SUBMISSION TO PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON THE CRIMINAL PROCEDURE AMENDMENT BILL [B 39—2010] TO AMEND SECTION 49 OF THE CRIMINAL PROCEDURE ACT, 1977

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EXECUTIVE SUMMARY

1. The continuing hostility to the present form of sec. 49 on the Criminal Procedure Act stems from the mistaken view that, because of the combined effect of this section and the abolition of capital punishment, actual or threatened victims of violence are now denied the right to do what they need to do to defend themselves. There is a mistaken belief that sec. 49 must be changed to set this right – to fill a gap in constitutional legality. There is, in fact, no such gap.

2. It would be better to repeal sec. 49 entirely rather than to amend it, for the law would then be as stated by the Constitutional Court in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*. It would be consistent with the best international practice and is adequate.

3. The Constitution requires the law to ensure that the rights and interest of the community at large are balanced against the rights of a suspect. This means that the seriousness of the crime, and the threat the suspect poses to life and limb of police officers and ordinary members of the public, must be balanced against the suspect's right to life and dignity. The law must therefore allow arresters to take into account all relevant factors in order to determine the legitimate amount of force that may be used to affect the arrest of a suspect. What is clear is that where there is no immediate threat of serious bodily harm to anyone, an arrester may not use deadly force to affect an arrest as the force used would not be proportionate to the threat posed by the suspect.

4. In *Walters*' case it was said that 'the proportionality of the force to be permitted in arresting a fugitive must be determined not only by the seriousness of the relevant offence but also by the threat or danger posed by the fugitive to the arrestor(s), to others or to society at large.' The case definitively states that one may *never* use deadly force to affect an arrest unless there is a threat of serious bodily harm to the police or others if deadly force is not used.

5. The proposed amendments to section 49 infringe on the right to dignity, the right to life, and the right to bodily integrity guaranteed in the Bill of Rights. They do not constitute a justifiable limitation in terms of section 36 of the Constitution as they fail to balance these rights against the interest of the community proportionately as required by the Constitutional

Court. Applying section 36, it is not permissible merely to have regard to the seriousness of the crime allegedly committed in order to determine whether deadly force can be used. All relevant factors must be taken into account.

6. Any threat posed by a suspect must further be imminent. The proposed amendments are thus in conflict with the law as set out by the Constitutional Court in this respect also.

7. The proposed removal of the word *immediately* in section 49(1) would allow for the killing of a suspect to address a future menace. This would water down the common law principle on self-defence and would create the possibility of vigilantism by all arrestors – including private persons -- ie, who are not police officers.

8. The proposed new sec. 49(2(***(a)*** does not adequately reflect the law as stated by Kriegler J in ***Walters***'s case.

9. In key respects, the proposed new sec. 49(2)***(b)*** resembles the unconstitutional form taken by Sec. 49 as repealed following ***S v. Makwanyane and Mchunu,*** 1995 (3) SA 391 (CC).

10. The claim that the current form of sec. 49 affords suspects a so-called 'right to flee' is entirely without substance.

11. The position of the Constitutional Court about the correct manner in balancing these interests (as stated in ***Walters***) can be summed up as follows: (i) One may not shoot a fleeing suspect merely because he or she might get away; (ii) One may shoot and even kill a suspect (in other words, use deadly force) when one has reasonable grounds for believing that the suspect poses an ***immediate*** threat of serious bodily harm to anyone; (iii) One may shoot a suspect reasonably believed to have committed a crime involving the infliction or threatened infliction of bodily harm even where such a suspect does not pose an immediate threat of serious bodily harm to anyone, ***but only*** if it will be impossible to arrest the suspect at a later stage and then one can use ***only*** the least degree of force necessary to affect the arrest; (iv) Legislation that provides a blanket power to arrestors to use deadly force against anyone suspected of committing a crime involving serious threat of bodily harm where suspects flee or resist arrest would thus not pass constitutional muster.

12. The defence of private defence is reviewed in the light of the presumption of innocence, the burden of proof of guilt, and the evidential burden of a defence. In particular, it is not for an accused person on trial before a South African court to prove that there is a defence to the charge. The prosecution must prove that the defence on which the accused seeks to rely must fail, and it must make this proof to the same standard as proof of guilt – that is, beyond all reasonable doubt.

13. There is no justification for discriminating between a police officer or a private citizen for the purposes of sec. 49.

14. The proposed amendments have the effect of substituting the use of force for competent policing, and promote no policy of seeking the support of the community to trace and produce the person whose arrest is sought.

15. It is not in clear what way the existing form of sec. 49 poses difficulties in interpretation.

16. Alternative formulations are suggested:

(a) The entire section could be repealed and replaced by the following wording, which is based on the United Kingdom's Criminal Law Act 1967 (c. 58), sec. 3(1) and reflects the consideration that resisting an arrest is itself an offence: 'A person may use

such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.' Alternatively, the text can be replaced with the list of criteria set out by the Constitutional Court in *Walters*.

(b) Sec. 49(2)*(a)* could be deleted entirely (for it relates to private defence and the South African law is adequate for the purpose), and leave sec. 49(2)*(b)* unaltered.

(c) Sec. 49 could be replaced entirely with the rules stated by Kriegler J, for these focus entirely and exclusively on the management of arrests as a whole.

1. INTRODUCTION

1.1. Following the Constitutional Court's decision in *S v. Makwanyane and Mchunu*[1] in 1995 that the death sentence was unconstitutional, and its decision in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*[2] in 2002 that sec. 49(2) of the Criminal Procedure Act 1977 as it was enforced at the time[3] was also unconstitutional, there was no provision in our law which might be invoked to make it lawful for anyone to kill another deliberately otherwise than in the reasonable and proportionate exercise of the right of private defence.[4] In the belief that a gap had been created, the current form of sec. 49 was enacted in 1998.

1.2. Crime, and particularly violent crime, is not a uniquely South African problem and the gravity of the situation in South Africa raises no special and unique legal issues. We have committed ourselves to a constitutional democracy and the rule of law, and what we do must be done within the limits of what these permit.

1.3. In the context of the dreadful problems posed for South Africa by crime and violence, we are aware that pointing to the rights of suspects – let alone criminals – may be unpopular and open us to accusations that we are 'soft on crime'. However, empty clichés do not amount to helpful critical analysis, satisfactory legal solutions cannot emerge from nothing more than vengeance-driven passion, and Ministerial rhetoric such as 'Shoot the bastards!'[5] is not merely ugly but misleading and dangerous populism.

1.4. Such rhetoric is dangerous precisely because it sends the misleading message to a justifiably-alarmed public that still there remains a lacuna to be filled in the determination to be 'tough on crime'. It suggests that there is still scope for legislation to supplement the common law by enabling a yet more aggressive response to criminal violence by exploiting still unexploited constitutional legitimacy for the use of lethal force.

1.5. The Memorandum to the Bill to amend sec. 49 from its present form – the form given to it following *Makwanyane*'s case[6] – refers to a criticism of the section by Professor Snyman to the effect that at present the section now affords a suspect a 'right to life and to "run away"'.[7] We consider this criticism in more depth later in this submission; suffice it to say at this point that we see Prof. Snyman's remark as an unsuccessful attempt to give jurisprudential legitimacy to the idea that such a lacuna exists and that it can be, and ought to be, filled by putting an end to a suspect's so-called 'right to flee'. In our view no such right is created by sec. 49 in its present form, and the public should not be misled into being frightened of non-existent goblins conjured up to serve political ends: the well-founded fear of crime in South Africa

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[1]*S v. Makwanyane and Mchunu*, 1995 (3) SA 391 (CC).
[2]*Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*, 2002 (4) SA 613 (CC).
[3]The section had been amended in 1998 following the decision in *Makwanyane*'s case, but the amended form was not put into effect for five years.
[4]We prefer the term 'private defence' over 'self defence; see below, para. 8.3.
[5]Per the Deputy Minister of Police; see para. 10.2.2, below.
[6]See fn. 1, above.
[7]C.R. Snyman, *Criminal Law*, Fifth revised ed. (Lexis-Nexis South Africa, 2007), p. 136. In point of fact, the Memorandum misquotes Prof. Snyman and refers to a 'right to flee'.

needs calm attention precisely at the instant that panic and the passions of terror distract one. Hunting for a non-existent gap in the law to be filled in order to be seen to be doing something about crime is like looking hopefully in a pitch-dark room for a black cat that isn't there.

