

## HOW MUCH MIGHT IS RIGHT?

### Application of Section 49 of the Criminal Procedure Act

**Traggy Maepa  
Institute for Security Studies**

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In 1998 the South African parliament voted on the issue of the use of force when effecting an arrest, in order to bring standards of practice in line with the rest of the democratic world. Four years later the law still has not been signed by the state president, largely due to protests by the ministers of Justice and Constitutional Affairs and Safety and Security. The issue has been before the Constitutional Court and in May 2002, this court did what the executive was afraid to do, striking down parts of the Section and clarifying "reasonable force". But the court ruling still did not go as far as the legislation in protecting citizens.

The 1998 amendment to the legislation governing the use of force when making an arrest sparked debate and dissent: is it realistic to limit the use of force against suspected criminals in such a violent society? With our high rate of police murders, can we afford to limit their options when confronted with violent offenders?

These are important questions, but the real issue is why, in nearly four years, there have been no answers. In a country with the highest murder rate in the world, resolving the question of when lethal force can legitimately be used, should be a priority. The delay and consequent lack of clarity has fuelled uncertainty in the minds of the police and public. Misinformation about what the amendment will mean in practical terms, abounds.

The indecision surely increases the risk faced by police officers who must make decisions within seconds about how to react in dangerous situations. The sooner the police are trained to use force effectively and legally when making an arrest, the sooner they can reduce their own risk of harm, and ensure that cases proceed successfully through the criminal justice system.

#### **Amendment of Section 49**

The use of force in effecting arrests by the South African Police Service (SAPS) has not escaped controversy. Section 49 of the Criminal Procedure Act 51 of 1977 states that in the event that a suspect resists arrest or flees, the arresting officer may, "in order to effect the arrest use such force as may in the circumstances be reasonably necessary to overcome the resistance or prevent the person concerned from fleeing."

The Act goes further to state that if the person is being arrested for a schedule 1 offence (see box on page 12), or if the arresting officer has reasonable ground to suspect that such an offence has been committed, and the arresting officer is unable to effect the arrest or prevent the suspect from fleeing by other means either than by killing him, "the killing shall be deemed to be justifiable homicide".

It is this latter section that was challenged on the grounds that it contravenes the South African Bill of Rights. The subsequent debate resulted in the adoption of an amendment to Section 49 by parliament in 1998.

This amendment states that the arrestor may not use force that is intended to cause death or grievous bodily harm unless he or she has reasonable grounds to believe that:

- Force is immediately necessary for self-protection from imminent death or bodily harm of the arrestor or the person assisting the arrestor, or
- There is substantial risk that if the arrest is delayed the suspect will cause future harm or death, or
- The offence for which the arrest is sought is in progress and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm.

The effect of this new section is to restrict the use of deadly force in arrest situations to self-defence or necessity.

Schedule 1 offences include amongst others: treason, sedition, public violence, murder, culpable homicide, rape, indecent assault, bestiality, robbery, kidnapping, child-stealing, assault when a dangerous wound is inflicted, arson, malicious damage to property, breaking with intent to commit an offence, theft, consciously receiving stolen property, fraud, forgery, escaping from lawful custody as well as any conspiracy or incitement to commit any of the above offences.

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The amended Section 49 has however not yet been passed into law, as at the time of writing it had not been signed by the state president; this implies that the old Section 49 is still in force.

This article comments on the reasons for the delays around the passing of the bill into law and considers the outcome of some court cases that involve the use of lethal force in particular and other kinds of force in general.

### **Why the delays?**

One of the most obvious reasons for the delay is that the use of force when making an arrest is inherently controversial. The violent nature of South African criminal activity brings members of the SAPS into situations where the use of lethal force is often needed. This in turn necessitates advanced training and skills in the use of lethal force. On the flip side there is the high number of people who are injured or killed by the SAPS. Between 1997 and 2000 well over 1 500 people were killed by the police in South Africa, and many more injured.

Despite this worrisome figure, government has resisted the implementation of the amendment to Section 49. In February 2002 there was an announcement that the amendment would finally come into effect, but implementation was once again called off.

President Thabo Mbeki indicated that the amendment was subject to further discussion by some components of the criminal justice system, notably the justice department and the police. In March 2002 the ministers of Safety and Security and Justice discussed the matter and agreed that the amendment would not be implemented in its current form. The late minister Tshwete insisted that the new Section 49 was placing the police at risk of massive assault from criminals. Around the same time commissioner Jackie Selebi also indicated that the SAPS was not ready to implement the amendment.

