

b10446564
113902159

010110938

02

(i)

**THE GROSS EFFECT OF THE OPERATION OF SECTION 49(1)
AND (2) OF THE CRIMINAL PROCEDURE ACT NO. 51 OF
1977, AS AMENDED, ON THE BASIC HUMAN RIGHTS OF
INDIVIDUALS**

RIO
DIKG

BY

HARDLEY BUNONGOE DIKGALE

**SUBMITTED IN PART-FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE
OF
MAGISTER LEGUM
IN THE
DEPARTMENT OF PROCEDURAL LAW**

AT

VISTA UNIVERSITY

**PROMOTORS: PROFESSOR G. GERTSCH
PROFESSOR P. CARSTENS**

OCTOBER 1995



* 0 4 0 2 0 7 6 5 *

TOPIC

**THE GROSS EFFECT OF THE OPERATION
OF SECTION 49(1) AND (2) OF THE
CRIMINAL PROCEDURE ACT NO. 51 OF
1977, AS AMENDED, ON THE BASIC
HUMAN RIGHTS OF INDIVIDUALS**

ACKNOWLEDGEMENTS

I would like to thank God the Almighty for giving me the strength to work through this research. His over-arching love and grace kept me on.

I would also like to thank my promoters, Professor Grahame Gertsch and Professor Peter Cartens for their constant and sympathetic guidance. However, my special gratitude goes to Prof. Gertsch for his care and interest that enabled me to pursue this topic. His efforts and contributions are dearly appreciated. My thanks to Professor Esther Flemming for proof-reading and advising accordingly.

Another word of gratitude goes to the people who readily availed themselves for interviews even at a time when they were very busy in their respective commitments. One such person is Advocate Mojankunyane Gumbi who interrupted her busy schedule to narrate her experiences of cases involving police brutality and also arranged that I speak to some highly placed officials in the Government of National Unity, who are also critical of the police high-handedness in combating crime. My thanks also go to Mrs. Rita Marnewick for being willing to type my work.

Great credit and gratitude goes to the staff of the Wits Law Library for

their indispensable guidance during my research. If I were to single out an individual who helped me a great deal, I, indeed, would not hesitate to say Ms Thembi Monyane is a star. Surely, the same goes for Mrs. Sindi Moloto, Centre for Applied Studies (Wits). I will be making a mistake if I do not thank Ms Dudu Nkosi, Vista University (East Rand Campus) librarian, for her unbending support and invaluable comments.

My entire family shares in the outcome of this study, namely my wife Nokuthula and my two sons, Thato and Thabang and I thank them for their understanding, encouragement and perseverance.

This work is dedicated to my childhood friend/brother, the late Sipho "City" Mathenjwa who met his untimely and tragic death on Sunday, 24 September 1995 in Soweto. **HAMBA KAHLE MGABADELI.**

H.B. DIKGALE

18 OCTOBER 1995.

DECLARATION

I declare that:

**THE GROSS EFFECT OF THE OPERATION OF SECTION 49(1) AND (2) OF
THE CRIMINAL PROCEDURE ACT NO. 51 OF 1977, AS AMENDED, ON
THE BASIC HUMAN RIGHTS OF INDIVIDUALS**

is my own work, that all the sources used or quoted have been indicated and acknowledged by means of complete references, and that this dissertation was not previously submitted by me for a degree at another university.

H.B. DIKGALE

ABSTRACT

This study seeks to explore the origins of the South African rule of law which authorises the use of deadly force in the course of effecting or completing lawful arrests and to consider the scope of this privilege in the modern law as well as its impact on the basic human rights of individuals.

Since this dissertation involves a comparative approach, the comparative history of the provisions of Section 49 in this and other countries is surveyed briefly in Chapter One. This chapter is also intended to deal briefly with the provisions of Chapter Three, especially Section 7, 9, 33 and 35, of the Constitution of the Republic of South Africa Act 200 of 1993, as amended.

Chapter Two offers an exposition of the use of deadly force by the Security Forces in other jurisdictions, namely the United States of America and the United Kingdom.

Chapter Three begins with an evaluation of the dilemmas of police deadly force and proceeds to deal with statistical data depicting the deaths and injuries due to police action as well as settled and pending court proceedings involving the police.

Chapter Four offers a catalogue of recommendations for reform of the legislation. Finally Chapter Five will be my conclusion, where I will refer back to the topic to see if the problem has been adequately addressed.

TABLE OF CONTENTS		PAGE
Title page		(i)
Acknowledgement		(ii)
Declaration		(iv)
Abstract		(v)
Table of contents		(vii)
List of tables		(x)
CHAPTER ONE - THE NATURE, APPLICATION AND CONSTITUTIONAL RELEVANCE OF SECTION 49		
1.1	INTRODUCTION	1
1.2	A BRIEF HISTORICAL BACKGROUND OF SECTION 49	6
1.3	ARREST BY FORCE	8
1.4	JUSTIFIABLE HOMICIDE IN TERMS OF SECTION 49(2) AND ONUS OF PROOF	12
1.5	CONSTITUTIONAL PRINCIPLES	21
1.5.1	CONSTITUTIONAL SUPREMACY	24
1.5.2	THE RIGHT TO LIFE	27
1.5.3	CONSTITUTIONAL ANALYSIS	35
1.5.4	WHAT'S THE CONSITUTIONALITY OF POLICE USE OF DEADLY FORCE?	43

CHAPTER TWO - A COMPARATIVE STUDY

2.1	THE LEGAL POSITION IN THE UNITED STATES OF AMERICA	49
2.2	THE USE OF DEADLY FORCE IN BRITAIN AND NORTHERN IRELAND	55
2.2.1	THE BRITISH LEGAL SITUATION	55
2.2.2	THE NORTHERN IRELAND LEGAL POSITION	57
2.3	THE ROLE OF LAW IN A CHANGING SOCIETY	63

CHAPTER THREE - ANALYSIS

3.1	DILEMMAS OF POLICE DEADLY FORCE	66
3.2	OCCUPATIONAL ENVIRONMENT AND THE RULE OF LAW	68
3.3	PROFESSIONALISM AND POLICE CONDUCT	70
3.4	THE COMMUNITY AND POLICE CONDUCT	72
3.5	STATISTICS	74
3.5.1	DEATHS AND INJURIES DUE TO POLICE ACTION DURING THE APARTHEID ERA	75
3.5.2	THE POST-APARTHEID ERA	84

CHAPTER FOUR - RECOMMENDATIONS

4.1	LEGAL REFORM	88
4.1.1	ACCOUNTABILITY	90

4.1.2	TRANSPARENCY	92
4.1.3	THE OMBUDSMAN SOLUTION	93
 CHAPTER FIVE - CONCLUSION		
5.1	CONCLUSION	98
	BIBLIOGRAPHY	101
	APPENDIX A	112
	APPENDIX B	114

LIST OF TABLES	PAGE
Table 3.1: ANNUAL FIGURES OF THOSE KILLED AND WOUNDED BY POLICE, CONVICTED POLICE AND DISCHARGED POLICE 1970-1984	77
Table 3.2: SETTLEMENTS FOR ASSAULT BY POLICE	82
Table 3.3: A RACIAL BREAKDOWN OF ADULTS AND JUVENILES KILLED AND WOUNDED BY POLICE	83
Table 3.4: COURT ACTIONS AGAINST POLICE 1986-1989	84

CHAPTER ONE: THE NATURE, APPLICATION AND CONSTITUTIONAL RELEVANCE OF SECTION 49

1.1 INTRODUCTION

It can be sternly stated that in all but the most extreme situations the use of lethal firearms on unarmed civilians is both deplorable and unacceptable because, both morally as well as legally, it is unjustifiable. Notwithstanding the fact that there are basic legal principles and procedures that must at all times be adopted by either a policeman/woman or a private person using or applying force on the arrestee, in terms of the provision of section 49 of the Criminal Procedure Act, 1977¹, it still remains contentious to afford law enforcement officials a licence to kill.

In brief, the South African law allows the use of deadly force by policemen/women against malefactors in at least three situations: one is where the force is employed in defence of a person against attack or in protection of property of another or him/herself.² The second is where the force is used in the dispersal of an unlawful gathering in terms of the provisions of the Internal Security Act, 1982.³ The third instance

¹ Criminal Procedure Act 51 of 1977, as amended.

² E.M. Burchell and P.M.A. Hunt: *South African Criminal Law and Procedure*, volume I, General Principles of Criminal Law. (1983). 2nd Edition, p.321.

³ Sections 48 and 49 of the Internal Security Act 74 of 1982, as amended.

which constitutes the core of this thesis, involves the authorization granted by the law to a person charged with the duty of effecting a lawful arrest to employ deadly force against the arrestee in order to effect the arrest.⁴

It is, indeed, ironic that a legal and democratic regime which prides itself on its concern for procedural justice seems to be so ineffectual in its capacity to restrict the use of deadly force by law enforcement officials, the use of which makes the fairest legal procedures and most just courts irrelevant. Therefore, it will be argued that our legal system is deficient in this regard; that the courts have also not done as much as they are competently capable of in emphasizing the sanctity of human life; and that police do not follow internationally acceptable procedures before using firearms.

It is trite law that the implications of section 49 are far-reaching, indeed dangerous, and the intervention of the courts to curb or restrict this section was timely. In spite of the fact that our legal system, just like other international jurisdictions,⁵ places a high value or premium on the life of a person,⁶ it, however, sometimes strays from internationally

⁴ *Ibid.*

⁵ Lesansky, H. 1982. *Stop or I'll shoot: The use of deadly force by law enforcement officials*, p.23-27.

⁶ *R v Britz* 1949(3) SA 293(A).

accepted norms by dispensing significantly with '*the proportionality principle*', namely the principle that such force as is used should be commensurate with the danger or social harm that is sought to be prevented. In terms of this principle the law enforcement official, when he/she did what he/she, in fact, did, ought reasonably to have realised that he/she was acting too precipitately and used excessive force.⁷

The South African law generally conforms with the second internationally accepted principle that deadly force should be used alternatively only when there are no other less violent methods that can be employed.⁸ This is known as '*the minimum force principle*'. In terms of this principle the law enforcement official should always use the minimum force in the place of lethal force.

Therefore, for a police officer or private person to claim protection of section 49(1), the prescribed procedure must be strictly adhered to. Certainly, our legal system cannot justify the killing of a human being in terms of section 49(2) without actually prescribing a strict procedure on the part of the arrester. Suffice it to say that although section 49(1) protects the arrester from civil and/or criminal liability for using force in effecting arrest, it is indeed, not all gold that glitters in that there are some

⁷ *Ibid.*

⁸ N. Haysom: "*The use of Deadly Force*", 1987 vol. 1 SAJHR pp.8-19.

constraints on how much force the arrester may use without him/herself contravening the law. As correctly pointed out by Haysom⁹ that "somewhere in the process, law lost the strict prerequisite of proportionality".

It is evident from earlier decisions that the onus of proof that the killing was not justified was placed on the state, which was very much in accordance to common law. In fact, in an attempt to limit the availability of the statutory justification [i.e. sec 49(2)], the appellate division tried to cast the onus of proof on the accused person¹⁰, and although this approach has been profoundly questioned¹¹, it, however, now seems to be settled law.¹² The interpretation recently placed by courts on section 49(2) constitutes fundamentally a more vigilant approach to the use of deadly force under this statutory justification. This is apparent from the following appellate division judgments: in *S v Barnard*¹³ a young policeman on patrol near a supreme court building opened fire on a backfiring car, which he erroneously believed to contain saboteurs opening

⁹ *op cite note 8* p.10.

¹⁰ That the onus was on the accused has already been decided by the A.D. in *R.V. Britz* 1949(3) SA 293 (A) and in *S.V. Barnard* 1986(3) SA 1 (A) the court merely confirmed this view. See also Hiemstra: *Introduction to the Law of Criminal Procedure*. Second edition (1985) pp.20-26.

¹¹ *Matlou v Makhubedu* 1978(1) SA 949 (A) et 962.

¹² *S v Swenepoel* 1985 (1) SA 576 (A). However, it must be noted that in terms of section 25(3)(c) of the Interim Constitution the issue of the onus of proof remains a contentious one. This point will be discussed later in this dissertation.

¹³ *Ibid.*

fire. The court held that the deceased driver, a late-night reveller, had not been aware that Barnard was intent on arresting him and was therefore not a suspect '*evading arrest*'. Accordingly, Barnard was found guilty of culpable homicide.

In *S v Swanepoel*,¹⁴ another case which suggests a police propensity to shoot motorists in error, the appellate division upheld the conviction on culpable homicide. Swanepoel, in a case of mistaken identity, had shot the driver of a car, believing him to be a dangerous criminal. The court found that Swanepoel had failed to discharge the onus on him by showing, for example, that he could not have effected an arrest by other methods. In *S v Nel*,¹⁵ two police constables in plain clothes had fired at a motorist who failed to stop at their improperly constituted and amateurish roadblock. Finding that the police had no idea what offence the driver had committed and that they had not properly attempted to arrest the victims, the court held that the accused could not rely on section 49(2) of the Criminal Procedure Act. The court also rejected the alternative argument that the accused could have held a *bona fide* belief that they were entitled to shoot any motorist who failed to stop at a roadblock. The court confirmed the convictions of attempted murder. With the advent of the Bill of Rights in the Interim Constitution, the

¹⁴ *Ibid.*

¹⁵ 1980(4) SA 28(E).

question of onus of proof has since become not only a controversial issue but also contentious one, as it will be shown later in this dissertation.

1.2 A BRIEF HISTORICAL BACKGROUND OF SECTION 49

The principle that deadly force might be employed in the course of effecting or completing the arrest of anyone suspected of a crime has its roots in primitive institution of the English common law.¹⁶ It can be traced back to the period of the English feudal system. During this period a person guilty of felony, i.e. a serious crime, was considered to have forfeited his right both to the protection of the law as well as the life itself. Thus, when a felon, i.e. a person who has committed felony, was killed during an attempt to arrest him, the killing was deemed to be lawful because it was nothing more than an unofficial anticipation of inevitable execution.¹⁷

It must be noted that this somewhat outdated English principle rested essentially on the fact that the life of one suspected, charged and/or convicted of a felony was in any event forfeited. Section 1 of ordinance no. 2 of 1837 (Cape) was a progenitor of section 37 of the old Criminal

¹⁶ Pollock, F. and Maitland, F.W. 1923. *The History of English Law*, 2nd edition, vol II 449-465. See also *Collins Cobuild English Language Dictionary* (1987) for the meaning of 'deadly' force which means 'fatal' force.

¹⁷ *Ibid.*

Procedure Act of 1955¹⁸ and therefore according to Milton an anomaly. Although the range of offences for which the death penalty was competent in the 19th century was extensive, this is no longer the position today. Thus allowing arresters, especially police officers to use the "*ultima ratio legis*" on petty offenders and possible suspects of serious offences, is, in fact, to foreclose on a proper judicial inquiry.¹⁹

Milton,²⁰ further, contends that the statutory provision ignored the distinction between two important situations, one being where a person resists arrest and the other where a person merely flees. In this regard the old authorities accepted that fleeing from arrest was an almost instinctual reaction, and consequently, in any event those who flee can easily be apprehended later.²¹ Indeed, what is witnessed here is nothing but an instance wherein the power exercised by the arresters under the authority of duly enacted legislation, is in many respects beyond the reach of the law and, in that sense lawless.

¹⁸ Milton, J.R.L. 1976. "*Ultima Ratio Legis: The use of Deadly force in Effecting Arrests*", gedenkbundel H.L. Swanepoel (Ed. J.A. Coetzee) p.140-149.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Milton, J.R.L. 1976. "*Ultima Ratio Legis: The use of Deadly Force in Effecting Arrests*", gedenkbundel H.L. Swanepoel (Ed. J.A. Coetzee) p.140-149.