1.6. We believe that the hope or quest for a gap in the law on the part of some people flows from the fact the death sentence is no longer available. It is common knowledge that some regret this and say so, unambiguously and emphatically – Prof. Snyman is one such person[8] – but this not a view for which we have the least sympathy.

1.7. This submission is not the appropriate context for a detailed review of what was said in *Makwanyane*'s case,[9] where the Constitutional Court found that the death sentence was incompatible with our Constitution, nor do we offer an examination of all its implications. However, the point must be made that one of its consequences was to raise the question of whether, the sentence of death having been abolished, it could possibly still be lawful to kill someone as permitted by sec. 49(2) in the form in which was then.[10] The Constitutional Court specifically questioned whether the constitutionality of the sub-section could survive the Bill of Rights. Subsequently, the Court answered its own question in the negative in *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another*.[11] Speaking for a unanimous Bench, Kriegler J set out the principles to be followed instead.

1.8. We believe that much of the continuing hostility to the present form of sec. 49 stems from the mistaken view that, because of the combined effect of this section and the abolition of capital punishment, actual or threatened victims of violence are now denied the right to do what they need to do to defend themselves. There is a belief that sec. 49 must be changed to set this right – to fill a gap in constitutional legality. The confusion includes private defence in its toils.[12]

1.9. As it stands, sec. 49 has not been challenged in any court and its constitutionality has not been impugned: as the saying goes – 'If it ain't broke, don't fix it'. However, what the Constitutional Court said in *Walters*' case is now the lens through which sec. 49 must be viewed.

1.10. We maintain that it would be better to repeal sec. 49 entirely rather than to amend it, for the law would then be as stated by the Constitutional Court in *Walters'* case and consistent with the best international practice. Following from this inevitable consequence we believe, firstly, that the proposed amendments are unsatisfactory and that we can demonstrate this; secondly, we believe that the amendments would inevitably be successfully challenged in the Constitutional Court with the result that *Walters'* case would be the source of the law anyway.

1.11. The legal limits on the use of force by arrestors must be judged in the context of the history of the relevant provisions on the Criminal Procedure Act as well as by the limits placed

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[8]See para. 8.2.5 below, where we address this point in detail.

[9]*S v. Makwanyane and Mchunu*.

[10]Set out below, para.3.2.1

[11] 2002 (4) SA 613 (CC). By the time this case was decided, the Legislature had responded to what was said in *Makwanyane*'s case. Though sec. 49 had been amended to its present wording, *Walters* still had to address the issue as the amendment had not yet been brought into force.

[12]It is interesting that in the United Kingdom, shortly after the death sentence was abolished by an Act of Parliament, it was felt to be necessary to codify the law governing self-defence. We address this aspect in the course of this submission.

on the use of such force by the Constitution. In dealing with the use of force by arrestors it is imperative to distinguish conceptually between two distinct situations and to provide legal rules applicable to each. Firstly, the law may allow for the use of appropriate force to protect life and limb in cases where a suspect threatens immediate serious bodily injury to anyone. Secondly, different rules must apply in the case where a suspect resists or attempts to evade arrest but does not pose an immediate threat of serious bodily injury to anyone.

1.12. The Constitution requires the law to ensure that the rights and interest of the community at large are balanced against the rights of a suspect. This means that the seriousness of the crime, and the threat the suspect poses to life and limb of police officers and ordinary members of the public, must be balanced against the suspect's right to life and dignity. The law must therefore allow arrestors to take into account all relevant factors in order to determine the legitimate amount of force that may be used to affect the arrest of a suspect. What is clear is that where there is no immediate threat of serious bodily harm to anyone, an arrestor may not use deadly force to affect an arrest as the force used would not be proportionate to the threat posed by the suspect.

1.13. In this submission we review briefly the history of section 49 of the Criminal Procedure Act as well as the rules developed by the Constitutional Court in dealing with the use of force. We point out that the proposed amendments to sec. 49 of the Criminal Procedure Act are unconstitutional because they effectively revive the unconstitutional effects of sec. 49 in the form it took before the Constitutional Court ruled in *Walters*'[13] case. We propose alternative ways of dealing with the issue.

1.14. However, before proceeding further, we explain as briefly as we possibly can the implications of certain fundamental principles of criminal procedure which the Constitution has written into South African law. Though these principles are often referred to in popular and forensic discourse, we believe that it is necessary to address them explicitly here because, being fundamental, their explicit and formal appearance in the Constitution has had a profound impact on the manner in which statutes must be construed. Notwithstanding that they are often referred to, common understanding of them is commonly clumsy.

1.15. We are aware that not everyone who will be taking legislative decisions on the proposed amendments is a trained lawyer, and we offer criticisms and comments on existing and proposed law. As the decisions to be taken require an understanding of some basic legal theory, we feel that explaining the fundamentals on which we rely is a matter of courtesy.

2. THE PRESUMPTION OF INNOCENCE, THE BURDEN OF PROOF OF GUILT, AND THE EVIDENTIAL BURDEN OF A DEFENCE

2.1. The presumption of innocence

2.1.1. It is common knowledge that the Constitution provides that 'Every accused person has a right to a fair trial, which includes the right.....to be presumed innocent, to remain silent, and not to testify during the proceedings'.[14] One of the several important consequences of this is the fact that the prosecution carries the burden of proof; another is that the standard required is proof beyond all reasonable doubt.

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[13] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*.

[14] Constitution of the Republic of South Africa, 1996 (originally Act 108 of 1996), Sec. 35(3)*(h)*.

2.1.2. It is true that sec. 36 of the Constitution also provides that it is possible for this right to 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.....' The section offers a non-exclusive list of what these factors might be, and has been interpreted as imposing very severe standards; indeed, the Constitutional Court has shown great reluctance to allow such exceptions. We consider this section more fully below.[15]

2.2. The proof of guilt

2.2.1. In order to discharge its burden the prosecution must prove each element of the crime alleged to have been committed, and it does so by ensuring that there is sufficient admissible evidence before the court from which it can conclude that the element in issue has been established.

2.2.2. In order to determine what the elements of a crime are, it is necessary to examine carefully its formal statutory or common law definition which the jurisprudence of criminal law divides into two components: firstly, the visible, physical conduct by an accused person, and any consequences of this conduct which are stipulated by the definition (known from the most ancient roots of our law by the Latin term *actus reus*); and secondly, the state of mind with which the *actus reus* is carried out by the accused (known in a similar fashion as the *mens rea*). Unless the prosecution proves that both of these were present when the alleged crime was committed, the case against the accused must fail.[16]

2.3. The evidential burden of a defence which seeks to exclude unlawfulness

2.3.1. This submission is not the place for an extensive explanation of what is meant by 'unlawfulness'. In brief, however, such a defence exists where the accused does not deny involvement in the matter (as would be the case, for example, if the defence relied on was mistaken identity or an alibi), but instead claims that there were additional circumstances to the facts proved by the prosecution which must frustrate a finding of guilt. Prof. Burchell, in the leading textbook on criminal law, explains the matter thus:

> 'Despite having perpetrated prohibited conduct or having caused a consequence prohibited by law, an accused may escape criminal liability by leading evidence of a recognised defence excluding the unlawfulness of the conduct..... If the prosecution does not negate the existence of such a defence beyond reasonable doubt, the defence succeeds and an acquittal results.'[17]

Prof. Burchell explains that it is recognised that there may be circumstances or considerations which 'deprive the unlawful conduct of its blameworthiness, or, in other words, remove the social need to punish the accused for the performance of the conduct in question'.[18]

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[15]See para. 4.3.

