring them to trial'. But killing in defence against threats of serious violence is clearly justified, and may therefore be justified if the threat is not immediate but reasonably foreseeable at some point in the future.⁶⁶

While this motivation for retaining the power to use lethal force for arrest is compelling this should not be seen to diminish the seriousness of the exercise of this power. Its consequences are of the most extreme nature and it carries with it also the risk that innocent people, or persons who do not in fact pose such a serious danger, may be killed.

Interestingly this 'future danger' principle is also expressly used in the new section 49 (i.e. the 1998 amendment). In addition to circumstances resembling private defence, this states that an 'arrestor' would be justified in using deadly force intended or likely to cause death or grievous bodily harm to a suspect only if s/he believes on reasonable grounds, inter alia, that 'there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed'.

A similar position is put forward in the Canadian Criminal Code. Subject to a number of other conditions, a peace officer or person lawfully assisting the peace officer is justified in using force intended or likely to cause death or grievous bodily harm to a person to be arrested if 'the person to be arrested takes flight to avoid arrest', [and] 'the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm', [and] 'the flight cannot be prevented by reasonable means in a less violent manner'.⁶⁷

The current [International Association of Chiefs of Police](#) (IACP)⁶⁸ model policy on the use of force also makes use of a concept of 'future danger' that the suspect 'will pose a significant threat of death or serious physical injury to others. The policy states that 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
- 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 discharge of the firearm, officers shall identify themselves as law enforcement officers and state their intent to shoot'.⁶⁹

It may be noted that, in a closing disclaimer, the IACP policy goes on to state that 'Every effort has been made ... to ensure that this model policy incorporates the most current information and contemporary professional judgement on this issue. However, law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique [legal and administrative] environment ... that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities, among other factors'.⁷⁰

The IACP policy therefore emphasises that contextual factors are also of relevance to shaping policies on the use of lethal force. But what are the relevant contextual factors in South Africa, and how, if at all, should they impact on lethal force policy?

(b) A concrete test?

The 1998 Amendment to Section 49, the Canadian Criminal Code, and IACP model policy all indicate that it is legitimate that lethal force be used for the purposes of private defence against threats to life or threats of serious bodily harm. In addition they also all indicate that

where there is a reasonable likelihood that a person will unlawfully kill or cause serious bodily harm to other people in future, and that preventing the person from escaping appears to be the only way of ensuring that they will not commit such acts, then it is legitimate to use lethal force to prevent their escape and if possible to secure their arrest, even though this carries with it the risk that the fleeing person may be killed in the process. By implication these provisions state that, while arrest is the preferable outcome, the public interest in ensuring that persons who are likely to commit further violence which carries with it the risk of death or serious bodily harm, do not escape, is such that it justifies the risk that such people may be killed when an attempt is made to arrest them.

The purpose of these provisions then is to prevent future harm to others. By contrast with these provisions the framework defined by the *Govender* and *Walters* judgments, which is the same as the approach taken in 1985 by the US Supreme Court in *Tennessee v Garner*, is subtly but significantly different.

While the motivation which is provided for the use of lethal force is the danger which the fleeing person may pose to other people if allowed to escape, the judgments also state that implicitly a person who is reasonably believed to have committed a crime involving the infliction or threatened of serious bodily harm, may reasonably be believed to pose such a danger. The judgments therefore go beyond a statement of the *principle* of 'future danger' which provides the motivation for the use of lethal force to provide a concrete test as to when an individual may be seen to pose such a danger.

To take the example of circumstances where a person is reasonably believed to be a fleeing vehicle hijacker, this would constitute an offence involving 'the infliction or threatened infliction of serious bodily harm'. In terms of the *Govender* and *Walters* judgments this would clearly qualify as a case where the use of lethal force would be justified to prevent the flight of the suspect if there is no other means of apprehension.