1.3 ARREST BY FORCE

Under this heading an important question to be asked is what degree of force may the arrester use in apprehending the person to be arrested. Where the arrestee neither resists arrest nor attempts to flee, the position is not so controversial in that in terms of section 39 of the Criminal Procedure Act of 1977, as amended, which applies to both police officers and private citizens alike, the arrester must touch the body of the arrestee. The arrester is to inform the arrestee of the cause of the arrest. However, it has been held that the arrester need not do so where the arrestee is caught red-handed, because the reason for the arrest is obvious.²²

Section 49(1) confers upon a person authorised to effect an arrest the right to use '*reasonably necessary*' force to apprehend a person who resists, arrest or flees. Where the arrestee is not co-operative the immediate interesting and controversial question comes up: when and to what extent, may force be used in effecting the arrest? In an attempt to answer this question, courts have come up with two important principles, namely the '*proportionality principle*' and '*minimum force principle*'. At least part of the answer is to be found in two sub-sections of section 49 of Act 51 of 1977.

²² *Minister van Wet en Order v George* 1985(4) SA 390(C).

Section 49(1) states that if the arrestee

- * resists the attempt and cannot be arrested without the use of force;
or

- * flees when it is clear that an attempt to arrest him is being made, or
resists such attempt and flees,

the arrester or his assistant may use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

Though this subsection authorises the use of force, it places two clear constraints in respect of the extent of force the arrester may use without himself contravening the law. Firstly, the amount of force must not substantially exceed that which is necessary to subject the arrestee or stop him from getting away. To this end the proportionality principle becomes a reality. Secondly, it must be reasonable in the light of the seriousness of the suspected offence - this conforms with the minimum force principle.

The question in regard to the degree of force which will be considered reasonable cannot be defined in the abstract. An objective test will be applied to each particular set of circumstances.²³ This means that the

²³ *Macu v Du Toit* 1983(4) SA 629 (A) at 635.

court asks whether the action of the arrester measured up to the standard of what the hypothetical reasonable man in his position would have done in the situation. Indeed, the court will try to avoid adopting the posture of an armchair critic.²⁴ Therefore our judges have made it clear that the arrester will not enjoy the protection of section 49(1) unless the arrestee knew that an attempt was being made to arrest him, and the arrester intended to hand the arrestee over to the police at the earliest opportunity.²⁵

The courts have emphasized that section 49(1) was to be interpreted strictly against the person relying upon it.²⁶ In *George, N.O. v Minister of Law and Order*,²⁷ Jones, J., held that to justify the shooting of Queenie, George's eight year old sister, whether in terms of section 49 or the plea of self defence, the defendant had to show that the shooting had been reasonably necessary to avoid the greater evil posed by George toward the police and others. In other words, the defendant's conduct was to be subjected to close and critical scrutiny in order to minimize any possible abuse of the wide protection that the provision gave for the infliction of violence upon the person of another. In a recent case of

²⁴ Osborne, M. "Arrest by Force: A Licence to Kill?". 1987, 16 *Businessmen Law* 229.

²⁵ *Fortune v SA Eagle Insurance Co Ltd* 1985(1) PH J5(C).

²⁶ *George N.O. v Minister of Law and Order* 1987(4) SA 333(SE); see also Dendy, M. "Violent Arrest - and the Injured Bystander". 1988. 17 *Businessmen Law* 134.

²⁷ *Ibid.*

*Msoni v Minister of Law and Order*²⁸ and others, Levy, A.J. held that in determining the question whether police officers, who have caused injury to another person by shooting, are entitled to the protection of section 49(1)(b) of the Criminal Procedure Act 51 of 1977, on the ground that the shots were fired in order to effect the arrest of such person who was fleeing when it was clear that an attempt to arrest him was being made, the court has to be satisfied that there was a deliberate intention on the part of the suspect to escape from his arrest by whatever means he may have chosen, that is whether on foot or in a vehicle. The facts of the case *in casu*, the plaintiff, was a passenger in a vehicle that was driven by another person who was attempting to escape arrest by the police. He was struck by a bullet fired by the police attempting to arrest the occupants of the vehicle. The court accordingly held that the defendants had failed to demonstrate that:

- (i) there was some indication on the part of the passenger that he shared the desire of the driver to escape their arrest and thereby made himself a party to a concerted effort to escape arrest in the motor car controlled by a fleeing driver; and
- (ii) they were entitled to the protection of the Act by reason of the fact that they were unable to prove a deliberate intention on the part of

²⁸ 1993(1) SA 168(W).

the suspect to escape from his imminent arrest.

1.4 JUSTIFIABLE HOMICIDE IN TERMS OF SECTION 49(2) AND ONUS OF PROOF

Section 49(2) applies only where the arrestee

- * has committed an offence referred to in Schedule 1 of the Act,²⁹ or
- * is reasonably suspected of having committed such an offence; and goes on to proclaim that if the authorised arrester or his assistant, cannot arrest him or prevent him from fleeing by other means than by killing him, then the killing shall be deemed to be justifiable homicide.

One may further ask whether section 49(2) affords the arrester with a licence to kill? It should always be borne in mind that this provision has been subjected to severe criticism and it has become the central issue in one of the highly publicised trial.³⁰ According to Milton this privilege of deadly force is, in the modern law, an anachronism in so far as its historical base was the rationale of crude motion that since a felon had by his crime forfeited his life, his life might be taken in the course of attempts

²⁹ Criminal Procedure Act 51 of 1977, as amended.

³⁰ The Louis van Schoor's case in *Weekly Mail* 30, Nov. 1989, *The Star* 16, No.v 1989, *Daily Dispatch* 15, Nov. 1989, *The Citizen* 16 Nov. 1989, *The Daily News* 29 Nov. 1989, *The Star* 3 Nov. 1989, and *Tribune* 17 Dec. 1989.

to bring him to justice.³¹

Indeed, the development produced rather the irrational consequences that the privilege operated to deprive man of his life for an offence of a relatively minor nature. In the words of Milton³², one for which "a court of law privilege is anomalous in the sense that it amounts to an authorised circumvention of the elaborate and fundamental machinery of the process of law". Consequently, Prof. Milton went on to document the provisions of section 49(2) as state authorise lynch law,³³ especially in so far as it operates to deny to the accused the strategic presumption of innocence. In *R v Labuschagne*³⁴, Schreiner, J.A. described this provision as extremely, even dangerously wide. Thus, the major criticism of subsection (2) of section 49 relates to the fact that Schedule 1 offences include a wide variety of minor offences, for example offences for which an accused could be sentenced to a term of imprisonment exceeding six months without the option of a fine.³⁵

Furthermore some courts have held that the defence of justifiable homicide is absolute and need not be weighed against the seriousness of the

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ 1960(1) SA 632(A) at 639.

³⁵ *R v Britz* (supra) at 303-344.

offence.³⁶ In effect this meant that even a child who steals an apple from a fruit and vegetable vendor and refuses to submit to an arrest could justifiably be shot dead in terms of the provision of section 49(2). That is, even if a 10 year old child struggles when two police officers try to arrest him, instead of holding or hand cuffing him, he could justifiably be shot dead. There is, in fact, no doubt in my mind that this justification for using deadly force patently breaches not only the proportionality principle but also the minimum force principle.

Again, section 49(2) also confers the power to kill without the slightest requirement that anyone's life, person or property be at risk or in danger. Therefore, the stakes are, of course, much higher in section 49(2) situation than in other provision, in that should the suspect be killed, then the arrester may find himself now the accused on a charge either of murder or culpable homicide. In *S v Barnard*,³⁷ the appellate division summarised the requirements of a defence based upon section 49(2) as follows:

- * the accused must have reasonably suspected the deceased of having committed a Schedule 1 offence;³⁸

³⁶ *Matlou v Makhubedu* 1978(1) SA 949(A) at 956-7.

³⁷ 1986(3) SA 1(A) at 7.

³⁸ The suspicion must have been objectively reasonable. That is, it will not avail the accused to say that he harboured a vague suspicion that a schedule 1 offence might have been committed: see *Weisner V Molomo* 1983(1) SA 151(A).

- * the deceased must have been on the point of being arrested;
- * the deceased must have been aware that the accused was attempting to arrest him, and must have fled in this knowledge, i.e. he must have attempted to avoid arrest by fleeing;
- * killing the deceased must have been the only way of preventing his flight.

Indeed, the last requirement is probably the most important in practice, in that non-fatal ways of preventing escape should be tried before deadly force is resorted to. Possible preliminary steps suggested by our courts include the summoning of others to help with the arrest,³⁹ an oral warning should be given then, if that does not help, a warning shot should be fired into the ground or into the air, depending on the circumstances.⁴⁰ If all else fails, or nothing else is practicable in the circumstances, then the arrester should try to shoot the suspect in the legs.

The implications of these requirements become more apparent when one looks at the facts of the cases that came before the appellate division for

³⁹ *R v Labuschagne* (supra).

⁴⁰ *Metlou v Makhubedu* (supra).

judgment. For instance, in *Barnard*⁴¹ a young policeman on patrol near a supreme court building opened fire on a backfiring car, which he erroneously believed to contain saboteurs opening fire. The court held the deceased driver, a late-night reveller, had not been aware that Barnard was intent on arresting him and was therefore not a suspect '*evading arrest*' accordingly Barnard was found guilty of culpable homicide. Certainly, this judgment constitutes the more vigilant approach to the use of deadly force under section 49(2) of the criminal procedure act.

In *Swanepoel's*⁴² case, the appellate division upheld the conviction of warrant-officer Swanepoel. Swanepoel, in a case mistaken identity, had shot the driver of a vehicle, believing him to be a dangerous criminal. The court found that Swanepoel had failed to discharge the onus on him by showing, for example, that he could not have effected an arrest by other methods. In *S v Nel*,⁴³ two police constables in plain clothes had fired at a motorist who failed to stop at their improperly constituted and amateurish roadblock. Finding that the police had no idea what offence the driver had committed and that they had not properly attempted to arrest the victims, the court held that the accused could not rely on section 49(2) of the act. Furthermore, the court also rejected the

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ 1980(4) SA 28(E).

alternative argument that the accused could have had a *bona fide* belief that they were entitled to shoot any motorist who failed to stop at a road block, and then confirm the convictions of attempted murder.

Some three years later, i.e. since the minority judgment in Nel's case, the appellate division adopted⁴⁴ an appropriately humane and vigorous approach to monitoring the use of lethal force.⁴⁵ Although, the judgment dealt, in the main, with the elements of the requirement that the fleeing victim be aware that he is being arrested, it suggested also that where a suspect can later be apprehended, summonsed or traced, it need not be necessary to arrest him.⁴⁶ According to Haysom⁴⁷ this suggestion holds out the faint promise that our courts might in time recognise that in some situations allowing someone suspected of a minor offence to flee may not only be more reasonable than killing him on the spot, if that be the only means of effecting an immediate 'arrest', but may also be consistent with the law. There is no doubt in my mind that as it stands, the statutory provision has been interpreted as sanctioning the unreasonable use of firearms, for instance in *Britz's* case, Schreiner, J.A. commented that the protection can be used to justify the use of firearms:

⁴⁴ *Ibid.*

⁴⁵ *Macu v Du Toit*, 1983(4) SA 629 (A).

⁴⁶ At 651H-652C.

⁴⁷ *Ibid.*

*'... to prevent the escape of someone suspected, reasonably but perhaps wrongly, of some possibly not very serious crime ...'*⁴⁸

Once more, because the law does not require the force to be commensurate with the harm the community will suffer should a particular suspect escape, the courts have had to enforce the minimum force requirement strictly. However, it appears doubtful that current police practices in combating crime meet these requirements. Suffice to say that the appellate division⁴⁹ authoritatively cut down the availability of defence of justifiable homicide in two important ways by holding that:

- * it is for the accused to convince the court, on a balance of probabilities, that his actions satisfied the requirements of section 49(2) - indeed, fundamental departure from the general rule that the onus is on the state to prove every element of the offence charges; needless to say that this general rule has since been endorsed by the Interim Constitution in that, in terms of section 25(3)(c), thereof, the suspect is presumed innocent and if he so chooses he can remain silent during plea proceedings or trial and not testify during trial. In practice, the controversy arises if the suspect chooses not to testify during the trial - how can he convince the court on a balance of

⁴⁸ *R v Britz* op cit note at 304; see also *R v Labuschagne* note at 640C; and per Rumpff, C.J. in *Matlou v Makhubala* note at 957A.

⁴⁹ *op cit* note 12 at p.574.

probabilities, that his actions satisfied the requirements of section 49(2) especially when he remains silent? Is this not an anomaly?

- * the deceased must have been aware that the accused was attempting to arrest him and must have fled in this knowledge.

Section 49(2), unlike section 49(1), does not say that the arrestee must know of the attempt being made to arrest him. How, then could the court grant an unwritten extra requirement on the section? Without actually going into the esoteric areas of statutory interpretation, one may say that in the court's view⁵⁰ section 49 had to be read holistically. That is, all requirements of section 49(1) - including the requirement that the arrestee be aware of the attempt being made to arrest him - had to be read into section 49(2). One of the factors regarding this is fairly obvious that to interpret the two subsections separately would have the absurd result that a person who has killed in terms of section 49(2) is better off in court than one who has merely wounded another acting in terms of section 49(1). This is the case simply because section 49(1) contains the requirements that the arrestee be aware of the attempt to arrest him, whereas section 49(2) does not. It is, certainly, now evident how decisive the question of onus can be. Surely, the provisions of section 25(3)(c) of the Interim Constitution interpreted restrictively imply that the state bears the onus of

⁵⁰ *Ibid.*

proof.

Once more, when looking back at the *Swanepoel's*⁵¹ case, it certainly become evident that the police use of deadly force in order to effect or complete an arrest cannot go uncondemned. In this case an innocent motorist, who was unfortunate to bear a striking resemblance of a dangerous fugitive from justice, was shot dead by a plain-clothed policeman in Johannesburg. The appellate division held that the accused could not have relied upon section 49(2) even if the deceased had been the wanted criminal. This was so for two reasons:

- * The accused could not show that the only way to prevent the deceased's escape had been to kill him; He could easily have stopped the Cortina (i.e. deceased's car) by cutting it off at a red robot; or he could have used his radio to summon assistance.

- * In no sense could it be said that the deceased had been '*fleeing*' - indeed, he had not reacted in any way to attempt to arrest him. Why have our courts so restricted the availability of the defence of justifiable homicide. The short answer, as indicated before, is that our legal system is striving to place a high premium to life to be protected from arbitrary death.

⁵¹ *Ibid.*

Consequently, section 49(2) is a unique and drastic provision, allowing the taking of a human life on the basis only of a reasonable suspicion. Thus its protection should not be too readily granted.

1.5 CONSTITUTIONAL PRINCIPLES

Now that constitutionalism has become central to the new emerging South African jurisprudence legislative interpretation will certainly be radically different from what it used to be in the past legal order. In that legal order, due to the sovereignty of Parliament, the supremacy of legislation and the absence of judicial review of parliamentary statutes, courts engaged in simple statutory interpretation, giving effect to the clear and unambiguous language of the legislative text - no matter how unjust the legislative provision.⁵²

Indeed, with the entrenchment of a Bill of Fundamental Rights and Freedoms in a supreme constitution, however, the interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. Furthermore, constitutionalism is about balancing the principles of liberty and equality against power.⁵³

⁵² per Mokgoro J in *S v Makwanyane and another* 1995(2) SA CR(1) (CC) 103 at para-301E; see also Cachalia *et al*: 1994 *Fundamental Rights in the New Constitution* p.3.

⁵³ Boule, Harris and Hoexter. 1989. *South African Constitutional and Administrative Law*, pp.104-107.

It is trite that most constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future.⁵⁴

In some countries the constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future.⁵⁵ The South African Constitution is different, it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insolent and repressive, and a vigorous identification of and commitment to a democratic, ununiversalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.⁵⁶ Once more, one wonders if the provisions of section 49 are still defensible in the new

⁵⁴ per Mahomed J in *S v Mkwanyane* (supra) at paragraph 262 G-H.