[16]It is true that the constitutional provision referred to in para. 4.3 might conceivably be invoked by the Legislature in an effort to create a crime by a definition which lacks the *mens rea*, and indeed there have been attempts by the prosecution to claim in specific instances that such a crime existed. Such offences are known technically as offences of strict liability. However, here too the Constitutional Court has held that the strict requirements of the section have not been met and the point is not developed further.

[17]Jonathan Burchell and John Milton, *Principles of Criminal Law*, 3rd ed., revised edition updated to May 2006 (Cape Town: Juta & Co., 2005), p. 226.

[18]Ibid.

2.3.2. Sec. 49 and the defence of private defence seek to negate the element of unlawfulness where it is part of the definition of a crime.

2.3.3. Together, the presumption of innocence and the consequential requirement that the prosecution has to prove the guilt of the accused have crucial implications for the possible defences which may be raised in an answer to a criminal charge. It must be carefully noted that *it is not for an accused person on trial before a South African court to prove that there is a defence to the charge. The prosecution must prove that the defence on which the accused seeks to rely must fail, and it must make this proof to the same standard as proof of guilt – that is, beyond all reasonable doubt.*

2.3.4. Prof. Burchell's explanation is fundamental:

> 'There is no burden of proof on the accused to establish the defences excluding unlawfulness, since the prosecution bears the overall *onus* of proving the unlawfulness of the conduct beyond all reasonable doubt'.[19]

2.3.5. However, before the prosecution can be said to have been put to the task of proving that a defence must fail, the accused must discharge a different burden and must ensure that the defence has been put in issue before the court – that it has been raised to such an extent that the court must decide whether it might reasonably be true. If the court does so decide, and if the prosecution fails to prove that it cannot reasonable be true, then the case against the accused cannot be said to have been made out beyond all reasonable doubt and an acquittal must follow.

2.3.6. The accused carries the burden of putting the defence in issue by ensuring that there is sufficient admissible evidence before the court to satisfy it that the defence raised *may, not must*, reasonably be true. This is sometimes referred to as an *evidential* burden and it must not be confused with a burden of proof which at all times remains exclusively on the shoulders of the prosecution.

2.3.7. It must particularly be noted that while it is common to say, 'If the accused acted in self-defence...' or that 'Accuseds must show that they acted in self-defence....', such statements are potentially misleading. We repeat: *the burden of proof is on the prosecution* and we are untroubled by any accusations of pedantry, for it cannot ever be appropriate and right to mis-state strict and clear legal rules.

3. THE HISTORY OF SECTION 49 BEFORE 1998

3.1. To understand fully why the proposed amendments to sec. 49 are unsatisfactory, it is necessary to review briefly certain aspects of the section's history.

3.2. Criminal Procedure Act, 1955 (Act 56 of 1955)

3.2.1. The 1955 Act substantially repeated earlier legislation, but what is of great and revealing interest is the debate which accompanied proposals to amend the list of offences to which it applied by the addition of theft. Sec. 37(1) read:

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[19]Ibid., p. 229.

> '(1) Whenever any person authorised under this Act to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected of having committed any offence mentioned in the First Schedule, attempts to arrest any such person and such person flees or resists and cannot be arrested and prevented from escaping by other means than by killing the person so fleeing or resisting, such killing shall be deemed in law justifiable homicide.'

The duly-amended the First Schedule listed the following offences:

Treason.
Sedition.
Murder.
Culpable Homicide.
Rape, or any statutory offence of a sexual nature against a girl of or under a prescribed age.
Sodomy and Bestiality.
Indecent Assault.
Robbery.
Assault in which a dangerous wound is inflicted.
Arson.
Breaking or entering any premises with intent to commit an offence, either under the common law or under any statutory provision.
Theft, either under the common law or under any statutory provision.
Receiving stolen goods knowing the same to have been stolen.
Fraud.
Forgery or uttering a forged document knowing it to be forged.
Offences against the laws for the prevention of illicit dealing in or possession of precious metals or precious stones or of the supply of intoxicating liquor to Bantu or coloured persons.
Offences relating to the coinage.
Offences the punishment whereof may be a period of imprisonment exceeding six months, without the option of a fine.
Any conspiracy, incitement or attempt to commit any of the above-mentioned offences.

3.2.2. The Leader of the Opposition, Sir de Villiers Graaf, objected to the amendment to the Schedule because the effect would be to extend the scope of the section. He claimed that the clause –

> '.....extended that right to every single kind of theft whereas in the past it was limited to stock theft and theft from a dwelling house at night'.[20]

He proposed that the amendment should be to the effect that the schedule should instead include theft from the person and theft of a motorcar. The Minister of Justice, C.R. Swart, rejected the proposal.

3.2.3. Reading the account of the debate today, it is difficult to make sense of the Opposition's protests. What does come across from both sides is a total preoccupation with fear for the perceived dangers based on race. The section makes no reference to self-defence,[21] and yet both Government and Opposition speakers discussed the matter on no other basis than the need to resist threatened violence from black people. B. Coetzee MP, (Nat., North Rand) was quite open about the purpose of the amendment.

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[20]Sir de Villiers Graaf (United Party), *Debates of the House of Assembly (Hansard): Third Session - Eleventh Parliament* 87 (1955): Col. 2403.

[21]This is the term used in the debates but see below, para. 8.3, explaining why the phrase "private defence" is preferable.

The section was designed, he said, to bring to the Act what passed for 'logic' at the time because as the law then stood –

> 'The innocent little K****r who is hungry at night and who goes to steal a piece of bread may be shot, but where an elderly woman has to stay alone in the house during the day time, as 90 per cent of the women in Johannesburg have to do, she has no right to shoot when a big brute of a K****r enters the house and steal valuable articles and then runs away.....This is merely a logical change to keep abreast of the country's development and it is a very essential change'.[22]

It is worth noting the exact words he used, not only for the fact that there was not a single objection to them for being unparliamentary language. They reveal the manner in which the explicit purpose of the section – addressing issues which might arise in the course of an attempt to arrest someone – become confused with self or private defence, punishment (including issues relating to the death sentence), and fear: all issues which are the territory of other legal rules.

3.2.4. This confusion continues.

3.3. Criminal Procedure Act, 1977 (Act 51 of 1977)

3.3.1. The immediate predecessor of the present sec. 49 made no reference either to any danger faced by the person making the arrest or to anyone else: the section was explicitly preoccupied with the 'use of such force as may in the circumstances be reasonably necessary' to overcome the resistance or to prevent the flight of a person whose arrest is in issue.

3.3.2. In 1998 the real issues became apparent, however, in the Second Reading Debate on the Bill[23] which amended sec. 49 of the 1977 Act to its current form. This amendment followed the Constitutional Court's views on the effects of sec. 49 in the context of its conclusion that the death sentence was unconstitutional. Chaskalson P had said:

> 'Greater restriction on the use of lethal force may be one of the consequences of the establishment of a constitutional State which respects every person's right to life. Shooting at a fleeing criminal in the heat of the moment is not necessarily to be equated with the execution of a captured criminal. But if one of the consequences of this judgment might be to render the provisions of s 49(2) unconstitutional, the Legislature will have to modify the provisions of the section in order to bring it into line with the Constitution.'[24]

3.3.3. The Minister of Justice stated explicitly that the context of the amendment was self-defence –

> '.....in terms of which common law permits the use of lethal force by a person whose life, bodily integrity, property or other legitimate interests are threatened, provided the lethal force meets the requirements of the doctrine of proportionality'.[25]

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[22]B. Coetzee (Nat), *Debates of the House of Assembly (Hansard): Third Session - Eleventh Parliament* 87 (1955): Col. 2418.

[23]Passed as the Judicial Matters Second Amendment Act, 1998 (Act 122 of 1998).

[24]*S v. Makwanyane and Mchunu*, para. 140.