However, the old legislation is indeed unconstitutional, because it assumes that suspects are guilty until proven innocent. The longer the confusion surrounding this issue exists, the longer the uncertainty for the police continues, resulting in police who are reluctant to carry out their duties with confidence. Conversely, it also poses the danger that more suspects continue to be shot by the police.

The argument that the new Section 49 endangers the lives of the police in the line of duty is flawed. While South Africa's rate of police killings is higher than that of countries like the United States, most of these deaths occur off duty. On average 235 police officials were killed per year in South Africa between 1994 and 1999. About 64% of these officials were killed off duty and 36% were killed in the line of duty.

It is also alleged that the amendment unreasonably limits the use of force. However, the new section does allow force to be used in situations of self-defence or necessity, not only of the arrestor but also if the suspect might 'cause future harm or death'.

### **Waiting for the courts to decide**

Another key reason cited by the police for delaying the passing of the amendment into law, is the necessity to wait for the outcome of two court cases. The first is the case of *Govender v the Minister of Safety and Security* which was heard on 16 March 2001 (although it was filed as early as 1995). The second is the constitutional court judgement in the case of *the State v Walters and others*, which was decided in May this year.

The *Walters* case is the watershed case that dealt with the constitutional validity of the old Section 49. It came before the Constitutional Court on 15 November 2001. The key question in this case is whether there are any circumstances in which it would be justifiable to shoot a fleeing suspect. And, if there are such circumstances, how they are defined in law, given the Bill of Rights. It is therefore dealing with issues of police effectiveness in upholding safety and securing arrests.

The *Walters* case involved the shooting of a fleeing burglar by two civilians. The prosecution in the case challenged the actions of the shooters under the reinterpretation of Section 49 by the Supreme Court of Appeal in the case of *Govender v the Minister of Safety and Security*. The court in that case found 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 that the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or that the suspect has committed a crime involving the serious infliction of grievous bodily harm."

In the Govender case the policeman on duty fired at a 17-year old suspect after several warning bullets had failed to make him stop. The suspect and his passenger were driving away in a vehicle which police had verified was stolen. They gave chase but the suspects did not stop.

In accordance with this interpretation, the judge was of the view that the police officer acted unlawfully in shooting and wounding the youth. An order was thus granted that the appeal succeed with costs and the matter was referred back to the court for the quantification of damages claimed.

In the May 2002 ruling, the Constitutional Court essentially upheld the Supreme Court of Appeal finding, striking down subsection two and reinterpreting "reasonable use of force" along Govender lines. The Constitutional Court also notified the executive that it could not use its right to determine the date of promulgation to block legislation passed by parliament.

### **Preparing to implement the new Section 49**

The Section 49 amendment may not be politically popular, but the delays are costly for police officers on the ground – and by implication the public. Once new laws are passed by parliament and signed by the President, they must be enforced. The pressure on the police (in this case) to constantly re-train and build capacity among its members to cope with the ever-changing legislative framework, is significant.

The delay in signing off on the amendment has meant that SAPS members have not been to any training in preparation for the implementation of the new Section 49. According to the SAPS, the department has been waiting for the outcome of the constitutional court judgement in the Walters case.

There is however an indication that the SAPS has already prepared the training programme material. They have also approached the justice department to verify whether that department's interpretation of the new section is congruent with that of Safety and Security. At the time of writing the justice department had not yet responded to the SAPS.

### **Conclusion**

South Africa's constitution has been hailed as one of the most liberal in the world in the way that it upholds human rights. There is, however, a huge gap between what is happening on the ground and what the constitution espouses. These undue delays about the passing into law and eventual implementation of the new Section 49 is an example of the circumvention of our constitutional democracy from the highest level of government.

Clinging to relaxed standards on the use of lethal force in effecting an arrest in a society that has been engulfed in a violent past, is not just a human rights issue. It also involves perpetuating the culture of violence that our Bill of Rights seeks to uproot. The insistence on maintaining outdated standards on the use of force reflects the emphasis in the SAPS, since 1999, on tough law enforcement approaches. If these measures mean increased use of violence by the state, their effectiveness will be undermined in the long run.

### **Source documents**

Criminal Procedure Act no 51 of 1977.

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