⁵⁵ Boule, Harris and Hoexter, 1989. *South African Constitutional and Administrative Law*, p.113..

⁵⁶ See preamble of the Interim Constitution "*.. whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms ...*"

constitutional dispensation. Surely, it is against this background that the constitutionality of capital punishment as an infringement upon the right to life had been decided by the Constitutional Court.

What is fundamentally important is that not only the right to life but also the right to liberty, freedom and security of individuals should be protected by law. Today constitutions of various countries protect citizens from arbitrary arrest and detention, and South Africa is no exception as will be seen in this discussion. The power of state officials to arrest and to detain individuals inevitably infringes upon the freedom and liberty of citizens. However, the arrest and detention of people who are charged with, or convicted of a crime is justified when it is, within constitutional bounds, necessary to protect society.⁵⁷

History has shown that the procedures and penalties of the criminal process can easily be abused. It is, therefore, necessary to have laws or regulations to limit the exercise of arbitrary power over the freedom of ordinary people. In the United States of America these principles are described as "*due process*" requirements whereas in the South African legal system the same notion is expressed in the concept "*the rule of law*". It should always be borne in mind that even though the present day

⁵⁷ *R v Labuschagne* 1960(1) SA 632 (A) 639; see also section 11 (1) and (2) read in conjunction with section 25 of the Interim Constitution.

security laws have undergone a radical change, they still depart fundamentally from the principles of due process.⁵⁸ Consequently, this failure on the part of our law to, not only systematically but severely, restrict the law enforcement officials' use of deadly force amounts to the conferring of a broad discretion to kill or injure without legal consequence.

1.5.1 CONSTITUTIONAL SUPREMACY

Section 4 of the Interim Constitution provides that

- (1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution; be of no force and effect to the extent of the inconsistency.
- (2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.

This section introduces a very important principle of constitutional supremacy which marks a radical departure from the constitutional dispensation of the past according to which Parliament reigned supreme in the true tradition of the so-called Westminster system (inherited from

⁵⁸ Mike Robertson. (1991). *Human Rights for South Africans*. Butterworths p.31-67.

the British Parliament) with the South African Act of 1909 and carried through to the so-called 1983 Constitution.

The interim Constitution also entrenches judicial independence. As Moseneke correctly pointed out that:

"Judicial review is the centrepiece of the constitutional mosaic and an inescapable but salutary corollary of constitutional supremacy".⁵⁹

Consequently the constitution makes it particularly imperative for court to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end common values of human rights protection the world over and foreign precedent, especially with regard to the applicability of public international law, may be instructive.

The judiciary is therefore, being accorded power by the Constitution to review the actions of government⁶⁰ and legislation is designed to ensure that government and its organs operates within the framework of the Constitution and the values and principles contained in a bill of rights. The supremacy of the interim Constitution is reflected in various other

⁵⁹ Basson, D. : 1995 South Africa's Interim Constitution Texts and Notes p.V.

⁶⁰ Section 4 of the Interim Constitution Act 200 of 1993.

provisions, notably the provisions pertaining to fundamental rights which are entrenched and protected judicially,⁶¹ even against unconstitutional parliamentary acts as well as the entrenched provisions of the interim constitution. To this end one wonders where the provisions of section 49 stand and whether they still have any relevancy in the police use of force when combating crime as well as law and order enforcement. It is against this historical constitutional background and ethos that a persuasive argument for the repeal of the provisions of section 49 will, later in this dissertation, be vigorously canvassed.

Furthermore, the fact that the interim Constitution is an entrenched and inflexible constitution is an important constitutional principle because it will mean very little in practice to expressly declare that the Constitution is supreme if it can, nevertheless, be easily amended by way of ordinary legislative procedures. In other words, it is clear that it will not be that easy to get around the entrenchment procedures provided for in terms of the interim Constitution,⁶² especially because all of the provisions of the interim Constitution are entrenched by way of prescribed procedures (involving special majorities).

Therefore, in the event by any law, act or legislative provision being

⁶¹ See Chapter 3 and Chapter 7.

⁶² See section 62.

inconsistent with the supreme constitution, such law, act or legislative provision is of no force or effect (unless otherwise provided expressly or by necessary implication)⁶³ However, it should always be borne in mind that in terms of section 35(2) read together with section 232 of the Interim Constitution, no law shall be constitutionally ~~invalid~~ solely by reason of the fact that it limits *any* of the rights entrenched in Chapter Three or its wording used is *prima facie* capable of an interpretation which is inconsistent with a provision of the Interim Constitution. Be that as it may, I am still baffled by the fact this outdated provisions of section 49 have actually survived and still continue to escape or evade the microscopic eye of the present parliament. Probably, now that the Constitutional Court is expressly empowered in terms of section 98 to inquire into the constitutionality of any act of parliament, regardless of whether such law was passed before or after the commencement of the interim constitution, section 49 would certainly, be no exception and will receive attention.

1.5.2 THE RIGHT TO LIFE

The right to life is the right of every human being not to be arbitrarily deprived of his/her life.⁶⁴ It is the most basic or fundamental of all the

⁶³ See section 4(1) and also note that schedule 4 cannot be amended whatsoever - it is, therefore, cast iron.

⁶⁴ Cachalia, A., *et al.* 1994. Fundamental Rights in the New Constitution p.98.

rights of man.⁶⁵ Its enjoyment is a *conditio sine qua non* to the realization of all his/her other rights. In other words, without life all of his other rights would be extinguished. Indeed, the right to life is a sacred right in the sense that it was given to man by the Creator Himself.⁶⁶

It is trite law that this right cannot be legally voided by the consent of the individual himself because freedom cannot be used to extinguish itself. The society of which the individual is an integral part, will not countenance the voluntary alienation of the right to life, because such alienation will be prejudicial to its collective right to self-preservation and self-perpetuation.

Indeed, it is for this reason that suicide, for whatever motive, is so universally condemned and attempted suicide a crime in many jurisdictions.⁶⁷ Therefore, by committing ourselves to a society founded on the recognition of human rights we are required to value the fundamental rights contained in Chapter 3, especially the right to life, above all others.

⁶⁵ per Chaskelson, P., in *S v Makwanyane* 1995(2) SACR57 (CC) at paragraph 144D-E.

⁶⁶ *S v Mhlongo* 1994(1) SACR 584(A) at 587E-G.

⁶⁷ Ramcharan, B.G., *The Right to Life in International Law* (1985) Chapter xi pp.245-277; see also Edwin Scott Haydon, *Law and Justice in Buganda*, Butterworths (1980) London, it was argued, for instance, that in Christendom generally, a suicide is not accorded christian burial rites. To the Baganda of Uganda suicide is considered to be an abomination. Consequently, a suicide is not entitled to be buried at the family burial grounds or to the customary burial rites, to post-funeral rites or to have an official heir. If he hung himself on a tree, the tree is felled, uprooted and burned. If he hung himself in a house, the house is burned down.

The right to life also imposes a corresponding duty on every member of the community to respect it. With the exception of cases of legitimate self-defence, he must refrain from threatening or from actually taking anybody's life, including his own. He must refrain from procuring, counselling or aiding another to take his own life. Surely, it is for the same reasons that the death penalty is regarded as sanctioning the deliberate annihilation of life.

Mahomed, J.A. as he then was, held:

"Death penalty is the ultimate and the most incomparably extreme form of punishment... It is the last, the most devastating and the most irreversible recourse of the criminal law, involving as it necessarily does, the planned and calculated termination of life; the destruction of the treasured and most precious gift which is bestowed on all humankind".⁶⁸

It has been persuasively and convincingly argued by the various eminent constitutional court judges that the death penalty violates crucial sections of the constitution and that it is not saved by the limitations permitted in terms of section 33.⁶⁹ Furthermore, it has been submitted that the state in everything that it does must demonstrate a respect for human rights, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example

⁶⁸ *S v Mhlongo* (supra).

⁶⁹ per Chaskalson, P. in *S v Makwanyane* (supra) at page 41 paragraph 95 D-E.

to others in the expectations that they might possibly be deterred thereby.⁷⁰

Certainly, that goes for the law enforcement officials who, whenever are called upon to perform their functions, would always easily arrive at the decision of taking the life of the fleeing suspect and later plead justifiable homicide. As the sanctity of life supersedes all other personal rights in Chapter 3, it is, therefore, imperative for such law and order enforcement officials to realise that when they shoot to kill a fleeing fugitive, their acts are not only legally wrong but also constitutionally unacceptable unless such action can be justified in terms of section 33.

The fact that section 7(1) of the interim Constitution refers to legislative and executive organs of state at all levels of government is evident enough that even police are bound by a bill of rights because in performing their functions, they exercise governmental authority. Fundamentally, human rights aim at promoting and protecting the dignity and integrity of every individual human being. That is, human rights are protective barricades against the abuse of power by both public as well as private authorities.⁷¹

⁷⁰ per Chaskalson, P. in *S v Makwanyane* (supra) at page 57 paragraph 144 D-E.

⁷¹ Hayson. 1987. "The Use of Deadly Force", *South African Journal on Human Rights*, vol. 1 pp.8-19.

Thus there is no doubt that human rights can be enforced only in a political system in which power is checked and curbed by the principle of substantial consensus among the citizenry that human rights must be respected.⁷² In other words, they require for their protection institutionalised and entrenched mechanisms that cannot be abused or evaded at the whim of the government and/or its organs. In the light of these facts human rights stand no chance against such provisions which allow the use of deadly force in order to effect an arrest.

Consequently, at times I am inclined to believe that it is a myth that our massive battery of criminal law is there to maintain 'law and order' or rather 'safety and security' but its real/principal aim would sometimes seem to be to shore up police dominations, especially now that, more often than not, law enforcement officials tend to behave as though they are the law unto themselves when performing their official duties. In fact, they even go as far as to say whatever they do or did was lawfully justifiable in terms of section 49(2) of the Criminal Procedure Act.

Surely, with the advent of the bill of rights as a constituent part of the new South African interim constitution,⁷³ it is, therefore, imperative that the human rights culture must be inculcated using the constitutional

⁷² Yoram Dinstein. 1981. *The Right to Life, Physical Integrity and Liberty*, pp.114-115.

⁷³ Chapter Three of the Constitution of the Republic of South Africa Act 200 of 1993, as amended.

supremacy principle. Indeed, if the process of the creation of a human rights culture and the enforcement of the fundamental rights provisions of Chapter Three of the interim Constitution, especially in respect of the right to life clause, is deemed to constitute a vital building block in the foundation of a new orderly, self-respecting and decent society governed by the constitution, as the supreme law of the land, then I see no reason why the unconstitutional provisions of section 49 still continue to enjoy a somewhat glorified existence in our statute book. Conversely, it would make more sense if clauses such as section 49 are enacted along constitutional lines, for example the proportionality test is pivotal in this respect in that it ensures that the weighing of the interest protected against the interest of the wrongdoer constitutes the point of departure.

The right to life is spelt out in the broadest possible terms. Section 9 of the interim Constitution provides:

"Every person shall have the right to life".

The right to life, in effect, is the right to be safeguarded against (arbitrary) killing by either the organs of the state or private citizens. However, it should always be borne in mind that any limitation of the right to life will have to pass the two-stages test contained in the general limitations

clause.⁷⁴ If the Constitutional Court held that death sentence offends section 9 of the Constitution,⁷⁵ what more does the Legislature hope to achieve by retaining such outdated, illegal and unconstitutional provisions of section 49.

In abolishing capital punishment the Constitutional Court held that the imposition of the death penalty is inevitably arbitrary and unequal.⁷⁶ Whatever the scope of the right to life in section 9 of the interim Constitution may be, it unquestionably encompasses the right not to be deliberately put to death by the State in a way which is arbitrary and unequal. Therefore, the unqualified right to life vested in every person by section 9 of the interim Constitution and the primacy of this right and its relationship to punishment at all times needs to be emphasised in view of our constitutional history. The doctrine of parliamentary sovereignty meant, virtually, that the State could do anything, enact any law, subject only to procedural correctness.⁷⁷

⁷⁴ Sec 33; see also Kurt Herndl, in his foreword to B.G. Ramacharam (ed) *The Right to Life in International Law* (1985) xi where he said: *'Of all the norms of international law, the right to life must surely rank as the most basic and fundamental, a primordial right which inspires and informs all other rights, from which the latter obtain their raison d'être and must take their lead. Protection against arbitrary deprivation of life must be considered as an imperative norm of international law which means not only that it is binding irrespective of whether or not states have subscribed to international conventions containing guarantees of the right, but also that non-derogability of the right to life has a peremptory character at all times, circumstances and situations'*.

⁷⁵ *S v Makwanyane* (supra).

⁷⁶ per Chaskalson, P. in *S v Makwanyane* (supra) at page 41 at paragraph 95 D-E.

⁷⁷ *S v Tuhadelemi and others* 1969(1) SA 153(A) at 172D-173F, see also Baxter:1984 *Administrative Law* 30.

Thus, when the interim Constitution was enacted it signalled a dramatic change in the system of governance from one based on rule by parliament to a constitutional state in which the rights of individuals are guaranteed by the Constitution.⁷⁸ It also signalled a new dispensation, as it were, where rule by force, either by police force or any member of a civilized society, would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom.

Furthermore, it is interesting to note that the Constitutional Court did not only declare death penalty a cruel, inhuman or degrading punishment but also went on to conclude that the carrying out of the death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it also annihilates human dignity, which is protected under section 10, and elements of arbitrariness are present in its enforcement and it is irremediable.⁷⁹

Consequently, the summary execution of a fleeing suspect by a police officer or private citizen is constitutionally unjustifiable despite the provisions of section 49(2) of the Criminal Procedure Act. Indeed, the life of any human being is inevitably subject to the ultimate vagaries of the due processes of nature and our Constitution does not permit it to be

⁷⁸ per Langa J. in *S v Makwanyane* and another.

⁷⁹ per Chaskalson, P. in *S v Makwanyane* (supra) at page 41 paragraph 95 D-E.

qualified by the unavoidable caprices of the due processes of law.⁸⁰ In the words of Mahomed, J.,⁸¹ life cannot be diminished for an hour, or a day, or "for life". While its enjoyment can be qualified, its existence cannot.

1.5.3 CONSTITUTIONAL ANALYSIS

Under this sub-heading focus will be on the interpretation as well as the limitation clauses of the interim Constitution. A very important dimension introduced by Chapter Three is the strict rule in as far as the application and the interpretation of the provisions of this chapter is concerned. In practice what this means is that with the advent of the justiciable rights courts are least expected to encounter insurmountable interpretive problems.

Surely, the fundamental provisions of the Bill of Rights apply to or rather bound everybody who is within the territorial boundaries of the Republic. It is therefore, an all inclusive chapter. It is for that reason that even state organs are also bound by a bill of rights when exercising governmental authority in performing their functions. Section 7(1) of the interim Constitution refers to legislative and executive organs of state at all levels

⁸⁰ per Sachs, J., in *S v Makwanyane* (supra) held that the issue, of course, is whether inescapable caprice prevents the process from being "due" when the consequences are so drastic.

⁸¹ *S v Makwanyane* (supra).

of government. In terms of the interpretation clause the phrase "organ of state" includes any statutory body or functionary.⁸² Therefore even the law enforcement officials, it is submitted are part and parcel of the organs of state envisaged in section 7(1) simply because any restrictive interpretation of the phrase "organ of state" would conflict with what can be regarded as the very essence of a bill of rights. The bill of rights should directly apply to the performance of all typical state functions that involve the exercise of governmental authority, even when they are performed by private persons and institutions.⁸³

Another section couched in a mandatory language is section 35(1) of the interim Constitution. In terms of this section a court interpreting the chapter on Fundamental Rights, where applicable, is required to 'have regard to public international law applicable to the protection of the rights entrenched in Chapter Three'. The section uses an imperative provision: "A court shall", and this, therefore, leaves me with little doubt that public international law applicable to the protection of life, whether it be regarded as customary international law, will have to be taken into account by South African courts in interpreting the provisions of section 9 of the interim Constitution which entrenches the right of life.