However in terms of the 1998 Amendment, the truth is that no-one will really know, whether or not a fleeing vehicle hijacker is to be seen as someone who poses a risk of 'future death or grievous bodily harm'. The question may effectively only be answered after the courts have given judgement on a number of cases on the issue. While the courts will at some point have to address questions to do with the meaning of the new section 49 the biggest difficulty which this presents at this stage is to police leadership who have to be able to tell police what is clearly permissible under the legislation. As the Constitutional Court itself stated

By reason of its constitutionally mandated law enforcement duties, it is the SAPS and its officers that are primarily concerned with the power and duty to carry out arrests; and it is these officers who are most frequently exposed to situations where the use of force is necessary or may subjectively be perceived to be such. It is the police that bear the brunt of the war against crime and it is these men and women who have the most direct interest in having clarity as to the boundaries of constitutionally permissible force when apprehending or attempting to detain suspects.⁷¹

While the 'future danger' principle is morally sound the law needs to go beyond a mere

statement of a principle that is fairly vague in terms of its practical implications. On balance it would therefore appear that the approach adopted in the *Govender* and *Walters* judgment is preferable as it provides a much higher degree of clarity while amounting to a concrete and intelligible expression of what is otherwise a highly speculative legal principle.

This need for clarity is enhanced by the realities of the South African situation in relation to the levels of skill and training, and the level of control exercised over, those who actually utilise the power to use lethal force.

V Who should have this power?

The *Makwanyane* judgment focused on the responsibilities of the state emphasising the responsibility of the state to be exemplary in upholding human rights.⁷² But, unlike the death penalty (which where it exists provides the courts and penal system with the power to kill), Section 49 of the Criminal Procedure Act, not only confers the power to kill on state personnel (the police) but also on ordinary civilians.⁷³ Section 49 therefore not only raises questions about the powers and conduct of state officials but also about what powers should reasonably be granted to civilians. Can it be constitutional for civilians to have the power of life and death, not only in situations of self defence, but also against people who are running away so as to avoid apprehension?

In authorising civilians (and therefore the growing number of armed security guards) to use lethal force for arrest the legal situation in South Africa is different from that in countries in North America and Europe which generally only authorise the police to use lethal force for arrest. Arguably it is inappropriate that this power should lie in the hands of people other than the police themselves.⁷⁴

However if this power of life and death is to continue to lie in the hands both of untrained civilians, and police, many of whom are themselves poorly trained and semi-literate,⁷⁵ this suggests the need for a legal framework that is defined in concrete terms, rather than one which requires speculative evaluation in the heat of the moment.⁷⁶ The *Govender* and *Walters* judgment have gone a considerable way in achieving this objective but the new Section 49 has instead muddied the waters.

VI An appropriate standard of belief

It is no secret that criminal justice systems are fallible: they are subject to human error as well as to deliberate abuses, such as tampering with evidence, by persons such as police officers and prosecutors.⁷⁷ Despite the very high evidentiary threshold of 'beyond a reasonable doubt', despite the process of sometimes lengthy deliberation, despite the procedural safeguards provided by appeal processes, courts can still get it wrong even in capital cases.

On the streets, where split second judgments are often required, and communication even less adequate, the potential for error is far greater. The fact that those exercising the power to use lethal force include both civilians and police, neither of whom are in general highly trained, obviously only compounds this potential.

Execution of the death penalty is a special class of administrative action. As the Constitutional Court emphasised in the Makwanyane judgment the killing of a person irrevocably eliminates human life, and thus access to all other rights which a person may enjoy.⁷⁸ Whereas the possibility of error and abuse exists in relation to all administrative actions, killing as an administrative action is clearly in a special class. Thus considerations of the possibility of error clearly need to be given considerable weight in evaluating questions relating to the use of lethal force.

If killing in error is a substantial risk, how can the law minimise this risk? What standard of belief should the police and other people be required to adhere to if they are to exercise the power to use lethal force for arrest?

The issue is not a simple one. As indicated in Table 3 there are various legally recognised standards of belief. The 1998 amendment, and the Govender and Walters judgments, serve as confirmation that the second standard listed 'has reasonable grounds for believing' applies in relation to the use of lethal force for arrest.

Table 3. Examples of legally recognised standards of belief

Restrictiveness	Standard	Comments
Most restrictive	Actual situation irrespective of belief	Objective standard
	Believes on reasonable grounds	Objective and subjective elements
Least restrictive	Believes	Subjective

While one wishes to minimise the risk of error, one cannot eradicate it. Thus it may be unfair to make use of an objective standard which only looks at the facts of the situation and does not look at the beliefs of the person involved, particularly as police are not only allowed, but actually required, to exercise their powers to use lethal force in situations where this is authorised by law.