[25]A.M. (Dullah) Omar (A.N.C.), *Debates of the National Assembly (Hansard): Second Session - Second Parliament* 21 (5–6 November 1998): Col. 8019.

3.3.4. The proposal to address these issues in these terms was bitterly resisted by those who resented the loss of the death sentence. R.H. Groenewald MP, speaking for the NP, opposed the amendment of sec. 49. He claimed that the clause 'tells the police that the use of force in effecting the arrest of a person is more risky for them than for the criminal'.[26] He gave no explanation of how this can be supported, and indeed it is a fundamental theme of this submission that Groenewald MP's point has never been clearly explained.

3.3.5. What Groenewald MP said about the death sentence reveals what really lies at the heart of his protests, and what in fact drives the whole determination to amend the section again – from the way it was amended in 1998 to read as it does today. Rather than amend sec. 49 as proposed, he said,

> 'Let us amend the Constitution, so that the death penalty can be reinstated, if this is standing in the way of our prosecuting criminals effectively'.[27]

3.3.6. As in the past, those opposing the law reform made no effort to distinguish between the various issues: to separate the use of force when effecting arrests, the defence of self-defence when confronted with danger, and the prevention of crime generally. This was brought out by C.P. Mulder MP, speaking in support of the amendment. He drew attention explicitly and succinctly to the confusing link, made by opponents of the amendment, between the abolition of the death penalty and the use of force when effecting an arrest, saying that:

> 'Because the death penalty has been declared unconstitutional, the temptation arises to kill suspects unnecessarily while arresting them.....The fact is, the crime situation will only be improved if police arrest criminals and take them to court where they are tried, after which they are locked up and adequately punished for the crimes they have committed. We must not now confuse this with the fact that the death penalty has been abolished and feel that the crime problem will be solved by making it easier, or apparently easier, for the police to sort out and kill suspects there and then. That is not a solution.'[28]

3.4. Who is an arrestor?

3.4.1. Section 49 defines an 'arrester' as 'any person authorised under [the CPA] to arrest or to assist in arresting a suspect'; accordingly, the effect of secs. 39,[29] 40[30] and 42[31] is that sec. 49 applies equally to both a police officer and 'any private person'. Indeed, by sec. 47 a private person may have no choice about being involved in an arrest:

> '(1) Every male inhabitant of the Republic of an age not below sixteen and not exceeding sixty years shall, when called upon by any police official to do so, assist such police official-
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> (a) in arresting any person;

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[26]R.H. Groenewald (N.P.), *Debates of the National Assembly (Hansard): Second Session - Second Parliament* 21 (5–6 November 1998): col. 8024 (English translation).
[27]Ibid., col. 8026.
[28]C.P. Mulder (F.F.), *Debates of the National Assembly (Hansard): Second Session - Second Parliament* 21 (5–6 November 1998): Col. 8033.
[29]Dealing with the manner and effect of arrest, which may be with or without a warrant.
[30]Dealing with arrest by a "peace officer" without a warrant. A "peace officer" is defined in sec. 1 to include a magistrate, justice, police official, and correctional official.
[31]Dealing with arrest by a private person without a warrant.

(b) in detaining any person so arrested.

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

3.4.2. There is thus no justification for discriminating between a police officer or a private citizen for the purposes of sec. 49, and this Submission must be read accordingly.

4. CONSTITUTIONAL REQUIREMENTS FOR THE USE OF DEADLY FORCE

4.1. Apart from a killing which an accused claims was committed in private defence and which the prosecution has not proved to be unreasonable and disproportionate, there is nothing in our common law which can be invoked to legitimise the deliberate and intended killing of one by another.

4.2. The Bill of Rights contains several guarantees applicable to the use of force by arrestors and police officers. Everyone has an inherent human dignity and the right to have their dignity respected and protected,[32] everyone has the right to life,[33] and everyone has a right to freedom and security of the person and bodily integrity.[34] The arrest of a person, by definition, entails deprivation of liberty and some impairment of dignity and bodily integrity. Where in addition it is accompanied by the use of force, the impairment of these rights is all the greater and, ultimately, the use of potentially lethal force jeopardises the most important of all individual rights – the right to life itself.[35] It can therefore not be contested that any legislative provision that sanctions the use of deadly force infringes on a number of constitutionally protected rights.

4.3. This is not the end of the matter however, as the infringement of rights may be justified by the 'limitation' section which states that 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.....'[36]

The question of whether legislative provisions which allow for the use of deadly force are con-

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[32]Section 10 states; 'Everyone has inherent dignity and the right to have their dignity respected and protected."

[33]Section 11 reads: "Everyone has the right to life."

[34]Section 12 states:

> (1) Everyone has the right to freedom and security of the person, which includes the right-
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> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) to be free from all forms of violence from either public or private sources;
> (d) not to be tortured in any way; and
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right-
>
> (a) to make decisions concerning reproduction;
> (b) to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent.

[35]*Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*, para. 30.

[36]Constitution of the Republic of South Africa, op. cit., sec. 36(1).

stitutionally valid must therefore be answered by applying the limitation clause enquiry, and the section gives examples of the factors which must be taken into account.

4.4. In essence, the section requires a balance to be struck between the public interest on the one hand, and the interest of individuals who may experience the negative effects of the application of section 49 on the other. In *Walters* the Constitutional Court applied this balancing test and endorsed the view expressed in other jurisdictions that –

> 'the proportionality of the force to be permitted in arresting a fugitive must be determined not only by the seriousness of the relevant offence but also by the threat or danger posed by the fugitive to the arrestor(s), to others or to society at large.'[37]

The Court rejected the notion that one could measure the degree of permissible force to be used with reference solely to the seriousness of the crime the suspect is being sought for. One would be required to look also at the proportionality of the amount of force used 'and the threat posed by the fugitive to the safety and security of the police officers, other individuals and society as a whole.'[38] Although force could therefore be used to arrest a suspect who poses an immediate threat of serious bodily harm to officers or to members of the public, or if the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm, *deadly* force may be used only with reference to the actual threat posed by the fugitive.

> 'By like token, if one accepts the SCA's general warning against the use of a firearm to prevent flight in the absence of a threat of serious bodily harm, *the use of deadly force and its exculpation under subsection (2) absent such a threat, can hardly be sustained.* One needs to add a weighty consideration before the lives of suspects can be risked by using a firearm or some other form of potentially deadly force merely to prevent escape.'[39]

4.5. *Walters* case thus definitively states that one may *never* use deadly force to affect an arrest unless there is a threat of serious bodily harm to the police or others if deadly force is not used. The judgment quotes with approval from US Supreme Court the judgment in *Tennessee v Garner* where Justice White stated:

> 'It is not better that all felony suspects die than that they escape. *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*. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.
> It is not, however, unconstitutional on its face. 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.'[40]

4.6. As the Court made clear, our Constitution 'demands respect for the life, dignity and physical integrity of every individual. Ordinarily this respect outweighs the disadvantage to the

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[37] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*, para. 18.
[38] Ibid., para. 38.
[39] Ibid., para. 41 (emphasis added).
[40] 471 US 11 (1985) (emphasis added).

administration of justice in allowing a criminal to escape'. Kriegler J sums up the constitutionally tenable position thus:

> '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. It does not necessarily involve the use of force. On the contrary, the use of any degree of force to effect an arrest is allowed only when force is necessary to overcome resistance (by the suspect and/or anyone else), to an arrest by the person authorised by law to carry out such arrest. *And where the use of force is permitted, only the least degree of force necessary to perfect the arrest may be used.* Similarly, when the suspect flees, force may be used only where it is necessary and then only the minimum degree of force that will be effective may be used. Arrest is not an objective in itself; it is merely an optional means of bringing a suspected criminal before court. Therefore resistance or flight does not have to be overcome or prevented at all costs. Thus a suspect whose identity and whereabouts are known or who can otherwise be picked up later, can properly be left until then. Even when the suspect is likely to get clean away if not stopped there and then, arrest at every cost is not warranted. The might of the law need not be engaged to bring to book a petty criminal.'[41]

4.7. In summary, the constitutional position is as follows: (i) One may not shoot a fleeing suspect merely because he or she might get away; (ii) One may shoot and even kill a suspect (in other words, use deadly force) when one has reasonable grounds for believing that the suspect poses an *immediate* threat of serious bodily harm to anyone; (iii) One may shoot a suspect who is reasonably believed to have committed a crime involving the infliction or threatened infliction of bodily harm even where such a suspect does not pose an immediate threat of serious bodily harm to anyone, *but only* if it will be impossible to arrest the suspect at a later stage and then one can use *only* the least degree of force necessary to affect the arrest; (iv) Legislation that provides a blanket power to arrestors to use deadly force against anyone suspected of committing a crime involving a serious threat of bodily harm where suspects flee or resist arrest would thus be unconstitutional.