⁸² Section 233(ix) - Afrikaans text (xii).

⁸³ Rautenbach. 1995. *General Provisions of the South African bill of rights*, p.55.

What section 35 is saying is that our courts are most equipped and competent to deal with any infringement of the basic fundamental rights of the individuals as contained in the bill of rights. In other words, even if the courts have some doubts as to their competency of matters involving the transgression of the constitutional rights of the entire citizenry, in terms of section 35, they are empowered to look far beyond the South African legislative boundaries for solutions.

Indeed, it is for that reason that our courts, more specifically the Constitutional Court, when confronted with constitutional conflict involving competing fundamental rights and freedoms, for example the debate on abortion, death penalty, euthanasia etc, reference is always made to a system of values extraneous to the constitutional text itself. It, therefore, comes as no surprise that I am, from time to time, going to refer to the American legal scenario as well as the United Kingdom for more clarity on the subject under discussion in this dissertation.

Therefore, if there seems to be no solution in sight in as far as South African sources are concerned, recourse may be had to foreign precedent which may be fairly instructive. As it will be pointed out later in this discussion that American courts have, actually, succeeded in formulating clear guidelines about when, where, why and how police may use force in effecting an arrest, thus there is no doubt in my mind that there is more

that our courts can learn from the experiences of such foreign jurisdictions.

However, it should always be borne in mind that rights are seldom entrenched in such a way that the protected conduct and interests may never be restricted. The Bill of Rights will generally present how and to what extent organs of state may have limited rights. But at the same time, the capacities derived from an entrenched and justiciable bill of rights to limit rights are not without limits either.⁸⁴ The provisions of a constitution concerning the way and conditions in which rights may be limited determine the effectiveness of the protection of human rights in any state. For this reason these provisions are often the most contentious provisions in a Bill of Rights.⁸⁵ I would also like to believe that South Africa is no exception.

Section 33(1) is arguably the most critical provision in Chapter Three and obviously the one that will fuel the early rounds of litigation on the chapter. As pointed out earlier in this discussion it is trite that no right, whether entrenched or not, can be absolute. That is why section 33(1)

⁸⁴ *Ibid.*

⁸⁵ Castello "Limiting Rights Constitutionally" in O'Reilly (ed) *Human Rights and Constitutional Law* (1992) 177: "As attested by many international instruments and national constitutions, there is widespread ('universal', to use the terminology of the U.N. Declaration of 1948) agreement that these are basic human and fundamental rights (as well as political and social rights) which it is the business of governments to protect and safeguard ... Disagreement arises when the State claims a power to limit their exercise... It will frequently be found that the key issue in disputes on human rights (whether in the courts or in public controversy) is not about the existence of a basic human right or its source but is about the validity of the limitation imposed on its exercise".

explicitly recognizes by providing a method or mechanism for the limitation of the fundamental rights and freedoms in the chapter. That is, section 33 provides a method for the courts to implement when they are called upon to decide the question of when a limitation on a fundamental right, which is entrenched in Chapter Three, will be legitimate and valid.

Only section 33(1) is a general circumscription clause providing for the limitation of all the rights entrenched in Chapter Three and therefore also the right to life. The limitation of any right can be achieved through 'law of general application'⁸⁶ (that is legal rules which generally and not solely on an individual case) provided that:

- (i) the right in question is limited only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality;⁸⁷ and
- (ii) its essential content is not negated.⁸⁸

These subsections introduce a stricter test, which requires that two hurdles have to be jumped before the limitation will be valid. Some

⁸⁶ Du Plessis, L.M. 1994. *"Whither capital punishment and abortion under South Africa's transitional Constitution Act"*. SACJ Vol. 7 no. 2 pp.145-150.

⁸⁷ See 31(1) (a).

⁸⁸ See 33(1) (b).

constitutional law writers⁸⁹ prefer to call it the two-stage approach. Before discussing this two-stage approach in-depth, I would also like to point out that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. I refer to the 'proportionality test' simply because it is an essential requirement of any legitimate limitation of an entrenched right. Again, this is implicit in the provisions of section 33(1).

Furthermore, the fact that different rights have different implications for democracy and, in the case of our constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances would differ from one situation to another. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.

In the balancing process the relevant consideration will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right

⁸⁹ Basson, D. 1995. *South Africa's Interim Constitution Text and Notes*, p.52; see also Cachalia, A. *et al.* and Rautenbach, 1995. *General Provisions of the South African Bill of Rights*, p.98.

is limited and the importance of that purpose to such a society; the extent of the limitations, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.⁹⁰

In practice, the two-stage approach works as follows:

- * The first stage of the enquiry is to determine whether the fundamental right in question has been infringed. The court will accordingly have to define the fundamental right concerned in order to determine its ambit when they are called upon to decide the question of whether the right has been infringed or abrogated. Accordingly, the principles of constitutional interpretation (which are aimed at giving content to the fundamental rights) will play a crucial role in this process. Obviously, the controversial question of when the courts will overstep the line and interfere on the legislative terrain also comes into play during this process of giving content to and defining the fundamental rights. Only if the answer to this first stage of the enquiry is in the affirmative, that is only if the conclusion is that the fundamental right concerned has, indeed, been infringed, does the second stage of the enquiry become operative.

⁹⁰ per Chaskalson, P. in *S v Makwanyane* (supra).

- * The second stage of the enquiry is to determine whether the restriction or limitation (which causes and infringement of the fundamental right concerned) is saved by the provisions of the limitations clause. The limitations clause permits limitations but only if certain prescribed requirements are met, for example that only permissible limitations are those that are consonant with an 'open and democratise society based on freedom and equality'. In other words, only those limitations that are consistent with such values qualify.

It is also important to note that whilst the onus is on the person whose rights are allegedly being infringed during the first stage of the enquiry, the onus is on the party involving the limitations clause during this second stage of the enquiry to show that the requirements for limiting the fundamental right are met.⁹¹

In my view, section 33 permits limitations on rights, not their extinction. The interim Constitution in this sense is certainly different from those that expressly authorise deprivation of life if due process of law is followed, or those that prohibit arbitrary taking of life. The unqualified statement that 'every person has the right to life' in effect outlaws any form of killing, either by the organs of the state or private citizens. Instead of establishing a constitutional framework within which the state may

⁹¹ *op cite note 82 Basson at p.53.*

deprive citizens of their lives, as it could have done, the new interim Constitution commits the state to affirming and protecting life. Because section 33 is not concerned with creating circumstances in which the right of any person may be disregarded altogether, nor with establishing exceptions which qualify the nature of the right itself, or exclude its operation, it cannot, therefore, be invoked as an authorization for any use of deadly force in the exercise of governmental duties.

Neither the infringement of section 9 nor section 7(1) by section 49 of the Criminal Procedure Act, as amended, could be saved by the provisions of section 33 of the interim Constitution. As I am satisfied that the provisions of section 49 do not meet the threshold test of reasonableness, I find it unnecessary to ask whether it is justifiable in the kind of society postulated, namely an open and democratic society based on freedom and equality. In other words, only provisions that are consistent with such values qualify.

1.5.4 WHAT'S THE CONSTITUTIONALITY OF POLICE USE OF DEADLY FORCE?

Predominantly, law enforcement personnel must be impressed with the value of and the need to observe human rights. They must also grasp the nature and scope of their function within the criminal justice system: To

bring suspected offenders to justice, and to treat them as innocent, hard though this may be, until they have been proved and adjudged guilty by the appropriate authorities within the system.

Furthermore, what needs to be emphasized is the fact that it is crystal clear that it is not the duty of the arresting officer to punish an offender or suspected offender. His primary duty is to bring him to justice, **alive**. It is respectfully submitted that the shooting to kill of suspected offenders or those attempting to escape from lawful arrest constitutes an unlawful, unconstitutional act.⁹² It does not, therefore, offend only against a cardinal rule of natural justice or the due process of law that no one may be punished unheard but also against the victim's basic human rights to life.

It should always be borne in mind that non-accession to police violence by the state robs the legal instruments and the law of its potency and gives comfort and solace to habitual violators, e.g. recalcitrant police, who continue to outrage national public opinion with impunity. Accession, on the other hand, will send the opposite signal to the violators: that their conduct and intransigence will no longer be tolerated. It will also be an invaluable service to the cause of the right to life if the state continues to spare an effort to reduce arbitrary killings by law enforcement agents.

⁹² Section 7(1).

Even though police may argue that they derive power to act in a specific manner from the interim Constitution, they, however, still primarily rely on the enabling act, namely Police Act 7 of 1958,⁹³ but what should be clear now is that if their act is repugnant to the spirit, purport and objects of chapter three of the constitution, then our courts will not hesitate to regard that behaviour as being unconstitutional and therefore unlawful. The example that comes to mind is obviously that of police use of deadly force in order to arrest or complete an arrest of a suspect.

To all intents and purposes, police have no general power to use deadly force, or any force at all, except where a statute expressly empowers them to perform a specific function for example in terms of the Internal Security Act⁹⁴ police officers of or above the rank of warrant officer are empowered to use force; including the use of firearms and other weapons, to disperse particular kinds of a gatherings. In short, the power to punish or to hurt is the preserve of the judicial and penal branches of the state. In terms of section 5 of the Police Act 1958⁹⁵ the functions of the South African Police shall be *inter alia*:

- * the preservation of the internal security of the Republic;

⁹³ Despite some changes in the police service but the Police Act still forms an important part of the legislation regulating police activities; see Mufamadi, S., 1995. RSA Review 8:2 pp.10-12 March.

⁹⁴ Section 49 of the Internal Security Act 74 of 1982, as amended.

⁹⁵ Act 7 of 1958, as amended.

- * the maintenance of law and order;
- * the investigation of any offence or alleged offence; and
- * the prevention of crime.

This section does not, in anyway, confer a broad discretion to use force as and when a police officer sees fit. In fact subsection (1) of section 6 of the Police Act provides further that:

'A member of the force shall exercise such powers and perform such duties as are by law conferred or imposed on the police officer or constable, but subject to the terms of such law ...'⁹⁶

Indeed there is no doubt that the police officer fulfils his/her functions and duties in terms of section 5 of the Police Act by exercising his/her statutory power to arrest however the practice of assaulting persons when arresting them is not only a violation of their fundamental human rights but would appear to be punitive enough and thus constituting an attempt to by-pass courts by dealing summarily with a suspect. In interpreting the vital provisions of Chapter Three of the Constitution our courts will be strictly compelled to promote the values which underlie an open and democratic society based on freedom and equality.⁹⁷ Consequently, law enforcement officials who continue to use deadly force in effecting or

⁹⁶ Section 6(1) of the Police Act, 1958, as amended.

⁹⁷ Section 35 of Act 200 of 1993, as amended.

completing an arrest of a suspect should not, therefore, be treated with kids' gloves simply because they are state's functionaries/agents.

Surely the police are expected to perform a vital function, namely to render the public service of law enforcement and in executing that fundamental task they should recognise and respect the democratic controls and constraints within which they operate. As Lustgarten⁹⁸ has correctly pointed out, the extent is a limited one in that the commands of impartiality and like treatment of like situations, and the others reflect the nature of the particular service provided: execution of law as laid down by parliament.

Furthermore, the concept '*democracy*' means that nobody is in power alone, but instead it means that power always has to be shared in a system of checks and balances in such a way that no group/organisation or person has the opportunity to suppress others for his/her own interest.⁹⁹ To all intents and purposes this concept '*democracy*' always has to be in the heads and hearts of all police officers.¹⁰⁰ There is, in fact, no doubt that they often have to work in situations where the sophisticated ideal of democracy is absent, and violence is present.

⁹⁸ Lustgarten, L. 1986. *The Governance of Police*. London 170 at 171.

⁹⁹ Mufamadi, S. 1995. *RSA Review* 8:2 pp.10-21 March.

¹⁰⁰ *Ibid.*

However, they have to try to balance their approach between the concept of democracy on the one hand and the use of deadly force on the other hand.

Finally, police accountability is crucial to the democratic process because without adequate accountability measures, the likelihood that police may be used as an arm of oppression by the state is great, or they may even behave unconstitutionally and illegally for their own ends.

CHAPTER TWO: A COMPARATIVE STUDY

2.1 THE LEGAL POSITION IN THE UNITED STATES OF AMERICA

Until recently there has been no uniformity and clarity regarding the restraint on the use of deadly force in the United States of America. This has been due to the fact that there were a variety of State and Federal laws dealing with the right of the law enforcement officials to use deadly force in the prevention of crime or apprehension of suspects.

Notwithstanding the fact that the States share the same common law, each State enacted its own statutes governing the law enforcement agencies under its jurisdiction,¹ for example the New York Penal Law. In terms of the latter State's criminal law police officers may use deadly force in effecting and arrest or preventing and escape when they *reasonably believe* that:

- * the suspect has committed a felony or attempted to commit a felony involving the use of threatened imminent use of any physical force against a person;

- * the crime committed is kidnapping, arson, escape or burglary in the

¹ Lesansky, H. 1982. *'Stop-Or I'll Shoot: The Use of Deadly force by law enforcement officials*, p.23-27.

first degree;

- * the force is necessary to prevent or terminate the burglary of a dwelling or occupied building in which they are performing official duties;
- * the fleeing suspect is armed with a deadly weapon or firearm regardless of the felony committed;
- * irrespective of the offence, it is necessary to defend themselves or others from the use or imminent use of deadly physical force;
- * to prevent the escape of a prisoner from a detention facility or while in transit to a detention facility.

Thus, what this piece of legislation actually provides for is that the officer is required to use only the force reasonably believed to be *'necessary to effect an arrest or prevent escape from custody'* and even when justified to use deadly force, he/she must not engage in reckless conduct ... amounting to an offence against or with respect to innocent persons whom he/she is seeking to arrest or retain in custody. However, another crucial issue to consider when discussing the American legal position on the police use of deadly force is the fact that sometimes the use of excessive force

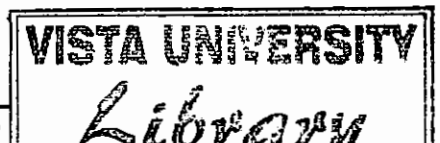
by the law enforcement officials has the effect of converting '*a state offence*' to '*an offence of constitutional dimension*',² which is basically what South Africa is about to witness. That is, with the advent of the Bill of Rights in South Africa, the causing of harm or death of another individual will not only be criminally or delictually wrong but also constitutionally unacceptable because such conduct will constitute a violation of the victim's basic human rights.

In *Cook V City of New York*³ it was held that in determining whether the use of deadly physical force is justified under the circumstances the '*reasonable belief*' required by law is the subjective belief of the actor and not the objective belief of the '*reasonably prudent person*'. In other words, the actor's state of mind is the crucial enquiry when a claim of justification is raised. Therefore, the jury must consider the defendant's subjective belief as to the imminence and gravity of the danger and whether the belief was reasonable.

Again based on the ruling in Cook's case, courts have upheld the police use of deadly force as justifiable under circumstances especially where there was a need for emergency measures to protect either the police officers or others. The facts of the case *in casu* were, police transported an

² *US v Delorme*. 457 F 2d/2 (2 Sept. 1981).

³ 82 A.D. 2d 72 (2d Dept. 1981).



unsuccessful suicide to the hospital where this patient walked naked from a treatment room, ran into a wall and then began swinging a laundry cart at a police officer. The cart struck the police officer and knocked him down. When the victim refused to stop, the officer concerned shot and killed him. The court concluded that the officer had a duty under the circumstances to arrest or subdue Cook by any means possible.