On the other hand the law regulating the use of lethal force for purposes of arrest needs to be exercised responsibly and it would not be acceptable to provide that this power be exercised on the basis of any belief that a person may hold irrespective of its reasonableness. Those exercising the powers to use lethal force not purely for private defence, but also for purposes of arrest, should at least be required to conform to some standard of responsibility and reasonableness in terms of their beliefs. Section 49 deals with people who use the authority of law to arrest other people and who use lethal force in the process of doing so. It would be unconscionable for police or private persons to regard themselves as having the authority to use lethal force for purposes of arrest without feeling that they have to be able to justify their actions in terms of some standard of reasonableness.⁷⁹

The standard of reasonable belief is clearly the preferable standard. But on its own it is regarded as acceptable in relation to a wide range of decisions by police which do not have the drastic consequences of a decision to use lethal force. As argued above concerns relating to the risk of error should weigh far more heavily in relation to decisions on the use

of lethal force which, where they involve the taking of human life, involve the irrevocable termination of all rights. But this has not been done as yet in South Africa with neither the major court judgments nor legislation or police policies making reference to the issue. Specific wording which draws attention to this risk should arguably be inserted in legal standards and regulations dealing with the use of lethal force.⁸⁰

VI Conclusion

Partly because of the crime situation, many people in South Africa are resistant to a more restrictive framework for the use of force in effecting arrest.

However in the United States, the restrictions imposed by the US Supreme Court in the case of *Tennessee v Garner*⁸¹ were supported by many police agencies. These restrictions have not resulted in increased crime or in increased danger to the police. Subsequently many US police agencies have used the *Garner* standard, or even standards which are more narrowly defined, as the basis for use of force policies which have enabled them to win credibility for observing high standards of professionalism and integrity in respecting human life.⁸²

The judgments of the Supreme Court of Appeal and Constitutional Court on this matter have provided a solid footing for South African law on this matter thus potentially enabling South Africa's police agencies to better give support to principles of respect for life whilst protecting people against threats to their safety.

However it is not clear that the new section 49 also contributes to this purpose particularly in the light of the realities of the use of lethal force in South Africa.

Considering the dangers which the police and others are exposed to in South Africa as a result of high levels of violence it would appear fair and reasonable that the law should provide a greater level of clarity than is provided by this mere statement of principle. It therefore appears that the approach taken in the *Govender & Walters* judgements, which appears to be a reasonable statement of the same principle, is the preferable approach.

The fact the 1998 Amendment has at last been brought into operation may be welcomed on some levels as a resolution of South Africa's protracted lethal force saga. While the principles which it embodies are important principles it is not clear that way in which it has been formulated will meet the current needs of police and others for a clearly defined statement of what is permissible in terms of our law. There may therefore at some point be a need for a further legislative amendment so as to promote clarity in the law on the use of lethal force. In the event of such an amendment special wording should also be inserted to highlight the risk of error.

Notes:

¹ The law on the use of lethal force for arrest was previously discussed in the SAJHR in N Haysom, "License to Kill Part I: The South African Police and the Use of Deadly Force" (1987) 3 SAJHR, 3 and N Haysom 'License to Kill Part II: A Comparative Survey of the Law in the United Kingdom, United States of America and South Africa' (1988) 4, 202.

² The term lethal force is used here in the way Geller and Scott use the term 'deadly force'. They say 'there is general agreement that the term means force reasonably capable of causing death or great bodily harm' (W Geller & S Scott *Deadly Force: What We Know*. (1992) 23). The term can be taken as equivalent to the phrase 'a firearm or similar weapon' used in *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) 24. In other words lethal force has the potential to be fatal though it is not necessarily fatal in all circumstances. Geller and Scott note that some US police agencies 'report as instances of deadly force only events involving police firearms, excluding for instance, high speed pursuits in which the police intentionally ram the suspect's vehicle' (ibid) while '[o]ther agencies explicitly acknowledge the potentially lethal consequences of certain high-speed pursuit tactics By some, although not most, police agency definitions, fatal chokeholds, fatal TASER shocks or fatal attacks by police dogs might be classified following investigations as official uses of deadly force' (ibid 24).