5. THE EFFECT OF THE PROPOSED AMENDMENTS ON THE CURRENT WORDING OF THE 'PREAMBLE' TO SECTION 49(2)

5.1. As affecting the law relating to the use of force when making an arrest

5.1.1. It should be borne in mind that sec. 49 of the Criminal Procedure Act itself does not create the offence of 'resisting arrest'. This is dealt with under the South African Police Service Act,[42] which provides that a person commits an offence who –

> 'resists or wilfully hinders or obstructs a member[43] in the exercise of his or her powers or the performance of his or her duties or functions or, in the exercise of his or her powers or the performance of his or her duties or functions by a member wilfully interferes with such member or his or her uniform or equipment or any part thereof.'

This is what is meant by the colloquial and widely-used phrase 'resisting arrest', as it is within the exercise of the powers, duties and functions police officers to make lawful arrests.

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[41] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*, para. 49 (emphasis added).
[42] Act 68 of 1995, sec. 67.
[43] For convenience, such a person is referred to hereafter as a police officer.

5.2. Section 49(2) of the Criminal Procedure Act states that if force is needed to effect an arrest, the only force which may be used is such force –

> 'as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing'.

Greater force would render the purported 'arrest' unlawful, and the victim of that unlawful conduct would be entitled to use reasonable force in private defence under the common law, regardless of whether the person responsible for that conduct is a police officer or not.

5.3. The sub-section carries three provisos. It is proposed to amend the first two and to delete the third. We consider the proposed amendments in turn.

5.4. The text before the provisos is thus a part of the current wording of sec. 49 and subject to what we say, to the effect that the entire section were better repealed and the Constitutional Court's statement of the law in *Walters'* case be relied upon, we make no comment on it.

6. THE EFFECT OF THE PROPOSED AMENDMENTS FOR A NEW PROVISO IN SECTION 49(2)(*a)*

6.1. The proviso reads at present (for convenience of reading, we omit the characters denoting the formal statutory architecture of sections, sub-sections and paragraphs):

> '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.... (t)hat 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;.....'

If the proposed amendments are adopted, this would be deleted.

6.2. The relevant new proviso *(a)* to sec. 49(2) would state that–

> 'the arrestor may use deadly force only if the suspect poses a threat of serious violence to the arrestor or another person....'

The Memorandum claims that the proposed amendments are effected by –

> 'aligning the words in the proviso, that sets out the criteria as to when deadly force may be used in order to effect the arrest of a suspect, with the criteria tabulated by the Constitutional Court in the *Walters* case.'

This purports to have been done by breaking paragraph (h) of Kriegler J's points into two.

6.3. The Memorandum gravely mis-states the situation. When read in the context of the remaining points made by Kriegler J, it is clear that the threat posed by the suspect must be *immediate*. This word is omitted from the proposed amendment. **Accordingly, the difference between what Kriegler J said and the proposed amendment is real, significant, and materially alters the meaning of what the Constitutional Court said.**

6.4. We draw attention to Prof. Burchell's discussion of the matter,[44] where he quotes what was said in *S v De Oliveira*[45] to the effect that putative private defence requires an honest belief on the part of an accused that life or property are endangered. This is consistent with the requirement that the danger must be immediate as a necessary consequence of the totality of what Kriegler J said. The omission of the requirement of immediacy opens the door to problems of interpretation and application which the word 'pose' by itself does not prevent.

6.5. The amendment is simply an attempt to reoccupy territory which was lost in the battlefield of *Walters*'s case and to legitimise the use of lethal force, notwithstanding the fact that the arrestor is objectively in no danger and knows this.

6.6. We oppose the removal of the explicit requirement that the threat must be immediate. We note that the Memorandum offers no explanation for this change. It can hardly be intended that one who is attempting to arrest a suspect on Monday may use deadly force because the suspect may 'pose' a threat of serious violence to be carried out on Tuesday; this being so, why remove the reference to immediacy?

6.7. If the intention is that the word 'pose' is to be interpreted in the sense that force becomes *immediately* necessary to protect the arrestor or any other person, then that is what the proviso reads at present. The word 'poses' as used by Kriegler J conveys precisely that sense of immediacy when read in the context of all that he said.

6.8. The provisions also relate to the common-law defence of private defence, which one does not need to be an arrestor to invoke. The current wording of sec. 49(2)*(a)* is unproblematic for it simply states the common law. In particular, the defence would be lawful and necessary 'where it is the only means available *at the time* for warding off the attack'.[46]

6.9. According to the Memorandum which accompanies the Bill, the present section is criticised in some quarters as being 'difficult to interpret'[47] but it is not made clear how the proposed change would lead to greater clarity because there is no explanation what the difficulties are.

7. THE EFFECT OF THE PROPOSED AMENDMENTS FOR A NEW PROVISO IN SECTION 49(2)(*b*)

7.1. The proviso reads as follows at present:

> '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.....that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed'.

7.2. If amended as proposed, it would then read:

> 'Provided that the arrestor may use deadly force only if the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious

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[44]Burchell and Milton, op. cit., p. 243.
[45]1993 (2) SACR 59 (A) at 63-4; see
[46]Burchell and Milton, op. cit., p. 238 (emphasis added).
[47]Memorandum, Criminal Procedure Act, 1977 (Act 51 of 1977), Para. 1.8.

> bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later'

7.3. This text is also based on point (h) of what was said by Kriegler J in *Walter*'s case but is taken entirely out of its context. **The whole constellation of points listed by Kriegler J is critical to the constitutionality of what he said in his point *(h)***, and enable a difference to be drawn between the old pre-Bill of Rights' right to use force when effecting an arrest[48] and what Kriegler J said.

7.4. The similarity between the repealed wording of sec. 49, unconstitutional since *Walters* case,[49] and the proposed new sec. 49(2)***(b)*** is – to be blunt – quite simply shocking. The only substantial difference is that where the old text referred to the right to use lethal force in the case of Schedule 6 offences,[50] the proposed amendment limits the right to crimes 'involving the infliction or threatened infliction of serious bodily harm'. The whole point of Kriegler J's explanation of the circumstances in which force – whether lethal or not – may be used is to enable a clear distinction to be drawn between what the Constitution now permits and what it prohibits.

7.4.1. Both texts envisage the deliberate killing of someone whose arrest is sought.

7.4.2. In both texts, the person attempting to effect the arrest – and using the deadly force – takes the decision that the person against whom the force is directed is 'reasonably suspected' of having committed the offence, and uses deadly force accordingly.

7.4.3. Both texts are based on nothing more than a 'reasonable suspicion' that the person concerned has committed an offence so grave that it is preferable to use deadly force rather than to risk that person's escape.

7.4.4. In neither the original wording of sec. 49 nor the proposed new wording of sec. 49(2)***(b)*** is the person whose arrest is sought someone whose guilt has been established.

7.4.5. In neither the original wording of section 49 nor the proposed new wording of sec. 49(2)***(b)*** is it necessary that any person – including the person using the deadly force – should be in any danger.