Consequent to this judgement another Appeal Court decision on the police use of deadly physical force followed, where it was held that the police authority to use deadly physical force is limited to circumstances where the police officer is acting in an official capacity.⁴ However, the position has now received some uniformity and clarity following the recent Supreme Court ruling in the matter of *Tennessee V Garner*.⁵ In this case a father, whose unarmed son was shot by a police officer as the son was fleeing from the burglary of an unoccupied house, brought a wrongful death action under the Federal Civil Rights Statute against the police officer who fired the shot. The Supreme Court, with three judges dissenting, held that deadly force may be used only where it is necessary to prevent the escape of a felon and the officer has *probable cause to believe* that the suspect poses a significant threat of death or serious physical injury to the officer or others. The court held that the Tennessee Statute, under the authority

⁴ *People V Purcell* A.D. 2d, 479 N.Y.S. 2d 768 (3rd Dept. 1984).

⁵ 471 US 1 (1984).

of which the police officer fired the fatal shot, was unconstitutional in so far as it authorised use of deadly force against an apparently unarmed, non-dangerous, fleeing suspect.

It should, however, be noted that the Tennessee Law forbade the use of deadly force in the arrest of a misdemeanour suspect, and that at the time of the *Garner* ruling many police jurisdictions in the United States of America had already enacted guidelines or policy procedures which prevented the use of deadly force where there was no attendant danger to life or limb of the police officer or another.

Therefore, the police officers may not use force carelessly or unnecessarily wantonly. It was, in fact, common cause in the *Garner*⁶ case that the suspect was young, slight of build, unarmed, and posed no threat to the officer or to any one else. The court reasoned that a mere suspicion that the suspect was a burglar could not of itself automatically justify the use of deadly force to effect his apprehension. Consequently, the ruling constituted a significant advance on the Common Law rule which allowed the use of whatever force was necessary to effect the arrest of a '*fleeing felon*'. The appellant had argued that the law was constitutional in that it was consistent with the common-law rules. The Supreme Court held on the contrary that:

⁶ *Ibid.*

***'changes in the legal and technological context meant that the rule is distorted almost beyond recognition when literally applied'*⁷**

The court noted that whereas felonies were formerly capital crimes few are now, and many crimes now classified as misdemeanours were non-existent at Common Law. Despite the fact that the distinction between the two is often arbitrary, the court also pointed out that the common-law rule was developed at a time when weapons were rudimentary. In dealing with the argument that the ruling would render law enforcement impossible, the court stated that there was no indication that holding a police practice, such as that authorised by the statute, unreasonable would severely hamper effective law enforcement. The judgment produced an outcry from the far right in the United States of America; it was criticized on the basis that it left many unanswered questions regarding precisely what deadly force statutes must contain to be constitutional. However, at the time of the ruling, many states had already enacted restrictive limitations on the use of deadly force and in other states police departments had already adopted policy guidelines which matched or improved on the *Tennessee* ruling.

Notwithstanding the fact that the South African Constitutional Court has not yet been called upon to pronounce on the constitutionality of the Criminal Procedure Act provision⁸ which authorises the police use of deadly

⁷ *Ibid.*

⁸ sec 49(1) of Act 51 of 1977, as amended.

force in order to effect or complete an arrest, but certainly both our legislature and judiciary stand to learn and benefit a lot from this American Supreme Court milestone decision. Finally, there is no doubt in my mind that the law-abiding, peace-loving and God fearing South African can no longer afford to sit back and watch helplessly innocent citizens being terrified, harassed or even killed by the undisciplined, unreasonable and, sometimes irresponsible law enforcement officials, who subsequently can plead justifiable homicide⁹ as defence and then go unpunished.

2.2 THE USE OF DEADLY FORCE IN BRITAIN AND NORTHERN IRELAND

2.2.1 THE BRITISH LEGAL SITUATION

In the United Kingdom a law enforcement official may justify his use of deadly force in self-defence or in the apprehension of a suspect or a person *'unlawfully at large'*.¹⁰ These defences originated in the Common Law but have, with the exception of the justification of self-defence, been superseded by section 3(1) of its Northern Ireland equivalent, the Criminal Law Act (Northern Ireland) 1967, which in identical terms provide that:

'A person may use such force as is reasonable in the

⁹ Sec 49(2) of Act 51 of 1977, as amended.

¹⁰ R.J. Spjut *"The official use of Deadly Force by Security Forces against suspected terrorists, some lessons from Northern Ireland"*. 1986 *Public Law* 38 at 39.

*circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large*¹¹

This section replaced the tortuous reasoning of the Common Law dealing with the arrest of suspects which sought, as in the United States, to distinguish between the use of deadly force against felons and those suspected of misdemeanours. However, it is not clear that this provision has superseded the common-law justification of self-defence. The Common Law allows persons to *use reasonable force* in defence of themselves, and, in certain circumstances, in defence of another person.

Although in the Common Law the person relying on the defence is normally obliged to *'retreat to the wall'* before killing an aggressor, the law does not require a policeman to comply with this obligation and instead expects that he will actively intervene.¹² Thus, as in South Africa, while the police officers' entitlement to use deadly force is purportedly the same as that of private citizens, the law fails to take into account that law enforcement officials are more often than not, well-equipped, as well as inclined by virtue of their training, to use lethal force.

Finally, the British law draws no distinction between the use of deadly force

¹¹ Section 3(1) of the Criminal Law Act (Northern Ireland) 1967.

¹² Spjut *op cit* note 10 at 41.

and other methods. The fact that deadly force is merely a difference in degree rather than in kind is, in itself, the most obvious deficiency of the law.¹³ But it also reflects a general unwillingness on the part of the legislature and the judiciary to lay down specific restrictive guidelines for law enforcement officials.

2.2.2 THE NORTHERN IRELAND LEGAL POSITION

As stated previously in this discussion that the provision of section 3(1) of the Criminal Law Act (Northern Ireland) 1967 regulates and authorises the use of deadly force only if it is *reasonable in the circumstances* in order to prevent a crime or effect a lawful arrest of a suspect who is unlawfully at large. The substance of the criticism of this provision is that neither the law nor the judicial interpretation of it provides any '*comprehensive guidelines; let alone definitions of the precise circumstances, as to when use of deadly force is justifiable*'.¹⁴ This problem is further compounded because they can merely requires a subjective belief that the jurisdictional grounds for the use of force were present rather than the objective existence of a necessity to use force. All what the law enforcement official relying on the justification must establish is that he/she had:

¹³ See the commentary on sec 3 of the Criminal Law Act of 1967 in *Ninth Report of the Standing Advisory Commission on Human Rights Annual Report 1982-83* at 21-23, 36-41 and *Ex Parte Die Minister van Justisie: In re S V Van Wyk* 1967(1) SA 488(A).

¹⁴ *Ibid.*

- * a reasonably held and honest belief;
- * that the use of force was necessary to prevent the crime or effect the arrest; and
- * the evil which would follow from the failure to prevent the crime or effect the arrest was so great that a reasonable person might think him/herself justified in taking another person's life in order to avert that evil.¹⁵

But legal commentators have stated that the reasonableness requirement encapsulates the three principles of proportionality, immediately (i.e. the force must be directed against an immediate threat and not a future occurrence), and non-excessiveness (i.e. the employment) of the least violent form of force.¹⁶ Therefore, the question whether the use of force was reasonable in the circumstances depends entirely on the opinion of the tribunal of fact which tries this issue.

In order to give greater clarity to law enforcement officials in Northern Ireland, members of the security force are provided with guidelines on when

¹⁵ See Ninth Report of the Standing Advisory Commission on Human Rights Annual Report for 1982-83 at 38.

¹⁶ Shoot to Kill? International Lawyers' Inquiry into the Lethal Use of Firearms by the Security Forces in Northern Ireland (chairman: Kadar Asmal). 1985 14-24 (hereafter referred to as '*Shoot to Kill?*').

they may or may not use lethal force, especially firearms. These standards have been dubbed the '*yellow card*' instructions which contain a minimum requirement of safeguards against arbitrary use of deadly force. Just how minimum these standards are can be seen from the fact that critics have alleged that the yellow card instructions are not inconsistent with a '*Shoot to Kill*' policy.¹⁷ For example, the yellow card states:

'If you have to fire:

**** fire only aimed shots;***

**** do not fire more rounds than are absolutely necessary to achieve your aim'.¹⁸***

There is indeed, no doubt that this section as it stands means that security force members are forbidden from shooting to wound or from firing warning shots. The criticism levelled against the firing of warning shots is that hooligans would rapidly note and take advantage of the regular firing of shots meant to pass harmlessly by and thus, the carrying of firearms would cease to deter.¹⁹

Another significant development to take note of when discussing the

¹⁷ See R.J. Spjut *op cit* note 10 at 55-7.

¹⁸ Paragraph 3 of Army Code 70771 instructions by the Director of Operations for Opening Fire in Northern Ireland (1972) and paragraph 6 of Instructions for Opening Fire in Northern Ireland (1980) (The Yellow Card).

¹⁹ (Lord Widgery Report) HC220 (1972) para 93, The Report of the Tribunal appointed to enquire into the events on Sunday 30, January 1972 which led to loss of life in connection with the procession in Londonderry on that day.

Northern Ireland legal position with regard to the police use of deadly force is the fact that all criminal cases deemed to be connected with the then civil conflict were tried by '*diplock courts*', that is, single-judge courts without a jury.²⁰ These courts were established following the recommendations of the report of the commission to consider legal procedures to deal with terrorist activities in Northern Ireland,²¹ which found that jury members may be subjected to too much pressure and accordingly recommended the abolition of trial by jury in security matters in Northern Ireland.

The recent application of the law in Northern Ireland has seen the principles of proportionality, minimum force and immediacy considerably watered down by considerations which purport to be factual findings on the '*circumstances*' but may reflect the opinions of judicial officers on what licence the '*public*' should accord police to kill.²² A typical example at hand here is the case of *R V Jones*²³ as well as that of *McNaughton*.²⁴ In the latter case, Lord Chief Justice Lowry stated that the yellow card was more restrictive than the ordinary law intended. He went further by allowing soldiers to kill on instinct:

²⁰ See *Shoot to Kill* note 16 at 114-24.

²¹ (Diplock Report) Cmnd 5185 (1972).

²² See *Spjut op cit* note 10 at 57.

²³ (1975) NIJB; and see also *Attorney-General for Northern Ireland's Reference* (No 1 of 1975) 1977 AC 105.

²⁴ *R v McNaughton*, (1975) 5 NIJB.

'Once the accused made up his mind to fire, his training would dispose him to fire at the centre of the target without having to make a conscious decision whether his intention was to kill Walsh ... His reaction, as I find, was instinctive, and, to quote an authority in a similar type of case, in these circumstances one does not weigh the conduct of the accused in jeweller's scales'.²⁵

In the *Jones* case MacDermontt J. went further by dispensing with the cautions required by the yellow card:

'He [the accused] might have fired to wound. He might have challenged a third time as the yellow card specified. "If he had and the man had gone on and been shot at fifty meters would that have been justifiable, whereas when he shot after two challenges at fifty metres it is not? I doubt if reasonableness can depend upon such knife-edged considerations"'.²⁶

MacDermott, J. went on to note that soldiers were not trained to fire warning shots and, accordingly, would not have been expected to consider such an option.

In these cases, the soldier's or police officer's mistaken belief that there is no alternative to shooting to kill or his inability to assess alternatives because of inadequate training allows him to kill without considering the possibility of firing a shot to warn or wound. These two decisions would appear to allow security officers the right to use deadly force, without

²⁵ At 14 of the unreported judgement.

²⁶ At 23 of the unreported judgement.

considering the alternatives, in a wide variety of circumstances in which neither the officer himself nor others are at risk. More than that, it makes the law enforcer responsible, not to instructions, but to instinctual responses. The fundamental question remains, how can one ever assert reason over instinct.

As a matter of fact a review of recent cases in Britain and Northern Ireland indicates that the use of lethal force by police officers is considered a very serious issue. Against this background investigations into the use of firearms by law enforcement officials seem, by South African standards, frequent. In addition, training of, and guidelines issued to, members of the police or security forces are evidence of an attempt to reduce the shooting and killing of civilians.

Consequently, these courts have actually perpetuated the vacuity of the phrase '*reasonable circumstances*' by undercutting the internationally accepted requirements of necessity, minimum force and proportionality, and, further, have dismissed acceptable alternatives to the use of deadly force. Thus, much of the criticism of the application and interpretation of the British law governing the use of deadly force, particularly in Northern Ireland, it is respectfully submitted that it is also applicable to South African law. As Prof. Haysom²⁷ has correctly pointed out that it would be

²⁷ 1987 South African Journal on Human Rights vol. 1 pp.8-19.

misguided to look to the British law to cure defects in the analogous South African provisions. Instead, more would be gained by taking note of the deficiencies in the British legal regime.

2.3 THE ROLE OF LAW IN A CHANGING SOCIETY

The fact that law is limited in its power to influence the democratic process does not mean that law cannot assist in promoting democratic conditions. By the same token, we should guard against over-burdening our legal system with an obligation to transform the social and economic terrain of South Africa. But the development of a responsive legal system will most certainly assist in nurturing a fledging civil society, the growth and resilience of which holds the long-term key to the attainment of the objectives of the transitional constitution - openness, democracy, freedom and equality.

In a democratic society, most people understand by 'rule of law' a state of affairs in which there are legal barriers to governmental arbitrariness, and legal safeguards for the protection of the individual. According to Friedman²⁸ a democratic ideal of justice must rest on the three foundations of (i) equality, (ii) liberty and (iii) ultimate control of government by the people. It is, however, far from easy to give these concepts a specific meaning.

²⁸ Friedman, W.G. *Law in a Changing Society* (1972) p.500 at 502.

Although democracy is certainly based on the ideal of equality, but, in practical terms, no democratic state has seriously attempted to translate this ideal into the absolute quality of all.²⁹ We can still not formulate the principle of equality in more specific terms than Aristotelle, who said that justice meant the equal treatment of those who are equal before the law. Thus, in terms of a democratic ideal of justice, liberty means certain rights of personal freedom which must be secure from interference by government, for example they include legal protection from arbitrary arrest, use of deadly force etc.

Consequently, the principle of control by the people means that law must ultimately be the responsibility of the elected representatives of the people. This is, indeed, a vital principle but it can say little about the technique by which the modern legislator can discharge this function. It is, therefore, imperative that the law should promote a democratic process rather than converting judicial officers into modern-day planners.

With the advent of the justiciable bill of rights, South Africa's legal system surely should undergo significant structural change. Major structural changes are needed to bring our legal system apace with the democratic forces that are gaining momentum and shaping South Africa's future. As the courts are both the interpreters and enforcers, and police are the

²⁹ Friedman, L.M. *Law and Society - An Introduction*, Prentice Hall (1977).

enforcers of the new substantive legal regime as well as the justiciable bill of rights, it is particularly critical that they be equipped to do so fairly and well.

Change is a fact of life. Although legislative reform and judicial innovation are not the only means by which a legal system can be improved and kept abreast with the changing times,³⁰ the policies and practices followed in the field of law enforcement may also have a marked impact on the legal development of a society.

As argued earlier on that comparative scholarship and the experience of other social systems can provide indispensable guidance, if critically applied, it is further submitted that the emphasis should shift to an understanding of the reasons for the development of the form and content of the legal system, and to the way in which it could be adapted to serve the needs of a changed political environment. Finally, the law has the potential to fulfil a vital power-inhibiting and freedom-protecting role in social relations.

³⁰ Bodenheimer, E. *Power, Law and Society*, (1972) 114.

CHAPTER THREE: ANALYSIS

3.1 DILEMMAS OF POLICE DEADLY FORCE

Indeed, a gun is not designed to fend off bullets but is only effective when fired and when it is fired at someone is likely to prove fatal. It is, therefore, against this background that we have to consider a series of complex thought-provoking questions triggered off by this discussion in as far as the extent of the impact of the police use of deadly force on the community is concerned. For example, how do arresters understand their decision to use deadly force?; what is the long-term impact of the use of deadly force upon their lives?; how do perceptions of community members of such incidents differ from those of the arrester?; what perception to further disorder and violence?; how are the rights of citizens and police officers balanced in a manner consistent with ideals of fairness implicit in a democratic society?; what risks should constitute a sufficient threat to warrant the use of deadly force by a police officer or private person?; how can policies be developed to protect simultaneously the safety of police officers and of citizens who are threatened by criminal activities?; and what policies might be encouraged to reduce the chance of injury or death to both law enforcement officials and citizen?