³ Section 7 of the Judicial Matters Second Amendment Act, No 122 of 1998

⁴ The two judgments are that of the Supreme Court of Appeal in *Govender v Minister of Safety and Security* (note 2 above) in June 2001 and *S v Walters and Another* 2002 (4) SA 613 (CC) in May 2002. The judgments are discussed at length below. In *Raloso v Wilson & others*, 1998 (2) SACR 313 (C) the Northern Cape Division of the Supreme Court refused an application to refer the constitutionality of s49(2) to the Constitutional Court in the light of indications given by representatives of the Minister of Safety and Security and of Justice that it was intended that section 49 of the Criminal Procedure Act would be amended.

⁵ Constitution of the Republic of South Africa Act 108 of 1996 (1996 Constitution).

⁶ Proclamation No R54, Government Gazette 252066, July 11.

⁷ 1995 (3) SA 391 (CC).

⁸ Issues concerning arrest, including when arrest is authorised, are dealt with in the Criminal Procedure Act primarily in Sections 39-52. According to Section 39(1), 'Unless the arrestee submits to custody, an arrest is effected by actually touching his person or, if the circumstances so require, by forcibly confining him'. Other provisions which are relevant to the issue of the use of force include Section 13(3)(b) of the South African Police Services Act, 68 of 1995. This provides that 'Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances'. Section 9(2)(d) of the Regulation of Gatherings Act, No 205 of 1993, also outlines circumstances where a police member, of or above the rank of warrant officer, may 'order the use of force, including the use of firearms and other weapons'. See also note 76 below regarding provisions which may result in the investigation of incidents of the use of lethal force.

⁹ C Snyman *Criminal Law* 3 ed (1995) 97 In relation to whether the right to life is likely to impact on the common law defence of private defence in protection of private property see further note 13 below.

¹⁰ Note 7 above, 138.

¹¹ Note 4 above, 33, 51, 53, 54(i).

¹² However the contents of footnote 66 to the Walters judgment (Ibid 53) to the effect that the Constitution may limit the rights to the use of lethal force in private defence of property, should be noted: 'Self-defence is treated in our law as a species of private defence. It is not necessary for the purposes of this judgement to examine the limits of private defence. Until now, our law has allowed killing in defence of life, but also has allowed killing in defence of property, or other legitimate interest, in circumstances where it is reasonable and necessary to do so. *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A). Whether this is consistent with the values of our new legal order is not a matter which arises for consideration in the present case. What is material is that the law applies a proportionality test, weighing the interest protected against the interest of the wrongdoer. These interests must now be weighed in the light of the Constitution.'

¹³ See W Geller and S Scott (note 3 above) 257 – 267 as well as R D Bruce Supplementary Affidavit in *S v Walters* (CCT 28/01), November 2001. Also see *S v Walters* (note 4 above) 27, 51 and 53.

¹⁴ Most arrest provisions incorporate a 'self-defence' component. While this may appear as an unnecessary duplication of the common law on private defence it possibly serves to protect the arrestor against accusations that he or she was the aggressor.

¹⁵ In the words of the Constitutional Court in the Walters judgment (note 4 above) Section 49 and its predecessors had 'elicited a good deal of judicial and academic criticism long before the advent of constitutionalism' (23). The following examples of such criticism are provided in a footnote (footnote 32) 'For judicial comment see for example *R v Hartzler* 1933 AD 306; *R v Britz* 1949 (3) SA 293 (A); *R v Koning* 1953 (3) SA 220 (T); *Mazeka v Minister of Justice* 1956 (1) SA 312 (A); *R v Horn* 1958 (3) SA 457 (A); *R v Metelerkamp* 1959 (4) SA 102 (E); *R v Labuschagne* 1960 (1) SA 632 (A); *Matlou v Makhubedu* 1978 (1) SA 946 (A); *S v Nel and Another* 1980 (4) SA 28 (E); *Wiesner v Molomo* 1983 (3) SA 151 (A); *Macu v Du Toit en 'n Ander* 1983 (4) SA 629 (A); *S v Martinus* 1990 (2) SACR 568 (A); *S v Martin* 2001 (2) SACR 271 (C). For other comment on the section and s 37 of Act 56 of 1955 see Harcourt *Swift's Law of Criminal Procedure* 2 ed (Butterworths, Durban 1969) at 67-8; Dugard *South African Criminal Law and Procedure Vol IV: Introduction to Criminal Procedure* (Juta, Cape Town 1977) at 68-9; Hiemstra *Suid-Afrikaanse Strafproses* 3 ed (Butterworths, Durban 1981) at 96-9 and 4 ed (1986) at 102-6; Louw and De Jager "Die geskiedkundige ontwikkeling van die reëls insake straffelose doodslag tydens arres in die 'common law'" (1988) 3 *Tydskrif vir die SA Reg* (Journal of SA Law) 426. For comment since the advent of the constitutional era see Du Toit et al *Commentary on the Criminal Procedure Act* Service 24 (Juta, Cape Town 2000) at 5-26 to 30; Steytler *Constitutional Criminal Procedure* (Butterworths, Durban 1998) at 7-76; Rudolph "The 1993 constitution - Some thoughts on its effect on certain aspects of our system of criminal procedure" (1994) 111 *SA Law Journal* 497 at 501; Watney "To shoot or not to shoot: The changing face of section 49 of the Criminal Procedure Act 51 of 1977" (September 1999) *De Rebus* 28.'