7.5. In view of the similarities, it is hard to see how the proposed new formulation of sec. 49(2)***(b)*** can be constitutional in the teeth of the reasons for which the original form of sec. 49(2) as passed in 1977 was struck down. In no way would the amendment address the tragedies in which totally innocent people have been deliberately shot, followed by claims that they had mistakenly been thought to be threatening.

7.6. If the proposed amendment is enacted, a reference to the Constitutional Court will be unavoidable. **As the Constitutional Court will test any legislation against its own judgment we submit that the real choice is between the repeal of sec. 49 as it stands in order to rely simply on what Kriegler J said in *Walters'* case, or to abandon the attempt to amend it.**

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[48]See para. 3.2.1, above.
[49]*Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*.
[50]See above, para. 3.2.1.

8. A RESPONSE TO CRITICISMS OF THE PRESENT WORDING OF SEC. 49

8.1. The Memorandum

8.1.1. We draw attention to paras. 1.10 and 1.11 of the Memorandum which claim that the intention is to align sec. 49 with the criteria set out in *Walters*' case. If this is so, we would expect a Bill to repeal sec. 49 entirely. There is no explanation why this is not a satisfactory course, and we see no objection to it. Most telling of all, we note that the Memorandum specifically states that –

> 'At the time of formulating the current text of section 49, Parliament did not have the benefit of the authoritative guidelines furnished by the Constitutional Court in the State v Walters case regarding the use of force for the purpose of effecting an arrest of a suspect.at the time the current wording of sec. 49 was formulated.'

Now that the excellent law in *Walters*' case is available, what problems are being addressed? We repeat the old saw: 'If it ain't broke, don't fix it'.

8.1.2. We draw attention specifically to what is said in para. 1.6 of the Memorandum to the Bill to the effect that the South African Police Service has 'raised serious concerns regarding the interpretation and application of the current text, especially in so far as appropriate training of police officers was concerned'. We address this and related matters below, but suffice it to state here that absolutely no explanation is offered to show why the interpretation or application of the current text is problematic.

8.2. A 'right to flee'

8.2.1. We drew attention to the claim by Prof. Snyman that the present wording of sec. 49 creates a 'right to life and "to run away"'.[51] We reject this criticism totally, because we believe that it is based on a totally erroneous approach to the interpretation of the section.

8.2.2. Not for a single moment do we deny the grim and disturbing criminal statistics for South Africa. On the other hand, these do not permit the constitutional rights of anyone – and that includes criminals – to be brushed aside. A hostile response to the law without an attempt to challenge the ratio behind *Walter*s' case lacks credibility, and Prof. Snyman's exegesis fails accordingly. He seeks to make out a case for the return to the pre-Bill of Rights law without addressing the jurisprudence of the cases which apply the Bill of Rights. For example, he illustrates his case with the following example and comment:

> '.....X, a security guard, witnesses Y shooting and killing Z and driving off in Z's car in the course of a car hijacking. X may neither kill nor even seriously injure Y in order to prevent Y's escaping.'

This, he points out, is despite the fact that Y may never be found and brought to justice.[52] He concludes with the comment that 'Anybody who considers a career in crime can't do better than to choose South Africa as her place to exercise her profession!'[53]

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[51]See para. 1.5, above.
[52]Snyman, op. cit., p. 136.
[53]Ibid.

8.2.3. As sec. 49 reads at present, it is clearly correct that its effect is that lethal force may be used (in broad summary) only if there is an immediate need to protect someone whose safety would otherwise be in grave danger; on the bare facts in Prof. Snyman's hypothetical case this does not appear to be the situation, and his conclusion is thus correct. However, it is striking and revealing that Prof. Snyman obviously objects to Y being afforded a 'right to life' despite the fact that he has intentionally infringed the right to life of another. He makes no attempt to review and to falsify the *ratio decidendi* in *Walters*' case – a case which addressed this very issue – and he thus articulates mere prejudiced distaste for its conclusions. He leaves one in little doubt that he regrets the decision of the Constitutional Court and would have the old sec. 49 back for it covered, and was intended to cover, precisely the situation which he hypothesises in order to secure the result he desires.

8.2.4. Further, we draw attention to the Constitutional Court's explicit approval of what was said in *Tennessee v Garner*. Kriegler J drew attention to the comment that –

> 'It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.'[54]

8.2.5. Prof. Snyman's hostility to the decision that the death sentence violates our Bill of Rights comes as no surprise for the issues are intimately linked, as *Makwanyane*'s and *Walters*' cases show. In the course of a passionate plea for the return of the death sentence, Prof. Snyman describes *Makwanyane*'s case as 'one which has had the most catastrophic consequences on society of any judgment relating to criminal justice.'[55] However, once again he offers no reasoned analysis of the *ratio decidendi* in that case either – there is no scholarly attempt to falsify a decision which sets out the reasons for conclusions he dislikes. Again, we characterise his unreasoned dislike as barren prejudice.

8.2.6. We refuse to enter the debate on the death sentence on these terms, because to do so would tend to legitimise unreasoned prejudice by dealing with it as a commodity worthy of consideration in the marketplace of ideas. In the words of one commentator:

> 'One of the most widespread arguments in favour of the death penalty is that it deters crime. Study after study has shown that it does not. If capital punishment deters anything at all, it is rational thinking.'[56]

We think that Prof. Snyman provides a grim example.

8.2.7. If the section as it stands is 'difficult to interpret' – which we do not accept to be the case – then the proposed amendment simply degrades what clarity it has.

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[54]Above, para. 4.5.
[55]Snyman, op. cit., p. 25.
[56]Mumia Abu-Jamal, *Death Blossoms - Reflections from a Prisoner of Conscience* (Plough Publishing, 1997), p. 129 Abu-Jamal's case has become a *cause celebre*; for details and references for further reading, see http://en.wikipedia.org/wiki/Mumia_Abu-Jamal.

8.3. Putative private defence

8.3.1. Section (49(2)*(a)* essentially covers the territory of the common-law defence of private defence as defined at the highest authority by Burchell:

> 'A person who is the victim of an unlawful attack upon person, property or other recognised legal interest may resort to force to repel such an attack. Any harm or damage inflicted upon an aggressor in the course of such private defence is not unlawful.'[57]

Prof. Burchell makes the further point, which is directly relevant to sec. 49(2)*(a)*, that it is a misnomer to describe it as 'self-defence' because this is a term –

> '.....that implies that what is in issue is only the defence of the physical self, the person. Since the defence is available for the protection of other persons and other interests such as property, chastity, liberty it is misleading.'[58]

This is a further congruence with the common law of private defence, as the sub-section refers to 'any person lawfully assisting the arrestor or any other person'.

8.3.2. There is absolutely no warrant or justification whatever in any South African authority which can possibly justify the use of force to address a future menace, and to claim the cover of private defence for doing so.[59]

8.3.3. The Memorandum which accompanies the Bill provides no explanation for this proposed amendment. It quotes from the Constitutional Court's decision in *Walters*' case when it held that the now-repealed text of sec. 49 was unconstitutional[60] and appears to rely on Kriegler J's statement that it is 'ordinarily' not permissible to shoot a suspect unless, *inter alia*, '.....the suspect poses a threat of violence to the arrestor or others'. It is unthinkable that the Constitutional Court had in mind that it would be in order to kill in order to protect someone who is not in immediate danger. The effect, quite simply, would be to create the potential for vigilantism: for example, police officers or private persons alike might feel that they have the cover of law to kill someone whom they have encountered who is known to be unarmed and who poses no threat at that moment, because from their knowledge they have reason to fear that at some future encounter that person will be armed and will attack.