Surely all these questions stem from a concern with citizen rights and are

about police modes of operation, the police exercise of their discretion as well as the effect of their actions. Probably, the answers to these fundamental questions may be found in the memorable words of Reinhard Bendix¹, who argued: *"The basic and anguishing dilemma of form and substance in law can be alleviated, but never resolved, for the structure of legal domination retains its distinguishing features only as long as this dilemma is perpetual"*. This dilemma is most clearly manifested in law enforcement officials, where both sets of demands make forceful normative claims upon police conduct.

First I wish to suggest that the dilemma of the police in democratic society arises out of the conflict between the extent of initiative contemplated by non-totalitarian norms of work and restraints upon police demanded by the rule of law. Secondly I want us to consider the meaning of police professionalization; pointing out its limitations according to the idea of managerial efficiency. Finally, we discuss how the policeman's conception of himself as a craftsman is rooted in community expectations, and how the ideology of police professionalization is linked to these expectations. Thus, we focus upon the relation between the policeman's conception of his work and his capacity to contribute to the development of a society based upon the rule of law as its master ideal.

¹ Bendix, R. 1964. *Nation-Building and Citizenship*. New York: John Wiley, p.112.

3.2 OCCUPATIONAL ENVIRONMENT AND THE RULE OF LAW

There is almost five features of the policeman's occupational environment that weaken the conception of the rule of law as a primary objective of police conduct. One is the social psychology of police work, that is, the relation between occupational environment, working personality, and the rule of law. Second is the policeman's stake in maintaining his position of authority, especially his interest in bolstering accepted patterns of enforcement. Third is police socialization, especially as it influences the policeman's administrative bias. Usually, a related factor is the pressure put upon individual policeman to 'produce', to be efficient rather than legal when the two norms are in conflict. Finally, there is the policeman's opportunity to behave inconsistently with the rule of law as a result of the low visibility of much of his conduct.

Although it is difficult to weigh the relative import of these factors, they all seem analytically to be joined to the conception of policeman as craftsman rather than as legal actor, as a skilled worker rather than as a civil servant obliged to subscribe to the rule of law. The significance of the conception of the policeman as a craftsman derives from the differences in ideology of work and authority in totalitarian and non-totalitarian societies. In brief, the managerial ideology of non-totalitarian society maximizes the exercise of discretion by subordinates, while

totalitarian society minimizes innovation by working officials.

This dilemma of democratic theory manifests itself in every aspect of the policeman's work, as evidenced by the findings of this study. In explaining the development of the policeman's 'working personality', the dangerous and authoritative elements of police work were emphasized. The combination of these elements undermines attachment to the rule of law in the context of a 'constant' pressure to produce. Under such pressure, the variables of danger and authority tend to alienate the policeman from the general public, and at the same time to heighten his perception of symbols pretending danger to him and to the community. Under the same pressure to produce, the policeman not only perceives possible criminality according to the symbolic status of the suspect; he also develops a stake in organized patterns of enforcement. Internal controls over policeman reinforce the importance of administrative and craft values over civil libertarian values. These controls are more likely to emphasize efficiency as a goal rather than legality, or more precisely, legality as a means to the end of efficiency.

The dilemma of democratic society requiring the police to maintain order and at the same time to be accountable to the rule of law is thus further complicated. Not only is the rule of law often incompatible with the maintenance of order but the principles by which police are governed by

the rule of law in a democratic society may be antagonistic to the ideology of worker initiative associated with a non-totalitarian philosophy of work. In the same society, the ideal of legality rejects discretionary innovation by police, while the ideal of worker freedom and autonomy encourages such initiative. In addition, bureaucratic rules are seen in a democracy as 'enabling' regulations, while the regulations deriving from the rule of law are intended to constrain the conduct of officials.

3.3 PROFESSIONALISM AND POLICE CONDUCT

The idea of professionalism is often invoked as the solution to the conflict between the policeman's task of maintaining order and his accountability of the rule of law. There are, however, costs in developing a professional code based upon the model of administrative efficiency. Such a conception of professionalism not only fails to bridge the gap between the maintenance of order and the rule of law; in addition it comes to serve as an ideology undermining the capacity of police to be accountable to the rule of law.

As a system of organization, bureaucracy can hope to achieve efficiency only by allowing officials to initiate their own means for solving specific problems that interfere with their capacity to achieve productive results.

It is certainly true, as Bendix² asserts, that a belief in legality means first and foremost that certain formal procedures must be obeyed if the enactment or execution of a law is to be considered legal. At the same time, while legality may be seen as comprising a set of unchanging ideals, it may also be seen as working normative system which develops in response to official conduct.

The structure of authoritative regulations is such that legal superiors are not part of the same organisation as officials and are expected to be 'insensitive' to 'productive capacity' as contrasted with legality. Thus, for example, a body of case law has been emerging that attempts to define the conditions and limits of the use of informants. Legality, therefore, develops as the other side of the coin of official innovation. To the extent that police organisations operate mainly on grounds of administrative efficiency, the development of the rule of law is frustrated. Therefore, a conception of professionalism based mainly of satisfying the demands of administrative efficiency also hampers the capacity of the rule of law to develop.

If this is to change what must occur is a significant alteration in the ideology of police, so that police 'professionalization' rests on the values of a democratic legal order, rather than on technological proficiency. No

² *Ibid.*

thoughtful person can believe that such a transformation is easily achieved.

3.4 THE COMMUNITY AND POLICE CONDUCT

If the police are ever to develop a conception of legal as opposed to managerial professionalism, they will do so only if the surrounding community demands compliance with the rule of law by rewarding police for such compliance, instead of looking to the police as an institution solely responsible for controlling criminality. In practice, however, the reverse has been true. The police function in a milieu tending to support, normatively and substantively, the idea of administrative efficiency that has become the hallmark of police professionalism.

Legality, as expressed by both the criminal courts community with which the police have direct contact, and the political community responsible for the working conditions and prerogatives of police, is a weak ideal. An 'order' perspective based upon managerial efficiency also tends to be supported by the civic community. The so-called power structure of the community, for example, often stresses to the police the importance of 'keeping the streets clear of crime ...' The emphasis on the maintenance of order is also typically expressed by the political community controlling the significant rewards for the police - money, promotions, etc.

In contrast to that of political authority, the power of courts over the police is limited. In practice, the greatest authority of judges is to deny the merit of the prosecution. Thus, by comparison to the direct sanctions held by political authority, the judiciary has highly restricted power to modify the police behaviour. Not only do courts lack direct sanctions over the police but there are also powerful political forces that, by their open opposition to the judiciary, suggest an alternative frame of reference to the police.

However, by this time the police have themselves become so much a part of this same frame of reference that it is often difficult to determine whether it is the political figure who urges 'stricter law endorsement' on the policeman, or the law enforcement spokesman who urges the press and the politician to support his demands against law 'coddling criminals'. Hence, a need for community policing rather than a police force which serves to promote and protect the adverse interests of the government of the day at the expense of the entire citizenry.

Generally speaking, law enforcement officials, more often than not, face a daunting task of having to determine and decide what to do? When and how to do it? Especially in the event of them having to contend with the presence/existence of a possibility that, if they fire in error, they may erroneously kill a human being or if they hold their fire when imminent

danger exists they or other people could be saved by shooting or a human life will be lost unnecessarily. Scharf and Binder³ have argued that a police officer's decision-making must be considered in terms of the criteria of reasonableness rather than of correctness of outcome.

Consequently, the use of deadly force must be evaluated by the extent to which the shooting decision is reasonable, judged not from the point of view of outcome but rather evaluated on the basis of the facts known at the moment of decision. For example, if the surgeon believed, given his tests of the patient, that his needed operation had 90 percent chance of success (i.e. the patient would be significantly helped by the surgery) and only a 10 percent chance of lethal outcome for the patient, then his decision to operate might be considered reasonable, despite the outcome.

The following statistics is not important only for political and moral reasons but also for immediate practical reasons. Thus, many communities have been literally torn asunder following a perceived abuse of police force or power.

3.5 STATISTICS

Under this sub-heading we are going to consider the statistical data of two

³ Scharf, P. and Binder, A. 1987. *The Badge and the Bullet: Police use of Deadly Force*, at 23.

distinct historical periods that are symbolic of South Africa's political scenario. On the one hand we have the statistics on the occurrences during the apartheid era, while on the other hand that of the post-apartheid era. The reason for this distinction is quite simple: during the apartheid period South Africa was a complete police state with an illegitimate government, and in the post-apartheid era we witnessed the birth of a democratic state with emphasis now being on community policing. In order to avoid unnecessary contradictions, it is, therefore, only fair not to treat the events during the aforesaid periods alike.

3.5.1 DEATHS AND INJURIES DUE TO POLICE ACTION DURING THE APARTHEID ERA

In reviewing the activities of the police during 1985, Minister Le Grange⁴ stated in parliament that illegal action by security force members would not be condoned. On the contrary, he claimed, stern action was taken against such members. However, it should always be borne in mind that the minister's position on police misconduct is the foundation upon which rests the standard reply of the police division of public relations to public allegations of misbehaviour by policemen, namely that complainants should submit affidavits to the police themselves, who will then investigate the allegations. Such investigation is deemed to render independent inquiry

⁴ *Cape Times*, 19 February 1986.

unnecessary.

The position of the victims/complainants should be viewed against the background of police violence in general in order to gain a clearer perspective. In this regard table 3.1 provides statistics of the number of people killed and injured by the police, as well as convictions of police, and an indication of subsequent action taken against convicted policemen, on an annual basis between the years 1970 and 1984. Police convictions in table 3.1 refer to total figures of those convicted of (i) common assault (ii) assault with intent to do grievous bodily harm (iii) culpable homicide and (iv) murder.

TABLE 3.1
ANNUAL FIGURES OF THOSE KILLED AND WOUNDED BY POLICE,
CONVICTED POLICE AND DISCHARGED POLICE 1970-1984

YEAR	PERSONS KILLED BY POLICE	PERSONS WOUNDED BY POLICE	NUMBER OF POLICE CONVICTIONS	CONVICTED WITH PREVIOUS CONVICTIONS	NUMBER OF POLICE DISCHARGED	
					WITH PREVIOUS CONVICTIONS	WITHOUT PREVIOUS CONVICTIONS
1970	54	148	230	27	25 Total	
1971	54	223	214	30	na	na
1972	84	289	205	27	13	43
1973	117	352	183	15	5	12
1974	102	354	208	13	10 Total	
1975	134	382	183	14	18 Total	
1976	202	439	236	8	2	16
1977	148	403	250	24	5	18
1978	203	514	283	19	9	8
1979	163	485	229	19	6	14
1980	178	424	na	na	na	na
1981	176	548	82*	1*	1*	10
1982	198	555	245	25	25	16
1983	211	388	246	31	31	28
1984**	287	937	251	30	30	23
1985	788	2 671	282	44	44	43

Source : Annual surveys of the South African Institute of Race Relations, and questions in parliament
na : Not available
* : Figures refer only to second half of the year 1981
** : 1978 and 1977 figures exclude those killed and wounded during civil unrest, while 1984 figures include civil unrest

One may note that the annual rate of police killing in South Africa increased substantially between 1970 and 1984. If one examines the data in terms of five year cycles, the mean South African death rates for the three cycles under scrutiny are: 1970-74 = 84, 2; 1975-79 = 170, 2; 1980-84 = 210. From the first to the third historical cycle this represents an increase in mean annual death rate of approximately 250 per cent.

Certainly both the size of the police force and size of the population have increased over this period, but not at the same rate as deaths by police action. For example, if one takes the actual total police complement at mid-1970-74 conservatively as 26 000,⁵ and at mid-1980-84 as about 37 000,⁶ an increase of 142 per cent in the size of the force is revealed. This is substantially lower than the increase of 250 per cent in the number of deaths caused by the police. Population figures also do not count for the increases: the total South African population in 1972 was 23 million, while official estimates for mid-1983 were about 26,1 million.⁷ This represents a population increase of 114 per cent. There is therefore no

⁵ Albie Sachs gives the authorised police total in 1972 as 34 500. Since that actual police complement is typically lower than the authorised police complement, we charitably take the actual figure to be in the region of 26 000. The real figure is likely to be higher; if so that would reduce the rate of police force increase, thus making the death rate increases comparatively more serious. See A. Sachs 'The Instruments of Domination in South Africa' in L. Thompson and J. Butler (eds) *Changes in Contemporary South Africa*. (1975) 233.

⁶ Official actual police complement for 1982 was 37 126. During the course of 1982 the nett gain in police personnel was 2 808 over 1981 figures. See (1983) 37 Race Relations Survey 532.

⁷ (1973) 27 Race Relations Survey.

doubt that the annual rate of deaths due to police action has increased as a greater rate than either the population or the police force. However, it is surprising that these figures have not attracted a greater amount of public criticism.

More pertinent to our argument here, however, are the data for police convictions (see Table 3.1) for violent crime, from common assault to more serious crimes. The annual figures, which have not varied much over the years and are usually between 200 and 250 convictions, paint a grim picture of police violence in the ordinary business of policing criminal activities.

What is done by the authorities with regard to this serious situation? Official figures indicate that on average, only about 10 per cent of those police convicted of violent crimes are eventually discharged from the force.

Furthermore, it is clear that only a minority of those with previous convictions are subsequently discharged. It is noteworthy, in addition, that where details are given, it is apparent that the majority of those with previous convictions hold them for similar violent crimes. These data point to the obvious conclusion that the police are not too diligent in policing themselves nor in dealing in any serious fashion with their own

infringements of the law. It leads to the further inference that police violence is condoned to a disquieting extent and these data refer, of course, to the far more publicly visible area of ordinary police activity, in contrast to areas of detention and security legislation which are largely hidden from public view and the protection of the courts.

There are numerous examples of treatment being relatively light even when policemen are convicted. One example relating to a detainee's case, illustrates this. On 17 March 1985 two members of the Black Sash witnessed two policemen sjambokking a shackled Mr. N. Kona in a Uitenhage police station.⁸ The two policemen concerned, Detective Constables A. Lubengo and G. Simanga, were subsequently convicted of assault and fines of R150 were imposed. Mrs. Helen Suzman, a member of parliament representing a non defunct Progressive Federal Party, described these sentences as very lenient. In a reply in parliament, Minister of Law and Order, Mr. Le Grange said the policemen had been suspended from duty, but that the board of inquiry set up to establish their fitness to remain in the police force had not yet concluded its investigation.⁹ One may note here the distinction between being suspended and being discharged.

⁸ (November 1985) 28 *SASH* 10.

⁹ *Cape Times*, 12 February 1986.

It is clear that in many cases of convictions, police may be temporarily suspended (it is not clear whether suspension means without pay, nor whether further disciplinary steps are taken during a period of suspension) only to be reinstated and transferred to other sections of the force or geographical regions.

An examination of the amounts paid by the Minister of Law and Order to members of the public as compensation for injuries resulting from police assaults confirms the view that few restraints are placed on the police. Table 3.2 provides these figures in summary form for years when such data were clearly given. While the majority of payments are made as a result of out of court settlements rather than pursuant to successfully contested court actions, it is clear that if there were no evidence of assault, settlements would hardly be effected. While civil actions regarding assaults, both successfully contested in court and settled out of court, have been fairly numerous, this is not the case with respect to attempts to institute criminal proceedings in relation to the assault of detainees in particular.

TABLE 3.2: SETTLEMENTS FOR ASSAULT BY POLICE

YEAR	SUCCESSFUL OR SETTLED ACTIONS	TOTAL PAID IN SETTLEMENT IN RANDS*
1969	14	5 845
1970	4	990
1971	14	10 500
1972	43	23 076
1976	39	33 667
1977	69	87 185
1978	78	178 725
1979	100	252 626
1982	190	418 914
1983	166	4 492 234

Source : Annual surveys of the South African Institute of Race Relations

* Includes both successful court actions and out of court settlements.