¹⁶ As noted (note 2 above) lethal force is not necessarily fatal.

¹⁷ Bruce, D. (1998). [Towards a Strategy for Prevention: The occurrence of deaths in custody or as a result of police action in Gauteng, April - December 1997.](#) Report for the Independent Complaints Directorate.

¹⁸ Section 7 of the Judicial Matters Second Amendment Act, (note 3 above).

¹⁹ Paton, C. (1999). [Tshwete takes up cops' right to shoot](#) *Sunday Times*, 29 August.

²⁰ In terms of the doctrine of objective invalidity this might be seen to have been incorrect. Nevertheless on a formal level it remained true as the old section 49 remained on the statute books. Note that the Constitutional Court's order that Section 49(2) was inconsistent with the Constitution and invalid was prospective only. *S v Walters* (note 4 above) 77.

²¹ *Govender v Minister of Safety and Security* (note 2 above) 2, 5.

²² *Ibid*, 24

²³ *S v Walters* 2001 (2) SACR 471 (Tk)

²⁴ National Police Commissioner Jackie Selebi was reported to have said that police management was 'not-worried' about the judgment. The police could live with the judgment because it did not deny them the right to self-defence, he said.' *Sowetan* July 4 2002.

²⁵ See for instance 'Net Selebi weet nie wanneer hy mag skiet', *Beeld*, 22 May 2003.

²⁶ Note that the death penalty case, *S v Makwanyane*, was decided under the 'interim' Constitution (Constitution of the Republic of South Africa, Act 200 of 1993) while *S v Walters* was decided under the 1996 Constitution (note 5 above).

²⁷ Note 8 above 326-7 cited in *Walters* (note 4 above) 5.

²⁸ Note 8 above 218 cited in *Walters* (note 4 above) 6.

²⁹ *Ibid*.

³⁰ The limitations clause of the 1996 Constitution is Section 36 which states that:

- (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 for in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

³¹ Note 7 above, 28.

³² Ibid, 26.

³³ Ibid, 54.

³⁴ Ibid, 95.

³⁵ Ibid, 51.

³⁶ Ibid, 138.

³⁷ Ibid, 95.

³⁸ Ibid, 145.

³⁹ Ibid, 124 -125.

⁴⁰ Ibid, 146.

⁴¹ Ibid, 122.

⁴² Ibid, 128.

⁴³ Ibid, 129.

⁴⁴ Ibid, 130, 145

⁴⁵ Ibid, 145.

⁴⁶ As indicated (note 26 above) the *S v Makwanyane*, was decided under the 'interim' Constitution in terms of which the test under the limitations clause was, amongst other questions, supposed to examine whether the provision or law in question was 'necessary' (Section 33(1)). Since the interim Constitution was substituted by the 1996 Constitution, the test is no longer whether the provision is 'necessary' but the comparable question posed by the limitations clause is whether there are 'less restrictive means to achieve the purpose' (note 31 above). For the purpose of this paper at least it appears sufficient to equate the two formulations.

⁴⁷ Note 4 above, 44.

⁴⁸ Some of the other points of comparison which are not explored here include the question of procedural safeguards, the nature of the cruel treatment entailed in the death penalty as opposed to the use of lethal force, and the relative impact of poverty, race and chance.

⁴⁹ Section 36 of the Constitution (note 5 above). See further notes 30 and 46 above and note 50 below

⁵⁰ See note 46, as well as 26, 30 and 49 above.