8.3.4. The removal of the word 'immediately' would involve a head-on clash with the reasons given in *S v. Makwanyane and Mchunu*[61] when it held that the death sentence was unconstitutional, and its further *obiter* remarks about sec. 49 as it then stood. These comments were justified and supported by *Walters*' case. To legalise a killing in the absence of immediate danger would simply be subverting the decision in *Walters*' case, and blurring the distinction between killing in private defence and the use of deadly force – which may prove in the event to be lethal – in order to carry out an arrest. This blurring is precisely what characterised the original justifications given, in the era before the

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[57]Burchell and Milton, op. cit., 230.
[58]Ibid., p. 230, n. 2.
[59]For the manner in which the law has accommodated force used by the victim of domestic violence, see Burchell and Milton, op. cit., p. 234, n. 29. It is clear from the cases and other authorities referred to there that this statement need not be qualified.
[60]*Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*.
[61]1995 (3) SA 391 (CC)

Bill of Rights, for the old form of sec. 49 and which today characterises the arguments for the revival of the death sentence.

8.3.5. Private defence requires no different rules in the context of a lawful arrest than in any other context. The requirement that the arrestor should have 'reasonable grounds' for using deadly force is thus part of the common law relating to private defence. No attempt will be made in this Submission to set out in further detail the law relating to private defence or to explain what is 'reasonable' beyond recalling the comment by Oliver Wendell Holmes in the United States Supreme Court to the effect that '(d)etached reflection cannot be demanded in the presence of an uplifted knife.'[62]

8.3.6. It would be better if sec. 49(2)*(a)* were deleted totally rather than amended in the manner proposed. As it stands, the worst that can be said of it is that might be found in future to tread on the toes of the recognised doctrines of private defence – a defence that does what is wanted of it, and which would apply to the context of an arrest as readily as in any other situation. If amended in the manner proposed, however, its constitutionality would be doubtful and the potential for damage and freelance violence great.

8.3.7. In *Makwanyane*'s case[63] the Constitutional Court drew attention to the rights to dignity, life, and a fair trial when it found that the death sentence was unconstitutional. The court in *Walters*' case, when it was faced with deciding the constitutionality of the 1977 wording of sec. 49, reminded itself of what it had said earlier and went on to deliver a stinging repudiation of sec. 49(2) as it then stood.

8.3.8. One passage in particular bears special noting. Kriegler J said:

> 'Nor should the essential failure of logic underlying the use of lethal force under s 49(2) be overlooked. The express purpose of arrest should be remembered. It is a means towards an end. Chapter 4 lists the four legally permissible methods of securing the presence of an accused in court. The first of these is arrest. Chapter 5 then sets out the rules which govern the application of this process in aid of the criminal justice system. Whatever these individual rules may say, for instance those in s 49(2) governing the use of lethal force to prevent a suspect's flight, the fundamental purpose of arrest - and the main thrust of everything that goes with it under chap 5 - is to bring the suspect before a court of law, there to face due prosecution. But killing the suspect is surely the most effective way of ensuring that he or she will never be brought before a court. It can therefore hardly be said to be justified to shoot a suspect where there is no suggestion of a threat to anyone.....'[64]

Section 49 is intended solely to govern how an arrest is to be carried out. As Kriegler J pointed out, the purpose of an arrest is to bring to trial persons suspected of having

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[62]*Brown v. United States*, 256 U. S. 335 (1921), p. 343. He went on to say that, " Therefore, in this Court at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant, rather than to kill him." The test in South African law is subjective, and objective unreasonableness of a belief is no more than evidence from which knowledge of unlawfulness can be drawn: generally, see Burchell and Milton, op. cit., p. 306, 468–71.

[63]*S v. Makwanyane and Mchunu*.

[64]*Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*, para. 50 In a footnote, Kriegler J drew attention to what he considered to have been "aptly" said by Justice White in *Tennessee v Garner* , 471 US 1 (1985) (85 L Ed 2d 1; 105 S Ct 1694) to the effect that killing was "a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion".

committed offences but it is not the only, nor always the best, method of doing so. He added, 'Arrest may never be used to punish a suspect.'[65]

8.3.9. The Memorandum quotes the nine points listed by Kriegler J in *Walters*' case as setting out the law. It appears, from the emphasis placed on it, that the Memorandum relies on point (h) to justify the constitutionality of the proposed amendments:

> (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.[66]

However, this passage fails utterly to carry the load placed on it for the simple reason that it does not stand alone, but must be read in the context of all the other eight points stated by Kriegler J. The Memorandum merely sets out the entire paragraph containing the points from *Walters*' case but makes no reference to its total impact.

8.3.10. In particular, no consideration is given to the overwhelming manner in which Kriegler J's sixth point qualifies his eighth – the point quoted above. He wrote:

> '(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.'[67]

Unless this qualification is read into point (h), no formulation of sec. 49 can survive constitutional scrutiny and the fate of the 1977 wording is testament to that. The Constitutional Court was unanimous in *Walters*' case and it is simply unthinkable that they would have held any other view. Indeed, had they though otherwise then they would have solemnly pronounced gibberish and not coherent jurisprudence.

8.4. Carrying out an arrest 'that time or later'

8.4.1. The proposed amendment requires that, for deadly force to be justifiable, the arrestor should believe 'on reasonable grounds that .....there are no other reasonable means of carrying out the arrest, whether at that time or later'. Quite apart from the incongruity of sanctioning an arrest by killing someone – a point referred to above – the requirement also means that the person seeking to make the arrest must not only be a confident prophet, but an unerringly accurate one.

8.4.2. The use of deadly force would thus be sanctioned against an untried and unconvicted person whose life is in danger because it is thought that at some future time he will be untraceable. It is hard to see how the constitution can be reconciled with this.

8.4.3. In support of the proposed amendments, the Memorandum to the Bill refers to a critical observation by Snyman to the effect that the current text of sec. 49 has given a suspect a 'right to flee'.[68] The writer illustrates his argument by an hypothetical case

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[65] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*, para. 50.
[66] Ibid., para. 54.
[67] Ibid.
[68] Snyman, op. cit., p. 136.

which, in all tragic truth, is not beyond the dreadful reality of crime in South Africa. The incident ends with an intruder into a home, who has just shot a woman in her bed, now fleeing from the scene. The intruder now poses no threat to the armed husband who is in pursuit. Snyman draws attention to the problem of identifying and tracing the intruder should he succeed in making his escape. Snyman's point is that, as sec. 49 now reads, the intruder has a 'right to flee'.

8.4.4. This criticism of the section is misdirected. No matter how appalling the situation might be, this does not give a jurisprudential justification for vigilantism – for failing to distinguish between private defence, effecting an arrest, and punishment. It is precisely the failure to draw these distinctions that led to the original (and now unconstitutional) form of sec. 49.

8.4.5. Amply-justified wrath, fear, and grief may well be the constituents of the gravest and most bitter and overwhelmingly credible provocation imaginable – a recognised defence in law which would seem to avail on a charge of murder against the husband, and which reduces but cannot eliminate liability. However, unless the legal rules are formulated on the lines set out by Kriegler J then no effective differences remain from the sec. 49 as it was written originally, and as discussed in the House of Assembly in 1955.[69]

9. PUBLIC POLICY ISSUES

9.1. Merging roles of police officer, prosecutor and judge

9.1.1. The proposed amendments have the effect of empowering the police officer or other person involved to take decisions and take actions which are properly the task of others in the executive and the judiciary.

9.1.2. The original form of sec. 49 – which, it has been shown above, the proposed amendments would restore – effectively enabled an arrestor to decide that a suspect should be prosecuted and was guilty of an offence, and might be dealt with accordingly. In fact, while the death sentence existed, the arrestor's use of lethal force amounted to a lawful execution.

9.1.3. Outside private defence, there is no provision in our common law by which one may lawfully kill another. The old, apartheid-era formulation of sec. 49 created an exception which could not possible survive under the new Constitution, for it had precisely the merging effect which the modern separation of powers put an end to. Both the current wording of sec. 49 and the decision of the Constitutional Court in *Walters* leave no doubt that this is so.

9.1.4. There is thus no doubt that the proposed amendments are an attempt to turn the clock back. There is, as was observed above, no gap in our law to be filled.