The figures in Table 3.3 provides figures of a racial breakdown of adults and juveniles killed and wounded by police in the execution of their duties in 1986, 87 until 1989. It is also important to note that the figures in parentheses denote those killed while allegedly attempting to escape arrest.¹⁰ According to the then Minister of Law and Order, Mr. Adrian Vlok the figures presented in Table 3.3 include deaths and injuries in respect of unrest-related incidents and no separate figures on such

¹⁰ See: *Race Relations Annual Survey*, 1986 part 2 at 862.

incidents existed. It, therefore, come as no surprise that at all times figures made public by the minister were inconsistent with those given by some independent commissions of enquiry.¹¹

TABLE 3.3: A RACIAL BREAKDOWN OF ADULTS AND JUVENILES KILLED AND WOUNDED BY POLICE

	KILLED		WOUNDED	
	ADULTS	JUVENILES	ADULTS	JUVENILES
BLACKS	863 (371)	126 (21)	1 882 (817)	485 (76)
COLOUREDS	84 (32)	11 (7)	118 (115)	51 (76)
ASIANS	6 (2)	0 (0)	15 (6)	0 (0)
WHITES	26 (4)	0 (0)	48 (7)	12 (1)
TOTAL	974 (409)	137 (28)	2 063 (945)	548 (153)

Sources : Annual Surveys of the Race Relations

() : Denotes those killed or wounded while allegedly attempting to escape arrest.

Table 3.4 further provides figures in summary form for years 1986 to 1989 in respect of court actions against police as well as amounts paid by the minister in settlement. What is evident in these figures in Table 3.4 is that the minister continued to use or spend taxpayers money recklessly without actually doing enough to address the root-cause of the police violence.

¹¹ *Op cit* 10.

Consequently all these statistics reveal an alarming incidence both of police crime and of deaths caused by police officers in the course of their duties. Most seriously officers convicted of violent crime run very little risk of dismissal from the force.

TABLE 3.4: COURT ACTIONS AGAINST POLICE 1986-1989

YEAR	SUCCESSFUL OR SETTLED ACTIONS	TOTAL AMOUNT PAID IN SETTLEMENT IN RANDS*
1986	124	1.2 MILLION
1987	148	3.4 MILLION
1988/89	131	2.7 MILLION

Source: Annual Surveys of the South African Institute of Race Relations

* Includes both successful court actions as well as out of court settlements

3.5.2 THE POST-APARTHEID ERA

Several attempts have been made to collate the necessary data with regard to cases involving police use of deadly force in effecting arrest but all in vain. I began by preparing a short questionnaire, which was made up of questions responses to would have enabled me to sketch out a clear picture of the problem lately.

Thereafter, this questionnaire was sent to the senior officials¹² in the Ministry of Safety and Security for their responses. Later on, I received a fax from the special legal advisor¹³ to the Minister of Safety and Security, Mr. Sydney Mufamadi stating that:

- (a) although it would be possible to furnish approximate answers to some of the questions contained in the questionnaire, this will require intensive research through a large number of files and will take months and months to complete;
- (b) some of the questions are furthermore impossible to answer since such records have not been kept;
- (c) in addition, any information collated from existing records will only reflect the position as far as the former South African Police is concerned;
- (d) no accurate information regarding any of the other ten (10) former police agencies is available; and

¹² See Appendix A.

¹³ See Appendix B.

(e) lastly, as the police service is at present involved in a process of amalgamation and rationalisation, it does not have the staff readily available to conduct this research and therefore, the department is unable to furnish me with the information I had requested.

What compounded the problem further is the fact that during the apartheid-era South Africa had eleven (11) different police forces for different regions within the country and some of those police agencies, especially the former Transkei, Bophuthatswana, Venda and Ciskei as well as the self-governing territories, kept no record of police activities.

Be that as it may, from the statistical data collated during the apartheid era I have been able to make certain observations and submissions which, without any doubt, still suffice today. I, therefore, have been able to base my findings on the data collated during the old (former) era. Consequently, now that monitoring and implementation mechanisms that we have in place in respect of police use of deadly force leave much to be desired, the following chapter will attempt to provide some solutions.

CHAPTER FOUR : RECOMMENDATIONS

It is for the law in any well-ordered society to tell the law enforcement officials, in clear and certain terms, that, necessary though their methods may be for the swift and effective achievement of a particular public purpose, they are too dangerous to other public interests to be allowed to use them. In addition, it is respectfully submitted that some answers to the fundamental questions raised and argued earlier on may be found in the submissions which will be discussed under the following headings:

- * legal reform;
- * accountability on the part of the police officers;
- * transparency on the part of the police officers; and
- * the introduction of an ombudsman.

Each of these submissions or recommendations may warrant an independent discussion or research but it is not the purpose of this study to tackle each one of them in-depth. These submissions should also not be viewed as a panacea but rather a step in the right direction.

4.1 LEGAL REFORM

There is little doubt that section 49 is too wide and needs to be brought up to socially ^{AND CONSTITUTIONALLY} acceptable standards. The very essence and existence of the section undermines the entire criminal justice system in that:

- (a) a suspect is killed without his or her guilt being tested in court;
- (b) a person making an arrest may find it more advantageous to kill a suspect with impunity;
- (c) the age of the suspect or victim is not taken into account;
- (d) the crimes which a suspect must commit before he can be shot are too wide and range between stealing an apple and mass murderer; and
- (e) whilst other democratic countries have amended their laws to be socially acceptable, South Africa still seems to be lagging behind.

However, it would be naive to believe that merely a human law enforcement agency and a restrictive legal regime would be sufficient to

reduce the extent of police killings in South Africa. Much as it is equally incorrect to lay the blame for the extent of police killings at the door of the judiciary. Although, people depend on the courts for the protection of their basic human rights, courts cannot always be expected to have the necessary powers or capacity to perform this mammoth task without the legislation backing them.

It should always be borne in mind that the judges are merely the interpreters and enforcers of the law and not the legislators, therefore, parliament as the country's supreme law-giver must enact and promulgate legislation intended to do the balancing between competing interests. Surely, there is a much more fundamental root to the problem. Notwithstanding the fact the South Africa is now a democratic country but the general citizenry is still trapped in the racial perceptions and practices of the past. Above it all, the law has the potential to fulfil a vital power-inhibiting and freedom-protecting role in social relations.

Consequently, it is respectfully submitted that the legal transformation discussed here should be the one that will be able to emphatically deal with the issue of accountability, transparency on the part of the law enforcement officials and an ombudsman solution to the prevalent policing problems.

4.1.1 ACCOUNTABILITY

Whatever misery and degradation the provisions of section 49 caused could not be justified as unavoidable necessities in laying the foundation of the new order. Again, it is crystal clear that power that is unchecked corrupts not only the readily corruptible but it also corrupts those who honestly believe that they are exercising it in the public interest, for instance innocent and disciplined police officers. As the saying goes, *'if you give someone a hammer everything begins to look like a nail'*. Indeed, the unnecessary exercise of power by the law enforcement officials tends to form a habit and once that happens, it becomes difficult to conceive of the possibility that one (police officer) may be wrong in his or her judgement and conduct.

It would, certainly, be foolhardy of one to suppose that police officers anywhere in the world will have human rights high on their list of priorities. They are actually not in the business of either promoting or protecting them. However, we need a democratic police who act to promote the interests of a new legitimate government, who serve all communities equally and whose methods are humane.

Police accountability is critical to the democratic process. Without adequate accountability measures, the police may be used as an arm of

oppression by the state, or they may behave anti-socially and illegally for their own ends. Obviously, accountability consists of the availability of democratic and hierarchical controls. Nonetheless, police officers can be motivated to act in ways that minimize the use of force - they do not have to be brutal and they do not have to be oppressive. Instead, police access to force can be employed to promote safety and security, democratic processes and liberty. Indeed, this is the essence of democratic policing.

The application of the concept of professionalism to the police bureaucracy fundamentally means that the police must be infused with the moral values of a democratic society and that they must be accountable to the rule of law. Unfortunately, police forces here and elsewhere have not responded enthusiastically to calls to limit their right to use deadly force.

Finally, the courts have a crucial role in laying down the guidelines which stress that one should not resort lightly to the use of deadly force. For example courts can impose appropriately severe punishment upon those who abuse arrest powers. Perhaps, this would assist to restrain over-hasty and unjustified police resort to the use of deadly force, and it would also go a long way to end the veil of secrecy which has dominated South African Police bureaucracy.

4.1.2 TRANSPARENCY

Transparency has become the operative word in the workings of the new democratic legal order, and therefore, there is no reason why policing should remain an exception. In this culture of openness, a transparent and impartial police service would be to the benefit of the country and its entire population.

In the past the police force has been perceived as some sort of an impregnable military castle and its actions and activities shrouded in conspicuous secrecy and suspicion. Obviously, transparency is a fundamental feature when the character of the force undergoes demilitarisation. However, it is equally important to note that transparency cannot be sustained when, at the same time, the government maintains a system that seeks to intimidate, for instance people should not be afraid to speak up when they are unhappy about the disquieting police misconduct rather abuse of power.

Any complaints on police abuse should not be approached in a bureaucratic fashion, instead the society should enjoy the openness of the process of investigating such wrongful acts, so that people should, later on, show willingness to welcome any verdict reached by the concerned

department tribunal, e.g. Departmental Disciplinary Committee. In other words, if the unscrupulous law enforcement officials, responsible for abusing their authority, are acquitted by such internal tribunals the general public, especially victims, should not suspect any foul play. To all intents and purposes, it is through a transparent process that it can be undoubtedly proved that one police officer can arrest, investigate and finally help to convict another for abuse of power. That is, police should be able to expose their colleagues' wrongdoing, which impacts negatively on the basic human rights of individuals.

4.1.3 THE OMBUDSMAN SOLUTION

Surely it is one thing to suggest and, in fact, demand that there must be a legal reform of the current provisions of section 49 but it is, indeed, another to expect full compliance by the police with the provisions of that legislation. The situation that obtains today is that the law enforcement officials continue to shoot first and question later. The obvious questions that come to mind are the following: How can this situation be changed? and how can a new style of policing be established? Three things are required:

- * first, a new ethos must be articulated;
- * secondly, those who act in accordance with it must be rewarded

and supported; and

- * third, those who do not must be penalised and discouraged.

To achieve this we do not need compliance only for virtue but also for coherence and consistence. However, only the creation of an external review body, which will be competent to address the aforementioned requirements, will bring about immediate desired change. Now that South Africa is a democratic country there is, therefore, no reason why she should not have or establish an ombudsman to oversee the South African Police. The fact that an ombudsman acts as a watchdog on behalf of the people implies that we need to have a person who will be brave to unequivocally say that the police use of firearms on defenceless, unarmed adults amounts to intentional killing and that their use on innocent children is little short of summary execution. Furthermore, in order to meet the needs of justice, the incumbent ought therefore to be well versed in analysing problems of law, administration and public policy. However, I do not, for a moment, believe that a legal knowledge is a *conditio sine qua non* for the post.

Notwithstanding the fact that the Police Complaints Investigation Unit was established in 1993 to deal with police abuse, this measure remains unpopular and inefficient by reason of the fact that its existence and activities are shrouded in secrecy. Certainly, most South Africans seem

unaware of this police reporting officers' service.

Certainly, there is no doubt that an ombudsman - an independent, high-level complaints-solving mediator - functions optimally in countries where those who govern and those who are governed share common ideals of efficiency, impartiality, fairness and good government. In other words, the ombudsman operates best where there is a respect for the rule of law and for the fights of the individuals by all, including the law enforcement officials.

Maybe the prevalent killing with impunity of innocent citizens by police will be discouraged and stemmed out completely through the establishment of an ombudsman, which will exist as a sort of 'supervisory shadow' that operate to keep officials including police, on their toes by ensuring that they will be required to answer to the people for their actions. Indeed, watchfulness or scrutiny is the gist of the ombuds idea. According to Professor Clifford Shearing¹ the ombuds idea includes three other essential features:

- * ombuds bodies hold governments accountable to the people by measuring their action against standards that define both the duties of government officials and the limits within which they are required to

¹ Shearing, C. 1991. "Policing the Police", *Indicator SA* vol. 8 no. 4. Durban: University of Natal.

operate;

- * where problems are identified ombuds bodies are required to intervene by making recommendations to right past wrongs and to prevent future wrongdoing;

- * the ombuds idea is the principle of impartiality.

It is, therefore, this combination of scrutiny, accountability, remedy and impartiality that has made the ombuds idea attractive internationally as a strategy for reviewing the activities of security forces. Thus, a strong case exists for having in this country an ombudsman in the true sense. But, what should be clear is that an ombuds body is not an alternative to a legitimate government instead it requires one, because if this were to happen ombuds bodies would cease to be watchdogs and would become part of government.

Furthermore, effective scrutiny requires that the ombuds body accept and process complaints and that it acts on its own initiative. Its watchdog role also requires that it have its own investigative capacity and that it be granted full and complete access to whatever evidence it requires.

South Africa's new democracy can be nurtured if the country's

bureaucrats can realise that the culture of giving reasons to support decisions creates a healthy atmosphere of the rule of law and reason. It also generates confidence in the government and goes a long way towards eliminating apathy among the citizenry. Again, under a regime of reasoned decisions, the citizen will fully comply with governmental decisions not by reason of their authority, but by the authority of their reasons.

In making judgements about the adequacy of policing the ombudsman will have to apply democratic standards and encourage the police to adopt a style of policing consistent with them. Certainly, the establishment of an ombudsman will also assist not only to restore confidence in the police service but also trust that seems to be a rare commodity within the security forces.

In conclusion, life in South Africa is both complex and frustrating, especially for the indigent and less privileged members of the society. Litigation is expensive, protracted and slow-moving and all too often the citizens will accept injustice simply because they cannot afford either the cost or the delay involve in obtaining judicial redress. But an ombudsman, operating in the generally accepted manner, while not the *panacea* for all of this country's ills, may be able to assist many persons to obtain the redress otherwise denied them, especially in those cases where police are at wrong for using deadly force.

CHAPTER FIVE : CONCLUSION

5.1 CONCLUSION

Our brief comparative study shows what steps other countries have taken to deter police from infringing the law by trespassing on the dignity of other persons. Today the need to protect the inviolability of the person is, in fact, impelled partly by powerful constitutional directives on the rights of the individual and partly by a growing popular desire to see a greater degree of accountability within the executive organs of state.

At the time when the constitutional court has finally outlawed capital punishment, it is amazing that, thus far, there has not been enough equivalent questioning of the wide scope of the existing law on the privilege of using deadly force in effecting arrests. The courts, both in South Africa and elsewhere, have had to grapple with the question of when a law enforcement official, i.e. a person charged with a duty to prevent crime, is entitled to take the life of an unarmed person.

It has been submitted in this dissertation that our law and law enforcement officials have not given sufficient weight to the citizen's right to be protected from the arbitrary termination of his or her life. Furthermore, what made things worse is the fact that the approach to the question

frequently begins with an attempt to define what the police officers' rights are in regard to the exercise of deadly force and not from the position that the victim was actually entitled to his or her life - even though he or she may have been a suspected or actual criminal. Consequently, unless the fullest respect for life is accorded, it will mean little to, *inter alia*, reintroduce the proportionality principle, in terms of which the taking of a man's life must be weighed against the immediacy and extent of the harm that may flow from not taking his life.

Only when there is a movement towards interpreting our laws in conformity with the internationally accepted proposition, now endorsed by the United States Supreme Court, that even a suspected thief has a right to life which cannot lightly be taken away, will we temper both our statutes and common law. Very much in line with what Scheiner, J.A.¹ said: "*The grave risk that firearms may, if the protection is too easily obtainable, be lightly used upon occasion to prevent the escape of someone suspected, reasonably but perhaps wrongly, of some possibly not very serious crime, and bearing in mind also the emphasis which our law and customs have in general laid upon the sanctity of human life*", it is, once more, submitted that the current statutory law relating to the use of deadly force in effecting arrests is deserving of review and reconsideration.