⁵¹ Note 7 above, 138.

⁵² Note 3 above.

⁵³ Note 2 above, 24.

⁵⁴ Note 4 above, 54.

⁵⁵ *Tennessee v Garner* 471 US 1 (1985) 11.

⁵⁶ *Ibid*, 22.

⁵⁷ See Section II(b)(i) above.

⁵⁸ *Govender* (note 2 above) 12.

⁵⁹ FR Finch Jr 'Deadly Force to Arrest: Triggering Constitutional Review ' (1976) 11 *Harvard Civil Rights – Civil Liberties Law Review* 361, 372 in *Govender*, *ibid*, 12.

⁶⁰ Note 4 above, 49.

⁶¹ Note 4 above, 54.

⁶² *Govender* (note 2 above), 19; *Walters* (note 4 above), 38, 41.

⁶³ *Tennessee v Garner* (note 55 above) 11-12 quoted in *Govender* (note 2 above) 17 and *S v Walters* (note 4 above) 43.

⁶⁴ *S v Walters*, *ibid*, 54h. It may be noted that in listing the key points relating to the use of force in arrest the court appeared to veer between, on the one hand, stating that the previous acts of the person are a sufficient test of 'future danger' and stating that it is both a question of previous acts and of 'future danger'. Thus in addition to restating the *Govender/Garner* principle (54h) the court stated that 'In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these

circumstances' (54(f)). The inference appears to be that in relation to the use of lethal force both of these considerations (i.e. the nature of the offence and the future danger) are covered by the *Govender/Garner* principle. In other words because the individual has committed a crime of such a nature, ordinarily it will be reasonable to infer that there is a danger of them committing similar crimes at a later point. While the court appears to resoundingly endorse the 'Govender/Garner test', paragraph 54f may be seen as carrying at least the smallest of suggestions that the test in itself is not sufficient, and that in addition to a reasonable belief that the person has committed an offence involving the infliction or threatened infliction of serious physical harm, the arrestor must *also* have grounds for believing that the suspect will pose a danger of such harm in future.

⁶⁵ In any circumstances where there is a pressing interest in finding out if the person can answer specific questions this objective will of course also be defeated if the person dies.

⁶⁶ In terms of its ethical or moral basis the future danger principle is therefore more of a temporal extension of principles of private defence, rather than a restriction of the 'fleeing felon' rule to offences of the greatest seriousness.

⁶⁷ Canadian Criminal Code, Chapter C-46, Section 25(4)

⁶⁸ The International Association of Chiefs of Police (IACP) is based in the USA and was founded in 1893 describing itself as 'the world's oldest and largest non-profit membership organisation of police executives, with over 19,000 members in over 100 different countries'. The association's goals are 'to advance the science and art of police services; to develop and disseminate improved administrative, technical and operational practices and promote their use in police work; to foster police cooperation and the exchange of information and experience among police administrators throughout the world; to bring about recruitment and training in the police profession of qualified persons; and to encourage adherence of all police officers to high professional standards of performance and conduct'. One of the initiatives which the IACP is involved with is the development of model policies relating to the use of force. These policies are periodically revised.

⁶⁹ Policy received on 19 October 2001 as attachment to e-mail message from Joe Bui, National Law Enforcement Policy Centre, International Association of Chiefs of Police, BuiJ@theiacp.org 1-800-THEIACP, ext. 319 Fax: 703-836-4543.

⁷⁰ Ibid.

⁷¹ *Walters* (note 4 above) 24. A footnote to the paragraph refers to Section 205(3) of the 1996 Constitution (note 5 above).

⁷² Note 7 above, 124 -125.

⁷³ The issue is referred to in *S v Walters* (note 4 above) 32 but, other than as indicated in note 76 below, its implications are never expanded upon.

⁷⁴ This is not necessarily a one-sided debate. If it is true that the police are ineffective in

apprehending criminals then this might be an argument in favour of retaining the access of civilians to the power to use lethal force for arrest. On the other hand police in uniform (which excludes detectives and police who are off duty) are at least readily identifiable as police officers. Providing civilians with the power to use lethal force may therefore exacerbate the risk that a person may flee, not because they wish to evade arrest, but because they innocently believe that the person calling on them to stop is someone who is acting unlawfully and intends to do them harm.