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[69]See para. 3.2.3, above. Prof. Snyman's hypothetical example seems to resonate with what was said in 1955 by B. Coetzee MP, and doubtless his view of the law lies behind government statements: see para.10.2.1.

9.2. The collaborative role of the public and the police

9.2.1. The proposed amendments have the effect of substituting the use of force for competent policing, and promote no policy of seeking the support of the community to trace and produce the person whose arrest is sought.

9.2.2. The dreadful problems of criminality in South Africa expose us to the dangers of demagoguery and demands for what appear to be easy solutions. It is not being 'soft on crime' if one formulates and implements policies which enhance the legitimacy of our legal system. Our modern Constitution and our commitment to build a humane and rights-based social order do not point down an easy road to the future, and there are no short cuts. No matter how revolting the conduct of other human beings might be, if we refuse to recognise that they are indeed humans and seek justifications to treat them otherwise then we will simply fuel the violence we fear.,

10. DIFFICULTIES OF INTERPRETATION AND APPLICATION

10.1. The South African Police Service

10.1.1. It is stated in the Memorandum that the South African Police Service has 'raised serious concerns' about the interpretation and application of sec. 49 as it stands currently, and also about the appropriate training of police officers.

10.1.2. In reply, one must ask: precisely what are these concerns? What are the precise points which make the section difficult to understand and to apply? Is it suggested that South African police officers are drawn from a sector of the population with lesser powers of comprehension than ordinary members of the public, who are frequently authorised to carry firearms without the training afforded to police officers?

10.1.3. The implication is that there is something special about the capacity of South African police officers to explain and to understand legal rules which private citizens are supposed to understand.

10.1.4. Other than a single reference to a legal writer, the Memorandum makes little reference to any careful, scholarly examination which has been made of the section and which has concluded that it is difficult to understand and would prove to be problematic at the moment of need.

10.1.5. There have been no cases taken to the courts – either by the police themselves, or members of the public to whom the section applies equally – in which an interpretation of the section has been sought. It is suggested that the reason for this dearth is that, in the field, the section as it stands creates no problems for anyone – whether a police officer or private person – who is determined to act competently and with integrity and who makes the necessary effort to read and to understand it.

10.1.6. In fact, whatever difficulties do exist it is because inaccurate and misleading statements have been made by those in authority.

10.2. 'Thy wish was father, Harry, to that thought'[70]

10.2.1. There is no question that there some people who resent the decision by the Constitutional Court that the death sentence is unconstitutional. This is, however, now the law and welcome indeed as the law, but public statements have been made which serve to foster that resentment and to signal that the demise of the death sentence should not inhibit those who regret its passing from acting how they feel that they would prefer to act.

10.2.2. For example, following the death of a three year old child at the hands of a constable who claimed that he had mistaken a metal pipe the child was holding for a gun, the Deputy Minister of Police told Parliament,

> 'In the course of any duty the innocent will be victimised. In this particular situation where you are caught in combat with criminals, innocent people are going to die not deliberately, but in the exchange of fire. They are going to be caught on the wrong side, not deliberately, but unavoidably..... Yes. Shoot the bastards. Hard-nut to crack, incorrigible criminals.'[71]

10.2.3. On another occasion, the Deputy Minister of Police said:

> 'Ons het oorlog verklaar! Ons gaan misdadigers wat die lewens van ons mense bedreig, skiet om hulle dood te skiet.'[72]

In an earlier statement, the previous Deputy Safety and Security Minister Susan Shabangu said:

> 'You must kill the bastards if they threaten you or the community. You must not worry about the regulations.'[73]

The President reacted to this by saying that 'police had at one stage been "asked not to shoot at criminals"'.

10.2.4. If it is really the case that this injunction has been directed at the police – and it would have to apply to private persons as well – then we must truly walk in fear for we are in the hands of malevolent incompetents, and whoever gave such advice should be considered for prosecution for sedition. No authority has ever been made known for such an extraordinary and improper instruction.

10.2.5. On the same occasion, the President went on to say:

> 'If you have a deputy minister saying the kind of things that the deputy minister was saying, this is what we need to happen.....the fact of the matter [is that] criminals shoot police. Instead of talking at that level, we ought to be seeing action that we are tougher on the criminals. That's the point I'm making.'
> 'What the deputy minister was saying is what we are to be doing is dealing with the criminals rather than talking about it.'[74]

Quite apart from lacking dignity, it is difficult to see how such language from persons of

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[70]Shakespeare, *Henry IV Part 2*, act 4, sc. 5
[71]Fikele Mbalula, "Collateral Damage is Unavoidable - Mbalula," *Independent On Line*, 12 November 2009.
[72]Liesel Peyper, "Skiet Om die Bliksems Dood Te Skiet – Mbalula," *Die Burger*, 10 August 2009.
[73]Graeme Hosken, "Kill the Bastards, Minister Tells Police," *Pretoria News*, 10 April 2008.
[74]"Zuma on Crime: Shabangu Has a Point," *Mail & Guardian Online*, 14 April 2008.

authority can be conducive in conveying a fair statement of the law as explained by Kriegler J – and, in particular, his crystal-clear statement that the purpose of sec. 49 relates to effecting an arrest and to no other purpose – and certainly not as punishment.[75]

10.2.6. Under the circumstances, it is not surprising that claims are made that the section causes difficulties in interpretation. Encouragement to do so is offered by statements such as those quoted above.

10.2.7. It is hard to imagine that one who is thought to be fit to carry a firearm would have any problem in interpreting sec. 49(2)*(a)* as problematic, when faced with such imminent danger to safety that immediate and adequate defensive action is needed.

10.2.8. It is important to note what Kriegler J said about the context of the principles he laid down:

> 'The legal position is really quite simple and the average police officer can be instructed sufficiently with relative ease and expedition. The variety of circumstances that occur in human experience is infinite. It would therefore be unwise to try to lay down hard and fast rules applicable in every conceivable situation. But the broad principles are clear enough to be understood and applied by anyone of average intelligence and commonsense. The Constitution obliges the police 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'. Police officers do not have a discretion to fulfil these obligations if they wish - it is their duty to do so. They are always entitled and often obliged to take all reasonable steps, including the use of reasonable force, to carry out their duties.'

10.2.9. Though the government speakers were addressing audiences of police officers, it must be borne in mind that sec. 49 applies with no qualification whatever to private citizens.

10.2.10. The overall impression given by the proposed amendments and the Memorandum is one of defeat in the management of crime, combined with scepticism of the capacity of the police both to understand legal rules which contain little novel, and to cope with crime within the law.

11. CONCLUSIONS

11.1. A suggested amendment

11.1.1. Bearing in mind that resisting an arrest is itself an offence[76] and that one may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large, it is proposed that the entire section be repealed to be replaced by the following text:

> 'A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.'

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[75]See para. 8.3.8, above.
[76]See above, para. 5.1.

The merit of this text is its comprehensive simplicity. It is hard to see any situation which might arise and which would fall under sec. 49, and which a section worded as suggested would not address.[77]

11.2. Alternative suggested amendments

11.2.1. As second-best alternatives to the above proposal, the following suggestions are offered: either –

11.2.1.1 Delete sec. 49(2)*(a)* entirely (for it relates to private defence and the South African law is adequate for the purpose), and leave sec. 49(2)*(b)* unaltered; *or*

11.2.1.2 Better still, replace the section entirely with the rules stated by Kriegler J, for these focus entirely and exclusively on the management of arrests as a whole.

11.2.2. The latter suggestion is to be preferred. It should be noted that the Memorandum quotes and refers to these rules, and purports base the amendments on them. As pointed out above, it does not do this successfully because it is selective, and the suggestion that they should be used in their entirety addresses this point.

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[77]We claim no credit for the wording of this text. It is, in fact, copied verbatim from United Kingdom's Criminal Law Act 1967 (c.58), sec. 3(1). Sub-section (2), which would be desirable because it would complete the entire project, reads:

> Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.

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