¹ in *R v Britz* (supra).

Indeed, while human rights issues have become increasingly compelling, both the international and national legal systems have been found wanting in the effective protection of human rights in all their aspects. The key test of the entire human rights regime is not the existence of human rights instruments but their effectiveness. However, the major weakness has always been the wide gap between normative claims and their implementation capacities. Surely, societies which imbibe the democratic spirit will experience fewer and fewer arbitrary deprivations of life.

BIBLIOGRAPHY

LIST OF REFERENCES

- Basson, D. 1995. South Africa's Interim Constitution Texts and Notes.
- Bendix, R. 1964. Nation Building and Citizenship. New York: Johan Wiley.
- Bent, A.E. 1974. The Politics of Law Enforcement.
- Bittner, E. The Functions of the Police in Modern Society.
- Bodenheimer, E. 1972. Power, Law and Society.
- Boulle, Harris and Hoexter. 1989. South African Constitutional and Administrative Law.
- Burchell & Hunt. 1983. South African Criminal Law and Procedure. Vol 1.
- Cachalia, A. & others. 1994. Fundamental Rights in the New Consitution.
- Cain, M.E. 1973. Society and the Policeman's Role. 1st edition.
- Campbell, C. & Wiles, P. 1979. Law and Society.
- Clayton, R. & Tomlinson, H. 1987. Civil actions against the Police. London.
- Corder, H. 1988. Essays on Law and Social Practice in South Africa.
- Dinstein, Y. 1981. The Right to life, Physical Integrity and Liberty.
- Dworkin, R. 1993. The Life's Dominion.
- Friedman, W.G. 1972. Law in a Changing Society. 2nd edition.
- Harris, J.W. 1980. Legal Philosophies. Butterworths:

- Haydon, E.S. 1960. Law and Justice in Buganda. London: Butterworths.
- Henkin, L. 1981. The International Bill of Rights: The Covenant on Civil and Political Rights.
- Hiemstra, V.G. 1985. Introduction to the Law of Criminal Procedure. 2nd edition.
- Leigh, L.H. Police Powers in England and Wales. 2nd edition. Butterworths:
- Lesansky, H. 1982. 'Stop or I'll Shoot: The use of Deadly Force by Law Enforcement Officials.
- Lustgarten, L. 1986. The Governance of Police. London:
- Milton, J.R.L. 1976. Ultima Ratio Legis: The use of Deadly Force in Effecting Arrests. Gedenkbundel, H.L. Swanepoel.
- Moore, J.N. & Lillich, R.B. 1980. The use of force, human rights and general international legal issues. Rhode Island: Newport Naval War College Press.
- Pollock, R. & Maitland, F.W. 1923. The History of English Law. 2nd edition (iii).
- Ramcharan, B.G. 1985. The Right to Life in International Law (xi).
- Rautenbach. 1995. General Provisions of the South African Bill of Rights.
- Robertson, M. 1991. Human Rights for South Africa.
- Sachs, A. 1973. Justice in South Africa. Berkeley:
- Scharf, P. & Binder, A. The Badge and the Bullet: Police Use of Deadly

Force.

Thompson, L. & Butler, J. 1975. Changes in Contemporary South Africa.

Tribe, L.H. 1990. Abortion: The Clash of Absolutes. New York: W.E. Norton.

UMAC (Unrest Monitoring Action Committee). 1990. Police Action and the Negotiation Process. Cape Town:

PERIODICAL PUBLICATION

Brewer, J. 1990. 'Policing in the Elusive Search for Peace: South Africa, Israel, Northern Ireland'. OUP. Cape Town:

Burns, Y. 1986. 'To Police the Police: Some Thoughts on the Appointment of a Police Ombudsman for South Africa". Cilsa (79).

Cawthra, G. 1986. 'Brutal Force: The Apartheid War Machine'. IDA. London.

Chapell, D. & Graham, L.P. 1985. 'Police Use of Deadly Force: Canadian Perspectives'. Centre for Criminology: University of Toronto.

Day, S.C. 1978. 'Shooting the Fleeing Felon: State of the Law'. Criminal Law Bulletin (14).

Dendy, M. 1989. 'When the State Frolics: A South African History of State Liability for the Delicts of the Police'. Acta Juridica.

De Rebus. 1994.

Du Plessis, L.M. 1994. SACJ 7(2).

- Frankel, P. 1980. 'South Africa: The Politics of Police Control'. Comparative Politics (12).
- Gerla, B. 1963. 'Justifiable Homicides by Police Officers'. Journal of Criminal Law, Criminology and Police Science, 54.
- Haysom, N. 1990. 'The Police' in M. Robertson (Ed.) South African Labour and Human Rights Yearbook, 1. Cape Town.
- Haysom, N. 1991. 'Greeks Bearing Gifts: S.V. Jansen van Rensburg'. South African Journal of Human Rights, 6.
- Haysom, N. 1990. 'Policing the Police: A Comparative Survey of Police Control Mechanisms in US, SA and the UK. Acta Juridica.
- Haysom, N. 1987. South African Journal on Human Rights, 3.
- Osborne, M. 1987. Businessman Law, 16.
- New Law Journal. February, 22, 1991. 'Compensation for accidental Shootings by Police'.
- Phillips, M. & Nathan, L. 1991. 'The Changing of the Guard: The Security Forces in Transition'. Social Justice.
- Race Relations Annual Surveys. 1986.
- Seegers, A. 1910-1990, 1991. 'One State Three Faces: Policing in South Africa'. Social Dynamics, 17(1).
- Shearing, C. 1986. 'Policing South Africa: Reflections on Botha's Reforms'. Canadian Journal of Sociology II.
- Shearing, C. 1991. 'Policing the Police: The Ombudsman Solution'. Indicator S.A., 8(4). Durban: University of Natal.

South African Barometer. 20 October 1989.

South African Journal of Criminal Justice, 7(2). 1994.

South African Law Journal. 1983

Stanford Law Review, 13. 1961. 'Justification for the use of Force in Criminal Law'.

Sydney Law Review. 1979. 'Privy Council Decisions in Australia: The Law of Excessive Force in Self-defence'.

THRHR, 52. 1989. 'State Liability for the Delicts of the Police'.

Voster, G. and Luyt, M.C. (1986)2. 'Blueman's Burden: Policing the Police in South Africa'. South African Journal on Human Rights. 305. November 1985 28 SASH 10.

COMMISSION AND OTHER GOVERNMENT REPORTS

A Report to Governor Mario M. Cuomo, on Police use of Deadly Force in New York State, compiled by Richard J. Cordon, Commissioner Division of Criminal Justice Services (Published in 1985).

House of Assembly Debates 5 February 1982 CO/230.

House of Assembly Debates 29 July 1988 CO/2005.

International Lawyers' Inquiry into the Lethal use of Firearms by the Security Forces in North Ireland, Chairman: Kader Ismail "Shoot to Kill".

S A 1988/89 The official Yearbook of the Republic of S A Bureau of Info

(1989) p.257.

Submission of the Irish Information Partnership to the International Lawyers' inquiry into the Lethal use of Firearms by Security Forces in Northern Ireland, January 1984, Appendix vi, p.17.

RSA Review (1994)7:7 p.1-13 September.

RSA Review (1995)8:4 p.10-19 May.

RSA Review (1995)8:2 p.10-21 March.

UNPUBLISHED DOCUMENTS

Brogden, M. 1991. "Social Accountability of Policing - an Alternative Agenda". Unpublished Paper: UCT.

Brogden, M. 1991. "Policing South Africa: An agenda for Incremental Change". Unpublished Paper, UCT: Institute of Criminology.

Brown, L. 1991. "The Role of the Police in a Democratic South Africa: The Problem of Police Partisanship in Divided communities: Lessons from the American South". Paper to CCJ Conference on Policing.

Erasmus, G. (Kallie). 1991. "The Image of the Police in a Changing South Africa". Paper presented at Venda University Symposium, August.

Fernandes, L. 1991. "Police Abuse of Power: A Historical Review Paper Presented to HSRC". Victimisation Conference.

Haysom, N. 1991. "The Police in a New South Africa: Accountability and Control". Paper presented at CCJ Conference on Policing, June

1991.

Maduna, P. 1991. "Popular Perceptions of Policing Among Blacks in South Africa Today". ANC Paper presented at CCJ Conference on Policing, June 1991.

Roskam, A. 1991. "An Ombuds - Structure for the Police during the Period of Transition". Unpublished Paper, Law School, University of the Witwatersrand.

Scharf, W. 1988. "Police Abuse of Power and Victim Assistance During Apartheid's Emergency". Paper presented at 6th International Symposium on Victimology, Israel.

Scharf, W. 1990. "Skeletons and Patriotic Positivism: Towards a New vision in South African Policing Studies". Paper presented to HSRC victimisation Conference.

Van Eyk, M. 1991. "The Principles and Problems of Policing in a Changing South Africa". Paper presented at CCJ Conference on Policing, June 1991.

Waddington, P.J. 1988. "Arming an Unarmed Police: Policy and Practice in the Metropolitan Police".

NEWSPAPERS

Cape Times, 19 February 1986.

Cape Times, 12 February 1986.

The Citizen, 16 November, 1989.

Daily Dispatch, 15 November, 1989.

The Daily News, 29 November, 1989.

The Star, 16 November, 1989.

The Star, 3 November, 1989.

Sunday Tribune, 17 November, 1989.

Weekly Mail, 30 November, 1989.

INTERVIEWS

Gastrow, P., Legal Advisor to the Minister of Safety and Security, Mr. S.

Mufamadi. We had a telephonic interview on 8 September 1995.

Gumbi, M., Legal Advisor to the First Deputy State President, Mr. T.

Mbeki. An interview was held in Johannesburg on 27 May 1995.

Gumbi, M., Legal Advisor to the First Deputy State President, Mr. T.

Mbeki. We had a telephonic interview on 18 July 1995.

Samuels, M., Legal Officer in the Safety and Security Ministry. We had a

telephonic interview on 6 September 1995.

Tlakula, P., Director of the Black Lawyers Association. An interview was

held in Johannesburg on 20 June 1995.

UNPUBLISHED THESES AND DISSERTATIONS

Hope, P.J. 1990. Who are the Terrorists? An account of Security Police Operations in the Forbes and Yengeni Trials. LL.B., University of Cape Town.

Parker, S. 1992. A Disclosure Analysis of the Major Participants in the Debate to Recruit Women into the SAP. B.A. Honours, University of Cape Town.

Pinnock, D. 1980. State Control and Street Gangs in Cape Town. M.A. University of Cape Town.

Sudano, B. 1989. The Law Relating to Treatment of Prisoners held in Police Cells and Discussion of SAP standing orders. LL.B., University of Cape Town.

Wrighton, B. 1991. Women in the SAP: Can Policy Overcome Prejudice? LL.B., University of Witwatersrand.

CASE LAW

Attorney-General for Northern Ireland's reference. 1977. A.C. 105.

Chaskalson, P. in S v Makwanyane 1995(2) SACR57 (CC) at paragraph 144D-E.

Cook v City of New York, 82 AD 2d 72. 2d Department 1981.

- Exparte Die Minister van Justisie: In re S v Van Wyk 1967(1) SA 488(A).
- Farrell v Ministry of Defence. 1980 1 ALL E.R. 166.
- Fortune v S.A. Eagle Insurance Co Ltd 1985(1) P.H. J5(C).
- Geogre, N.O. v Minister of Law and Order 1987(4) SA 222(SE).
- Macu v Du Toit 1983(4) SA 629(A).
- Matlou v Makhubedu 1978(1) SA 946(A).
- Mbambo v Minister of Law and Order NPD 23 May 1989. (Unreported) case no. 79/1989.
- Msomi v Minister of Law and Order 1993(1) SA 168(W).
- People v Long, 104 AD 2d. 902. 2d. Department 1984.
- People v Purcell, AD 2d. 474 N.Y.S. 768. 3rd Department 1984.
- People v Rayabo, 138 N.Y.S. 2d 267. S. ct Kings Co. 1955.
- R v Britz 1949(3) SA 293(A).
- R v Jones 1975 Belfast Crown Court.
- R v Labuschagne 1960(1) SA 632(A).
- R v McNaughton, September 5, 1974, Belfast Grown Court.
- S v Barnard 1986(3) SA 1(A).
- S v Mhlongo 1994(1) SACR 584(A) at 587E-G.
- S v Nel 1980(4) SA 28(E).
- S v Swanepoel 1985(3) SA 1(A).
- Tennessee v Garner 471 US 1, 1984.
- US v Calhoun, 726 F. 2d. 162, 4th circ. 1984.
- US v Dean, 722 F. 2d. 92, 5th circ. 1983.

US v Delorme, 457F. 2d. 156. 3rd circ. 1972.

US v Stokes, 506 F. 2d. 156. 3rd circ. 1972.

Wiesner v Molomo 1983(3) SA 151(A).

LEGISLATIONS

Cape Ordinance no. 2 of 1837.

Constitution of the Republic of South Africa Act 200 of 1993.

Criminal Procedure Act of 1955.

Criminal Procedure Act 51 of 1977.

Internal Security Act 74 of 1982.

Criminal Law Act (Northern Ireland) 1967.

Criminal Appeal (Northern Ireland) Act 1968.

The Model Penal Code of 1982 (US).

Police Act No. 7 of 1958.

APPENDIX A

QUESTIONNAIRE

NB: KINDLY SEND RESPONSES IN *WRITING*

1. How many complaints against Police use of deadly force have the Safety and Security Department received between 1990 and 1995?
2. What's the annual breakdown thereof?
3. What's the racial composition of these complaints?

Blacks	Coloureds	Indians	Others

4. How many of these complaints have been successfully investigated by the Safety and Security Department?
5. How many of these complaints have resulted/given rise to court proceedings against Police?
6. How many such claims involving Police were settled out of court between 1990 and 1995?
7. What's the annual breakdown thereof?
8. How many claims were in favour of the plaintiff(s)?
9. How much of the tax-payers' money was used, annually, to settle

these claims?

10. How many injuries and/or deaths resulted due to Police action?
11. How would you compare the degree of fatalities between black and white victims of police use of deadly force. The term 'black' also includes Coloureds and Indians.
12. Would you agree the police seem to have arbitrary decision-making powers, especially with regard to the question when and how to use deadly force?
13. Do you think the provisions such as those of section 49 still have a place in this new democratic dispensation?



Republiek van Suid-Afrika • REPUBLIC OF SOUTH AFRICA

U verw.
Your ref.
Verw.
Ref. JAT 3/A10/B/1 (1/95)

Tel: (021) 45 7400/1
45 7426/7
Fax: (021) 461 2594

Ministerie vir Veiligheid en Securiteit
Ministry for Safety and Security

PRIVAATSAK x9080
PRIVATE BAG
KAAPSTAD
CAPE TOWN
8000

Miss A Cassim
Office of the Executive
Deputy President, Mr T M Mbeki
Private Bag 9146
CAPE TOWN
8000

1995-09-14

Dear Miss Cassim

Your fax dated 13 September 1995 refers.

I have made enquiries with the Crime Information and Legal Division of the South African Police Service in an attempt to obtain the information you requested.

I am informed that, although it would be possible to furnish approximate answers to some of the questions contained in your request, this will require intensive research through a large number of files and will take months to complete. Some of the questions are furthermore impossible to answer since such records have not been kept.

In addition, any information collated from existing records will only reflect the position as far as the South African Police is concerned. No accurate information regarding any of the other ten police agencies is available.

The Police Service is at present involved in a process of amalgamation and rationalisation and does not have the staff readily available to conduct this research. We therefore regret to say that we are unable to furnish you with the information requested.

Regards

PETER GASTROW
SPECIAL ADVISOR : MINISTER FOR SAFETY AND SECURITY