⁷⁵ The argument that private persons 'do not possess the same skills as experienced police officials to decide in an emergency what constitutes reasonable conduct' Du Toit et al *Commentary on the Criminal Procedure Act* (Service 29, 2003) 5-24, only serves as a distinction between experienced police and others, but takes no account of the large number of police who are poorly trained and/or inexperienced. Similarly it is not clear if one should agree with the inferences made by the court in Walters that 'Police officers can reasonably be assumed to have been trained in the use of firearms and to have at least a rudimentary understanding of the legal requirements for conducting an arrest. They are also subject to the supervision and discipline of their superiors' (note 4 above, 32)

⁷⁶ A further consideration here relates to the nature of the procedural safeguards which operate in relation to the exercise of lethal force. These include: (i) Provisions for the investigation of shootings incidents in terms of SAPS standing order 251; (ii) The requirements for a police investigation and inquest proceedings following all deaths from 'other than natural causes' in terms of the Inquest Act, 58 of 1959; (iii) The requirement that the Independent Complaints Directorate investigate all 'deaths in police custody or as a result of police action' in terms of section 53(2)(b) of the South African Police Service Act, 68 of 1995; (iv) The possibility of a person being brought to trial at criminal law where there is evidence that he or she unlawfully killed or injured another person or recklessly used a firearm. There are a range of mechanisms but also reason to believe that their operation leaves much to be desired. Arguably the introduction of a vague and speculative legal standard principle will serve to diminish, rather than strengthen, the standards of accountability which are imposed in terms of these procedures.

⁷⁷ See for instance A Ashworth *The Criminal Process – an evaluative study* 2 ed (1998) 11-18 and A Sanders and R Young *Criminal Justice* 2 ed (2000) 18 for discussions of several miscarriages of justice in the British legal system.

⁷⁸ Note 7 above, 26.

⁷⁹ See however JJ Burchell, J 'Deadly force and fugitive justice in the balance: The old and the new face of section 49 of the Criminal Procedure Act' (2000)13 SACJ, 208. Burchell's argument focuses on the words 'believes on reasonable grounds' in the amended Section 49(2). Burchell's argument is that the provision unfairly discriminates against police officers (though he omits to mention that private citizens may be similarly affected if acting in terms of Section 49), if they kill someone whilst genuinely, but incorrectly, believing that they conformed to the conditions laid down in Section 49(2), as they would not have access to the protection afforded by Section 49(2) if the belief is held not to have been 'reasonable' by the court and might therefore be convicted of murder (the error being an error of fact not law). The motivation put forward by Burchell is that a person acting in what s/he

mistakenly believes is a situation of *private defence*, if s/he persuades the court that she mistakenly but genuinely believed that s/he was under attack, may be acquitted on a charge of murder or assault on the basis that mens rea (and therefore the factor of blameworthiness) is absent. (Though they might still be convicted of culpable homicide). Burchell therefore favours access to a defence based on 'psychological fault' (which would be encapsulated by the words 'believes') as opposed to 'normative fault' (encapsulated by the words 'believes on reasonable grounds'). See also A Du Plessis, 'The use of force in the furtherance of Justice: Section 49 of the South African Criminal Procedure Act 51 of 1977'. Paper presented at the Technikon South Africa 2nd World Conference on Modern Criminal Investigation, Organised Crime and Human Rights, International Conference Centre, Durban, 3-7 December 2001.

⁸⁰ An example of such wording would be that 'The arrestor, on the basis of direct knowledge or other firm and clearly justified grounds, reasonable believes ...'. This is not an argument that a higher standard of believe (such as direct knowledge or verified information) should be inserted into the legislation but merely that there is a special need for the law to draw attention to, and sensitise the arrestor to, the risk of error. Note however the examples of Kansas City and Atlanta in the United States which 'required police officers to have direct personal knowledge that someone had committed a crime'. LW Sherman 'Reducing Police Gun Use: Critical Events, Administrative Policy, and Organisational Change' in M Punch (ed) *Control in the Police Organisation* (1983) 108.

⁸¹ Note 55 above.

⁸² Geller and Scott (note 3 above) 257-267. Also see Supplementary Affidavit of R D Bruce in the Constitutional Court of South Africa, CCT 28/01, 1 November 2001, 10 - 22.